



Land and Environment Court

New South Wales

Case Name: Armada Avalon Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2021] NSWLEC 1490

Hearing Date(s): 29-30 April 2021 and 19-20 July 2021

Date of Orders: 26 August 2021

Decision Date: 26 August 2021

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:

- (1) The Applicant is granted leave to amend the application and rely upon amended plans and other documents at [3] and [7] of this judgment, subject to the Applicant paying the Respondent's costs thrown away as agreed or assessed in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979.
- (2) The Applicant's written request to justify the contravention of cl 26(2)(b)(i) of the State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 pursuant to cl 4.6 of the Pittwater Local Environmental Plan 2014, is upheld.
- (3) The appeal is upheld.
- (4) Development consent for Development Application No. DA2019/1260 for demolition works and construction of a seniors housing development comprising ten (10) self-contained dwellings for seniors or people with a disability and basement parking for twenty resident vehicles and two visitor spaces, site consolidation, and the removal of 45 trees at Nos 27 and 29 North Avalon Road, Avalon is granted, subject to conditions of consent at Annexure A.
- (5) All Exhibits are returned, except for Exhibits A, B, Q

and S.

Catchwords: DEVELOPMENT APPLICATION: seniors living housing development – State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 – distance of the site from public transport service exceeds 400m – clause 4.6 written request - location and access to services – solar access

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 3.43, 4.16, 8.7, 8.15
Environmental Planning and Assessment Regulation 2000
Land and Environment Court Act 1979, s 39
Pittwater Local Environmental Plan 2014 cl 2.3, 4.3, 4.6, 7.1, 7.2, 7.4, 7.10
Roads Act 1993, ss 138, 139
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cl 2, 26, 28, 29, 30, 31, 33, 35, 50
State Environmental Planning Policy No 55—
Remediation of Land, cl 7

Texts Cited: Department of Infrastructure, Planning and Natural Resources, 'Seniors Living Policy: Urban Design Guideline for Infill Development' (2004)
Pittwater 21 Development Control Plan

Category: Principal judgment

Parties: Armada Avalon Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
J Lazarus SC (Applicant)
C Gough (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Storey & Gough (Respondent)

File Number(s): 2019/404226

Publication Restriction: No

JUDGMENT

1 **COMMISSIONER:** This Class 1 appeal is brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the refusal by the Northern Beaches Local Planning Panel on behalf of the Northern Beaches Council (the Respondent) of Development Application No. DA2019/1260 seeking consent, following amendment, for demolition works and construction of a seniors housing development comprising ten (10) self-contained dwellings for seniors or people with a disability and basement parking for twenty resident vehicles and two visitor spaces, site consolidation, and the removal of 45 trees at Nos 27 and 29 North Avalon Road, Avalon (the site).

Evolution of the appeal

- 2 It is relevant to state here that the time initially set down for the hearing was exceeded, and the proceedings were adjourned part-heard on 30 April 2021. On the joint application of the parties, the Court granted two additional days after an adjournment of around 8 weeks.
- 3 Prior to the resumption of the hearing on 19 July 2021, the Applicant sought leave of the Court by Notice of Motion, unopposed by the Respondent, to amend the application and rely upon the following:
- amended architectural plans (later marked Exhibit Q)
 - amended civil engineering plans (later marked Exhibit P)
- 4 The Applicant also sought leave, on the grounds of ill health, to substitute the Applicant's access expert, Mr Jason Storer who had initially conferred in the preparation of the expert access report (Exhibit 6), and had provided oral evidence to the Court.
- 5 For completeness, the Applicant was granted leave to substitute the access expert, although the parties agree that no further evidence was to be adduced.
- 6 The Court granted leave to the Applicant to rely upon the amended plans and other documents at [3], subject to the Applicant paying the Respondent's costs thrown away as agreed or assessed in accordance with s 8.15(3) of the EPA Act. In granting leave to amend the application, the Court accepted the

Applicant's submission that the amendments contained in the amended plans arose from joint conferencing and had the potential to narrow or resolve contentions in the proceedings.

- 7 At the commencement of the hearing, the Applicant was also granted leave to further amend the application and rely upon the following:
 - an addendum to the Statement of Environment Effects (later marked Exhibit S),
 - a drawing prepared by ACOR engineers, Sheet P18 Revision G (later marked Exhibit U). This drawing was later superseded on the final day of the hearing with Revision H, annexed to a joint engineering expert report on concrete footpath modification marked Exhibit 19.
- 8 Arising from the amended plans and other documents at [3], the Court directed that the planning experts further confer in respect of three matters, and provide a supplementary written report at the commencement of the hearing on 19 July 2021 that was provided, and marked Exhibit 14.
- 9 The three matters on which the planning experts were directed to confer were:
 - The effect, if any, on the contentions arising from amended engineering plans.
 - The effect, if any, of the amended architectural plans on solar access to the rear dwellings, and
 - The proposed permanent operation of the 'Keoride' service in the Northern Beaches area.
- 10 Experts in traffic and engineering also conferred on the amended plans for which leave was granted at [3], resulting in agreement and removing the need for the Court to hear oral evidence from the experts in these disciplines.

The issues in dispute are distilled

- 11 In this matter, four principally contested issues were initially identified by the Respondent for the Court to determine which are set out in the Amended Statement of Facts and Contentions (Exhibit 3). These were identified as follows:
 - (1) Firstly, that as the public transport service available to the residents on Barrenjoey Road is greater than 400m from the site, the Court cannot be satisfied that residents of the proposed development will have access to the services required by the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD).

- (2) Secondly, that the footpath to the public transport services is not accessible by means of a suitable access pathway, and is not an obvious and safe pedestrian link.
 - (3) Thirdly, that the pedestrian refuge located on Barrenjoey Road fails to provide the required level of safety due to inadequate width and obstructed sightlines.
 - (4) Fourthly, that the proposed development fails to respect the character of the local area.
- 12 However, at the resumption of the hearing on 19 July 2021, an architectural plan annexed to the supplementary joint planning report, proposes a bus waiting area that the Applicant submits is an essential feature of the Applicant's primary and preferred response to the requirements for access to services at cl 26(2) of the SEPP HSPD.
- 13 The waiting area, located in the road reserve in front of the site, is intended to provide access to the 'Keoride' bus service ("Keoride service") for residents of the proposed development to satisfy the requirements set out at cl 26(2)(b) of the SEPP HSPD.
- 14 However, the application before the Court also proposes works in the road reserve connecting the site to the bus stops on Barrenjoey Road. Should the Court not be satisfied by the Applicant's primary and preferred proposal at [12] the Court was invited by the Applicant, in the alternative, to consider granting partial consent to the development the subject of the development application.
- 15 As it is put by the Applicant, it is only in the event that the Court finds the Keoride service does not satisfy the requirements of cl 26(2)(b) of the SEPP HSPD, that the Applicant relies on the footpath connecting the subject site to the bus stops on Barrenjoey Road, and the written request pursuant to cl 4.6 of the Pittwater Local Environmental Plan 2014 (PLEP).
- 16 In the event that the Court finds the Keoride service does satisfy the requirements of the SEPP HSPD, the Applicant submits that the Court may grant consent for the development, including the footpath connecting the subject site to the North Avalon shops, but not to the footpath and other works proposed between the shops and the bus stops at Barrenjoey Road pursuant to s 4.16(4)(b) or (c) of the EPA Act.

- 17 As a result of the above, the resulting questions to be resolved by the Court may be distilled as follows:
- (1) Firstly, whether the application before the Court satisfies the requirements of cl 26 of the SEPP HSPD in respect of the location and access to facilities; and,
 - (2) Secondly, whether the proposed development has adequate regard to the design principles set out in Division 2 of the SEPP HSPD.
- 18 For the reasons that follow, I determine that the answer to both of the questions is in the affirmative, and, after consideration of the relevant jurisdictional prerequisites, I conclude that the application is deserving of the grant of consent, subject to conditions pursuant to s 4.16 of the EPA Act.

The site and its context

- 19 The site is located on the southern side of North Avalon Road, and comprises two lots that are legally described as Lot 32 and Lot 33 in DP 8394 with a combined frontage to North Avalon Road of 36.58m, and a depth of 60.96m.
- 20 The site is within the R2 Low Density Residential zone identified in the PLEP. Seniors housing is prohibited in the R2 zone, and the Applicant relies upon the enabling provisions of the SEPP HSPD.
- 21 The site is currently occupied by two detached dwellings, a large number of trees and other vegetation.
- 22 The proceedings commenced with an onsite view at which the Court, in the company of the parties and experts, viewed the site and noted a number of the trees proposed to be both retained and removed.
- 23 As the character of the local area is the subject of contention, the Court was asked to note a number of existing houses and other development on North Avalon Road that are variously single and two-storey, in which the setbacks and front landscaping were aspects for note.
- 24 The Court was also taken in an easterly direction along North Avalon Road as far as the property at No 35, and in a westerly direction to the bus stops on Barrenjoey Road, and to the footpath which is the subject of expert evidence.

25 The Court was also taken to a recently completed development on Binburra Avenue known as 'Drift', and to the rear yard of three properties in Urara Road at No's 2, 6 and 8 to view the subject site from the private open space of residents who provided oral submissions later by telephone.

Public submissions

26 According to the Amended Statement of Facts and Contentions (Exhibit 3), an application for proposed development on the site has been notified on more than one occasion.

27 When most recently notified, 215 public submissions were received and these are contained in the Respondent's bundle marked Exhibit 1 (folder 2 of 2). I also record here that a large number of residents were also in attendance at the onsite view.

28 Prior to the hearing, leave was granted for 7 residents to provide oral submissions by telephone. Their submissions may be summarised as follows:

(1) Mr Bombadiere, of No 22 North Avalon Road, Avalon Beach:

- The proposed development does not 'fit' with the character of the area, which is zoned low density residential.
- Two-storey homes have been added successfully in the local area between existing trees.
- The number of existing trees on the site to be removed, including those proposed to be removed in the road reserve, is of concern as it will decimate animal habitat and replacement plantings will require years to mature.
- Has the Applicant investigated the impact of the basement car park on 'St Michael's Cave' which runs under North Avalon Road.

(2) Ms Clacher, of No 26 North Avalon Road, Avalon Beach:

- The proposed development is not in character with the area. The carpark basement is hard construction built to the boundary.
- The design is 'vanilla', has no architectural merit and results in the loss of too many trees on the site.
- The impact of construction on residents will worsen on-street car parking and traffic congestion in the street, disturb those with an intolerance to noise, and add to the inconvenience already experienced by the regular filming of television advertisements in the street.

- North Avalon is unique and should be preserved. The community is welcoming of good development.
- (3) Ms Darin, of No 6 Urara Road, Avalon Beach:
- Resident in the area for around 5 years, attracted by its proximity to the beach in a residential area.
 - Future residents are unlikely to be retirees, but families.
 - Concerned at the number of trees being removed, and replacement plantings will take an extended time to grow.
 - In the meantime, the privacy of residents on Urara Road is adversely impacted and the setback of the proposed development from the rear boundary is insufficient.
- (4) Ms Denman, of No 8 Urara Road, Avalon Beach:
- The proposed development should be refused as it is more than 400m from public transport, and to exempt the development from this requirement would de facto rezone the area.
 - The site is close to the Environmental Living zone and yet the extent of the basement leaves inadequate deep soil and habitat loss is likely to result.
 - Existing residents have developed in conformity with the development controls, are closely bonded and value the private outdoor character of properties that are not overlooked.
 - The apartments fronting North Avalon Road exceed the height of adjoining properties, and other elements such as outdoor walkways, the location of window openings and private open space in proximity to neighbours cannot be considered sympathetic.
- (5) Mr Hanstrum, of No 31 North Avalon, Avalon Beach:
- The proposal is an over-development of the site that has made little attempt to integrate existing trees that controls seek to preserve and so is inconsistent with the character of the street.
 - The basement accommodating 22 cars is indicative of an engineering solution addressing the over-development.
 - The setback of apartments fronting the street is well in front of the setback to adjoining buildings, and taller when compared to the height of the open carport on Mr Hanstrum's property.
 - As a result, the proposed development will dominate the landscape in the street while residents have taken care to design sympathetically to preserve existing trees.
 - The site fails to provide safe access to public transport, and is not within the distance required, and crossing of Barrenjoey Road is dangerous.
- (6) Mr Jones, of No 48 Marine Parade, Avalon Beach:

- The site is not suitable for the proposed development. It is well inside the R2 zone, and is not located close to centres or public transport where such medium density development is preferred.
 - The development does not provide the access to services required of it, and consent would invite similar development that would change the character of the area.
 - The pedestrian crossing at Barrenjoey Road is dangerous, as Mr Jones has experienced directly.
- (7) Ms Thomas, of No 2 Urara Road, Avalon Beach:
- Is a long term resident, with knowledge of construction in the area where underground water is a known problem, and the extent of excavation raises concerns.
 - Transporting the volume of excavated material off site will impose congestion on local roads.
 - The height of the development is unclear, but the limit imposed by the controls is 8.5m.
 - Screening should be provided to neighbouring properties that are affected by overlooking.
 - Residents in the immediate vicinity, and the local area more broadly, require a form of compensation for the development proposed on a fragile headland.

Expert evidence

29 The Court was assisted by expert evidence in the following disciplines:

| Discipline | Applicant | Respondent |
|----------------------|-------------------|-----------------------|
| <i>Town planning</i> | Ms Amy Sutherland | Ms Rebecca Englund |
| <i>Stormwater</i> | Mr Bruce Kenny | Ms Uma Shanmugalingam |
| <i>Landscape</i> | Mr John Lock | Mr Joseph Tramonte |
| <i>Arboriculture</i> | Mr Mark Kokot | Mr Joseph Tramonte |
| <i>Geotechnical</i> | Mr Laurie Ihnativ | Ms Uma Shanmugalingam |

| | | |
|--------------------|--|-----------------------|
| <i>Waste</i> | Ms Whitney Brunson | Mr Ray Creer |
| <i>Traffic</i> | Mr Paul Corbett | Ms Rezvan Saket |
| <i>Access</i> | Mr Jason Storer (later Howard Moutrie) | Mr Gary Finn |
| <i>Engineering</i> | Dr Fred Moshiri | Ms Uma Shanmugalingam |

30 As stated at [10], resulting from the conferring of the experts prior to, and during, the hearing, a number of the contentions were resolved, and only the experts in planning and access were required to provide oral evidence.

The application demonstrates the location and access to facilities required by cl 26 of the SEPP HSPD

31 According to cl 26(1) of the SEPP HSPD, residents of seniors housing development must have access to the following facilities:

...

- (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.

32 Where those services described at cl 26(1) of the SEPP HSPD are not located on the site of seniors housing development, as is the case here, those services may be located off-site if access to those off-site services satisfies the requirements of cl 26(2)(b) of the SEPP HSPD that are in the following relevant terms:

...

- (2) Access complies with this clause if—

...

- (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)...

...

- 33 The Applicant submits that the Keoride service is a form of public transport available to the residents of the proposed development that is able to take residents to facilities and services referred to in subcl 26(1) of the SEPP HSPD.
- 34 The Addendum to the Statement of Environmental Effects (Addendum to the SEE) describes Keoride as an on-demand service that has been operating on a trial basis for 4 years, but which will be made permanent from 31 October 2021 (Exhibit S, p4).
- 35 Appendices to Exhibit S provide the following information in support:
- (1) Appendix C of the Addendum to the SEE contains media releases and news articles in respect of the Keoride service.
 - (2) Appendix D of the Addendum to the SEE contains a map showing that B-Line bus stops are serviced by Keoride in the Avalon Beach area.
 - (3) Appendix E of the Addendum to the SEE contains an email exchange between Ms Sutherland, and a representative of Keoride. The exchange is re-produced below:

“Dear Sir/Madam

Would you be able to advise whether people who have limited mobility are able to be picked up directly from their home in the Northern Beaches service area?

Thank you very much”

To which the representative of Keoride replies:

“Hi Amy – yes we can pick up from home if they have a mobility issues – we do not however have wheelchair buses – they will be coming later in the year. It is best practice to inform us of the persons needs when you register them that way we can add a code for home pick up”

(4) Appendix F contains the operating hours of the Keoride service, which are as follows:

Monday to Wednesday: 6am–10pm

Thursday to Friday: 6am–11.30pm

Saturday: 7am–11.30pm

Sunday: 7am–9pm

36 The planning experts agree that the Keoride service is identified as a public transport service on the Keoride website, and in press releases from the NSW state government (Exhibit 14, par 2.2(a)).

37 However, Ms Englund's concerns with the Keoride service are summarised as follows:

- Keoride is a comparatively new service that was not in operation when the SEPP HSPD was drafted.
- While cl 26 of the SEPP HSPD requires the path providing access to transport services to be accessible by electric wheelchair, Appendix E demonstrates that the Keoride service does not, at this time, provide wheelchair-accessible buses.
- While cl 26(2)(b)(i) requires a distance of no more than 400m to the transport service, the Keoride website advises that patrons may need to walk up to 500m to access the service.
- The proposed waiting area in the street frontage will dominate the road reserve, will result in a loss of on-street parking, and will set an undesirable precedent.
- As the service is 'on-demand', and not regularly scheduled, the Court cannot be certain that the service will always be available at the times required by cl 26(2)(b)(iii) of the SEPP HSPD.
- The service favours patrons with a smartphone, being a device many seniors may not own or be familiar with.

38 In her oral evidence, Ms Englund also identifies that as the waiting area proposed by the Applicant is not a requirement of the Keoride service, there is no certainty that the provision of a waiting area will result in the Keoride service utilising the waiting area.

39 On the basis of all of the evidence before me, I find the Keoride service is not a public transport service described at cl 26(2)(b)(i) of the SEPP HSPD for the reasons that follow:

- (1) Firstly, while the Applicant submits otherwise, I find that the Court cannot be satisfied, by written evidence, that the Keoride service will utilise the waiting area proposed in the road reserve at the subject site. The result may therefore be that residents are required to walk a distance for the service that is greater than 400m.
- (2) I do not consider the email exchange at [35(3)] to provide sufficient certainty that those operating the Keoride service will prioritise use of the waiting area because the service is not 'door to door', but is instead, as I understand it, a route that may be described as a 'line of best fit' determined by all of those seeking to use the service at the time. On the basis of the limited, and general email exchange at [35(3)], 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.
- (3) 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 pick up, if not at the waiting area, would be at a location that is accessible via a suitable access pathway in the terms required by cl 26(4)(a) of the SEPP HSPD.

40 In the alternative, the Applicant relies upon what it submits is a suitable access pathway documented in Exhibit P, and in supporting engineering details in Exhibit U between the site and the public transport service along Barrenjoey Road.

41 In summary, this comprises a new footpath from the site, to the corner of Tasman Avenue, and then a widening of the existing footpath onwards to Catalina Crescent to a width of 1500mm.

42 I record here that the amendments contained in the above exhibits, according to Mr Gough for the Respondent, fully address and resolve those matters initially identified by the Respondent's access expert, Mr Finn, other than in relation to the distance of the public transport service on Barrenjoey Road.

43 As the bus stop on the western side of Barrenjoey Road is located greater than 400m from the site, the Applicant relies upon a written request, prepared by Ms Amy Sutherland in accordance with cl 4.6 of the PLEP dated 15 July 2021 (the request request).

44 The written request identifies that the variation from the development standard at cl 26(2)(b)(i) of the SEPP HSPD is limited to the distance of the bus stop on

the western side of Barrenjoey Road from the subject site, which is measured at 414.6m.

- 45 I record here that there is no dispute between the parties that the bus service along Barrenjoey Road is consistent with the requirements of subcl (2)(b)(ii) and (iii), the schedule for which forms Appendix B of the Addendum of the SEE (Exhibit S). Likewise, Appendix A of Exhibit S establishes that the facilities required by cl 26(1) of the SEPP HSPD are in accordance with cl 26(3) of the SEPP HSPD.
- 46 The bus stop on the eastern side of Barrenjoey Road is measured at 374.5m from the site, and meets the requirements of the standard.
- 47 In the absence of an objective at cl 26, the written request considers the aims of the SEPP HSPD at cl 2, and the underlying objective and purpose of the standard which is to ensure that sites developed for the purpose of housing seniors and people with a disability are in a location where residents are not required to travel excessive distances to a public transport services where that service is required to access the facilities set out at cl 26(1).
- 48 Strict compliance with the development standard is said to be unnecessary or unreasonable in the circumstances of the site because the proposed development is consistent with the underlying objective of the standard, and with the objectives of the R2 zone. Additionally, seating is proposed along the path of travel to the bus stops on Barrenjoey Road at approximately 150m intervals, the North Avalon shops provide some of the services set out at cl 26(1) within 230-250m of the site, and because the bus stop on the eastern side of Barrenjoey Road is well within the distance required by the standard.
- 49 In essence, the written request states that when the round trip to and from the site to the bus services on both sides of Barrenjoey Road is considered, the total distance walked by a resident is less than the 800m permitted by the standard.
- 50 In her written and oral evidence, Ms Englund is of the view that the written request fails to demonstrate consistency with the underlying objective of the standard, relies on statements of fact that do not justify a non-compliance with

the access provisions of the SEPP HSPD, and that as the standard does not specify the need to achieve a round trip of 800m, it is not relevant that one part of the journey is less than 400m.

- 51 While I accept Ms Englund's argument that a distance of 800m is essentially identified as a maximum, and not a target, I consider the overall distance required in a return journey to be a relevant consideration, particularly given the marginal difference in distance between the eastern and western bus stop on Barrenjoey Road that is partly explained by the width of the road itself.
- 52 I also accept this is a sufficient environmental planning ground for the purposes of cl 4.6(3)(b) of the PLEP insofar as the variation does not require residents to walk an excessive distance when the complete journey is considered. Furthermore, I consider the provision of seating along the path at 150m intervals, and the close proximity of local shops that provide some of the services for which access to public transport is otherwise required, are grounds to justify the contravention of the standard as stated on p11 of the written request.
- 53 Whether the proposed development is consistent with the objectives of the R2 zone or not as claimed in the written request, and as required by cl 4.6(a)(ii) of the PLEP, is the subject of dispute between the planning experts.
- 54 The objectives of the R2 zone are set out in accordance with cl 2.3(1)(a) of the PLEP in the following terms:
- To provide for the housing needs of the community within a low density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.
- 55 While the planning experts also engage in whether or not the proposed development is of a low intensity and scale, compatible with surrounding land uses as set out in the third zone objective, I record here my view that as the second and third objective of the zone relate to land uses other than housing, it is only the first objective of development in the R2 zone that I consider to be relevant to the test of consistency.

- 56 Furthermore, the first objective only requires the housing needs of the community to be provided within a low density residential environment. It does not identify characteristics such as intensity, scale, or compatibility with surrounding land uses as are contained in the third objective.
- 57 The development the subject of the development application is for housing for seniors and people with a disability. While seniors housing is not a permitted use in the land use table at cl 2.3 of the PLEP, the development relies upon the SEPP HSPD and I am satisfied that the development is consistent with the first objective of the development in the R2 zone. In arriving at this conclusion, I note the floor space ratio (FSR) of the proposal complies with the 'must not refuse' provision at cl 50(b) of the SEPP HSPD and so cannot be refused on the basis of density, despite Ms Englund holding the view that she does not consider the development to be low density (Exhibit 4, par 2.3.15).
- 58 However, in the event that I am incorrect in my view, I now consider the zone objectives as they are engaged by the experts in their written evidence, responsive to the written request.
- 59 In general terms, the Respondent submits that the proposed development is akin to a medium density development in that it is too high, too close to the street, too large, has poor solar access, and does not respond to the character of the Avalon Beach locality.
- 60 The Respondent refers to the locality statement at Section A4.1 of the Pittwater 21 Development Control Plan (PDCP) that provides, relevantly:

"Context

...the locality has developed into a predominantly low-density residential area, with dwellings built along valley floor, slopes, and ridges. The locality is characterised mainly by one and two-storey dwelling houses on 600-1,000 square metre allotments (some smaller blocks may exist), increasing to 950-1,600 square metres on the plateau and slopes, and up to 8,000 square metres in Ruskin Rowe. The residential areas are of a diverse style and architecture, a common thread being the landscaped, treed frontages and subdued external finishes. The dominant feature of the Avalon Beach locality is houses setback from the street with low and no front fencing and vegetation used extensively to delineate boundary lines. Medium-density housing is located around the Avalon Beach Commercial Centre and neighbourhood retail centres.

...

Desired Character

The most important desired future character is that Avalon Beach will continue to provide an informal relaxed casual seaside environment. The locality will remain primarily a low-density residential area with dwelling houses a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. Secondary dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancies will be located on the valley floor and lower slopes that have less tree canopy coverage, species and habitat diversity, fewer hazards and other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities. Retail, commercial, community and recreational facilities will serve the community.

...

Future development will maintain a building height limit below the tree canopy, and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with development. The objective is that there will be houses amongst the trees and not trees amongst the houses.

...

The design, scale and treatment of future development within the Avalon Beach Village will reflect the 'seaside-village' character of older buildings within the centre, and reflect principles of good urban design.

..."

- 61 It is Ms Englund's evidence that the proposed development is not suited to the low density residential environment because:
- (1) Firstly, its character is defined by a roof form that exceeds a height of 8m set out in cl 50(a) of the SEPP HSPD and that could be reduced without impact;
 - (2) Secondly, the proposed massing, siting and intensity is inappropriate when the proposed front setback is considered, and when guidance on the landscaped area desired by the Seniors Living Policy: Urban Design Guideline for Infill Development (Seniors Living Guidelines) is applied to the size of the site.
- 62 These inconsistencies arise from a failure to undertake an adequate site analysis in accordance with cl 30 of the SEPP HSPD, which is particularly necessary given that seniors housing is prohibited in the R2 zone.
- 63 The result is a proposed development that is inconsistent, firstly, with the provisions of the Seniors Living Guidelines, that must be taken into consideration in accordance with cl 31 of the SEPP HSPD, and secondly, with

the neighbourhood amenity and streetscape to which adequate regard must be had in accordance with cl 33 of the SEPP HSPD.

64 While the proposal complies with the FSR and landscaped area controls at cl 50 of the SEPP HSPD, the Seniors Living Guidelines (Exhibit 1, Tab 8) advises, relevantly, that:

- (1) a 'rule of thumb' is for developments to "Respond to council planning instruments that specify the character or desired character to the area" (folio 212); and
- (2) proposed development "...should contribute to the overall character of the area, or in other words to have a good 'neighbourhood fit'. The starting point for achieving 'neighbourhood fit' is an appreciation of the defining characteristics of the neighbourhood that the new development could retain or reinforce" (folio 207); and
- (3) the amenity of neighbours can be protected "by carefully designing the bulk and scale of the new development to relate to the existing residential character, for example by: - setting upper storeys back behind the side or rear building line" (folio 213); and
- (4) internal site amenity should include "dwelling entries...are clear and identifiable from the street or driveway, provide a buffer between public/communal space and private dwelling, provide a sense of address for each dwelling, are oriented to not look directly into other dwellings" (folio 215); and
- (5) the "proportion of the site given to landscape area and deep soil should be increased in less urban areas..." (folio 210).

65 The Applicant's primary submission in response is that cl 2(2) of the SEPP HSPD explicitly anticipates the setting aside of local planning controls in the following terms:

(2) These aims will be achieved by—

(a) setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and

(b) setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form, and

66 Furthermore, to the extent the Respondent considers the proposed development, that otherwise complies with the SEPP HSPD, to offend a provision of the PDCP, that provision has no effect to the extent it is inconsistent or incompatible with a provision of the SEPP HSPD in accordance with s 3.43(5)(b) of the EPA Act.

67 That said, the Applicant accepts that cl 33 of the SEPP HSPD calls up local planning controls to which the Court should have regard. In doing so, however, the scope of the controls are limited to consideration of the location's current character, and not the desired future character given the site is not within a precinct undergoing transition.

68 Clause 33 of the SEPP HSPD sets out design principles for Neighbourhood amenity and streetscape in the following relevant terms:

The proposed development should—

(a) recognise the desirable elements of the location's current character (or, in the case of precincts undergoing a transition, where described in local planning controls, the desired future character) so that new buildings contribute to the quality and identity of the area, and

...

(c) maintain reasonable neighbourhood amenity and appropriate residential character by—

(i) providing building setbacks to reduce bulk and overshadowing, and

(ii) using building form and siting that relates to the site's land form, and

(iii) adopting building heights at the street frontage that are compatible in scale with adjacent development, and

(iv) considering, where buildings are located on the boundary, the impact of the boundary walls on neighbours, and

(d) be designed so that the front building of the development is set back in sympathy with, but not necessarily the same as, the existing building line, and

(e) embody planting that is in sympathy with, but not necessarily the same as, other planting in the streetscape, and

(f) retain, wherever reasonable, major existing trees, and

...

69 Ms Sutherland's evidence is that the proposed development is compatible with both the current and desired future character of the location because the scale, setbacks, quantum of landscaping, internal layout and materials and finishes of the development are compatible with or responsive to the particular features of adjoining sites and surrounding development, and is consistent with the objectives of the R2 zone for the reasons set out on p 13 of the written request, summarised as follows:

(1) The massing evident in the proposed development seeks to maintain the general pattern of detached dwellings by breaking the form up in to

four buildings, with a pitched roof form and modulated façade articulation.

- (2) The landscape character of the North Avalon Road community is maintained by the retention of existing trees, and the addition of new trees that are integrated in a landscape plan that includes landscaped setbacks to the side and rear boundaries to soften and screen.
- (3) The proposed development is consistent with the pattern of one and two-storey buildings evident in the R2 zone, with a predominantly northern orientation to reduce potential privacy impacts on surrounding properties.
- (4) The location of the driveway in the centre of the site maintains the existing driveway location, retains trees in the road reserve, and minimises the acoustic impact of vehicle movements on adjoining properties.

70 In respect of the height of the proposed development, Ms Englund acknowledges the proposed development complies with the 'must not refuse' provision at cl 50(a) of the SEPP HSPD, but considers questions of character to differ from that of numerical compliance, and be a relevant consideration by virtue of cl 33(a) of the SEPP HSPD.

71 Furthermore, the 2-storey form of the proposed development is arranged contrary to the desirable elements of the location's current character which Ms Englund describes as one storey forms addressing North Avalon Road, and two-storey forms set well back.

72 In Ms Englund's view, the existing built form in North Avalon Road conforms to the front setback control at Section D1.8 of the PDCCP which requires a setback of 6.5m, or to an established building line, whichever is the greater.

73 'Established building line' is defined at Section A1.9 of the PDCCP as "a building line that is established by map (foreshore building line) or a de facto building line".

74 'De facto building line' is defined as "the line of the facade of structures created by the location of structures on nearby properties. There may be separate de facto building lines for dwellings and decks, verandahs, etc. See also established building line."

75 In essence, Ms Englund believes the de facto building line in this case supports only single storey structures at a setback of 6.5m, and not the two-storey structure proposed.

76 In support of her opinion, Ms Englund prepared an aerial image (Exhibit 16), re-produced below, identifying single storey massing (in red), and two-storey massing (in blue), and massing that is an open structure such as a carport, verandah or balcony (shown white dashed).



77 The Applicant submits there is nothing in the definition of 'de facto building line' to distinguish building lines on the basis of the number of storeys.

78 I accept the definition of 'de facto building line' provides some latitude in how an appropriate setback may be determined. If the properties at Nos 23 and 25 also had carport structures in the front setback, detached from the dwelling as is the case at Nos 31 and 33, this might support an argument for separate de facto building lines.

79 But this is not the case. The dwellings at Nos 23 and 25 clearly demonstrate a 6.5m setback. In the case of No 25, adjoining the subject site, the setback is marked by a fully enclosed, triple fronted garage.

- 80 I prefer and accept Ms Sutherland's evidence that a distinct building line is established by the structures either side of the subject site. I also consider it relevant that the balcony structure proposed at the 6.5m setback does not adopt the roof form of the dwellings that are, according to Ms Sutherland, setback 9.5m (although no dimension appears on the architectural drawings, and Ms Englund records the setback at 9.7m).
- 81 While the balcony structure is two storeys in height, it is a lower building form than the primary dwelling. As it is also a predominantly open structure, it appropriately mediates, in my view, the modest variation in setback of the carport structures to the east of the site, with the two-storey form evident at No 25 to the west of the site. Considered together, I conclude that the proposal adopts building heights at the street frontage that are compatible in scale with adjacent development (cl 33(c)(iii)), and a front setback that is in sympathy with, but not necessarily the same as, the established building line (cl 33(d)).
- 82 In respect of the height of the proposed development more broadly, I also accept that as the height of the development complies with the 'must not refuse' standard of 8m when measured to the ceiling of the proposal (cl 50(a) of the SEPP HSPD), height cannot be a reason to refuse consent, and that single storey development is proposed to the rear 25% in accordance with the standard at cl 40(4)(c) of the SEPP HSPD. I also accept the view stated in the Amended SEE (Exhibit B, Tab 9) that the pitched roof form is compatible with the roof forms in the local area.
- 83 I also give weight to Ms Sutherland's evidence, supported by Appendix D of Exhibit 4, that but for the requirement to be clear of the Probable Maximum Flood (PMF) level, the development is close to compliance with the height of 8.5m required by cl 4.3 of the PLEP.
- 84 According to the locality statement, a common thread in an otherwise diverse style and architecture of the area currently, is the landscaped, treed frontages and subdued external finishes. The Applicant seeks consent for the removal of all but 16 trees, and the landscape plan prepared by John Lock & Associates Landscape Architecture (Exhibit B, Dwg 2604 LP-01) provides for the addition of 31 new trees and I note the landscape experts agree that the selected

canopy trees and other vegetation nominated, including 8 additional trees in side setbacks, will reduce the bulk and scale of the proposed development and result in the establishment of the desired character in time (Exhibit 9, p3).

- 85 The planning experts agree that a darker colour scheme can be provided so the development is recessive to the landscaping, and conditions of consent are proposed.
- 86 Next, the locality statement identifies the dominant feature of the Avalon Beach locality is houses setback from the street with low and no front fencing and vegetation used extensively to delineate boundary lines. As stated at [81], I find the proposal has had adequate regard to the requirement at cl 33(d) of the SEPP HSPD to set back the front building of the development in sympathy with, but not necessarily the same as, the existing building line.
- 87 Furthermore, while the proposal includes a front fence that may stand as high as 1.8m, other than at the driveway entry and waste collection pad, it is set back a distance of 2m behind a landscape buffer that will delineate the front boundary line in a manner that largely consistent with the locality statement.
- 88 After considering all of the zone objectives, which are said at [46] by the written request to have been achieved, I am satisfied that the written request adequately addresses those matters required of it by cl 4.6(4)(a)(i) of the PLEP.
- 89 As I am satisfied that the proposed development is consistent with the underlying objective of the standard, and the objectives of the zone, I am also satisfied that the development is in the public interest, in accordance with cl 4.6(4)(a)(ii).
- 90 In forming my opinion of satisfaction, I have considered the extent, dimensions, and levels of the new, and upgraded, footpath in Exhibit P connecting the subject site to the North Avalon shops where services are available, and then on to the western bus stop on Barrenjoey Road where the access path to the bus stop is to widened to 1800mm; the provision of seating in two locations along North Avalon Road; and the finally agreed form of the pedestrian refuge

on Barrenjoey Road, vehicle sightlines and line marking in Exhibit 18 that is the subject of agreement between the traffic experts.

- 91 I also note the conclusions of Mr Storer in respect of compliance, or the capability of compliance in the gradients measured to the existing and proposed access contained in his Assessment of Distance and Path of Travel to the Bus Stops dated 3 November 2020 (Exhibit D).
- 92 I accept and am satisfied that a suitable access pathway as defined at cl 26(4)(a) of the SEPP HSPD will result.
- 93 Furthermore, while the Keoride service may not be a service that, by written evidence, can be said to comply with cl 26(2)(b) of the SEPP HSPD, I accept that it may represent a potential adjunct service in addition to the public transport service on Barrenjoey Road, from a natural service point at somewhere like the North Avalon shops, within 250m of the site.
- 94 Understood in this way, I find the Applicant's proposed waiting area would be, on balance, of limited utility, given the impact such an area of concrete would impose on the streetscape.
- 95 Clause 4.6(4)(b) of the PLEP requires that the concurrence of the Planning Secretary be obtained for development consent to be granted to development that contravenes a development standard. The Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 that the Secretary's concurrence may be assumed for exceptions to development standards, subject to certain conditions contained in the notice.
- 96 That said, s 39(6) of the *Land and Environment Court Act 1979* gives the Court the power to grant development consent without obtaining the concurrence of the Secretary, although consideration ought be given to the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.
- 97 I have considered whether the contravention of the standard at cl 26(2)(b)(i) of the SEPP HSPD raises any matter of significance for State or regional environmental planning, and whether there is a public benefit of maintaining the development standard. I conclude that no matter of significance arises, and

I consider there to be a public benefit served by upholding the written request for the reasons set out above.

- 98 In addressing the written request in the manner engaged by the planning experts, I consider the question put at [17(2)] as to whether the proposed development has adequate regard to the design principles set out in Division 2 of the SEPP HSPD to be substantially addressed.
- 99 However, and while not a contention in Exhibit 3, the Respondent sought to adduce evidence from the planning experts on solar access to living areas, and private open space to dwellings 4, 5, 9 and 10 that are located to the south of the site.
- 100 The amended plans at Exhibit P revise the size and orientation of skylights to the single storey living spaces, and enlarge windows located to the south of dwellings 4 and 9, and to the north of dwellings 5 and 10.
- 101 North-facing windows are also evident in the kitchens of dwellings 4, 5, 9 and 10.
- 102 The Respondent, supported by Ms Englund's evidence, submits that dwellings 4, 5, 9 and 10 do not receive the solar access required by cl 50(e) of the SEPP HSPD because windows facing side boundaries are shaded, sunlight to north-facing windows is marginal, and the effectiveness of the skylights is limited by the roof pitch to the south.
- 103 Additionally, private open space is located to the south and unlike to receive anything but marginal direct sunlight during the day.
- 104 A consent authority, or the Court on appeal, must not refuse the grant of consent on the basis of solar access if the standard at cl 50(e) of the SEPP HSPD is achieved. Clause 50(e) is in the following terms:

(e) **solar access:** if living rooms and private open spaces for a minimum of 70% of the dwellings of the development receive a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter,

- 105 Clause 35 of the SEPP HSPD also address solar access in the following terms:

35 Solar access and design for climate

The proposed development should—

(a) ensure adequate daylight to the main living areas of neighbours in the vicinity and residents and adequate sunlight to substantial areas of private open space, and

(b) involve site planning, dwelling design and landscaping that reduces energy use and makes the best practicable use of natural ventilation solar heating and lighting by locating the windows of living and dining areas in a northerly direction.

106 The design principle set out at cl 35(a) seeks to ensure daylight to residents, and sunlight to substantial areas of private open space.

107 The experts agree that the amenity of dwelling 5 can be improved by a condition of consent requiring an area of 15m² of private open space being provided to the west.

108 Assuming the adoption of the condition proposed above, the Applicant submits that, at worst, the proposed development is one dwelling short of achieve the threshold set by cl 50(e) that would prevent refusal on the grounds of solar access.

109 I accept the Applicant's submission that the private open space of dwellings 4, 5, 9 and 10 is not limited to the area shown as an area of decking immediately adjacent to the main living areas, and which is covered by roof, but also extends to the soft landscaping beyond that is shown in Exhibit P to receive direct sunlight between around 10am – 2pm in mid-winter.

110 I also accept that, when considered together, the skylights and windows proposed are sufficient to provide adequate daylight to the main living area.

Other considerations (see jurisdictional statement)

111 Clause 28 of the SEPP HSPD requires the Court on appeal to be satisfied, by written evidence, that the housing will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage. On the basis of the statement made on p 21 of the Amended SEE, and the Stormwater Management Plans (Exhibit B, Tab 7), I am so satisfied.

112 In accordance with cl 29 of the SEPP HSPD, I have taken into consideration those relevant matters at cl 25(5)(b) as follows:

(1) In respect of subcl (5)(b)(i), I consider the issue addressed at [83];

- (2) In respect of subcl 5(b)(iii), I consider the provision of relevant infrastructure to be addressed at [87]-[91], and on the basis of the proposed conditions of consent;
 - (3) In respect of subcl 5(b)(v), I consider the bulk, scale, built form and character of the proposed development to be addressed at [78]-[81].
- 113 The site analysis required by cl 30 of the SEPP HSPD is, according to Ms Englund's evidence, deficient in respect of those matters to be included by reference to subcl (3) and (4). I agree that more is expected of a site analysis than that which appears on the plan so titled at Drawing 020 (Exhibit B). However, the information lacking in Drawing 020, such as the height of neighbouring buildings, is evident in the remainder of the architectural plan set, and is assisted by the information contained in Amended SEE and so I am satisfied that the Applicant has taken into account a site analysis in accordance with cl 30(1) of the SEPP HSPD.
- 114 I am also satisfied that the development standards set out at cl 40 of the SEPP HSPD are complied with so as not to preclude the grant of consent.
- 115 On the basis of the Amended Access Report prepared by Vista Access Architects Pty Ltd dated 22 September 2020 (Exhibit B, Tab 14), I am satisfied the proposed development complies with the standards concerning accessibility and useability for hostels and self-contained dwellings at Schedule 3 of the SEPP HSPD in accordance with cl 41 of the SEPP HSPD.
- 116 While the site is located within an area identified as being Class 5 Acid Sulfate soil, the Geotechnical Investigation and Acid Sulfate Soil Assessment prepared by STS Geotechnics dated October 2020 (Exhibit C) concludes on p11 that acid sulfate soils are unlikely to be encountered and, given the degree of seepage in four boreholes drilled on the site, groundwater is unlike to be lowered as a result of the proposed works.
- 117 On the basis of this report, and its conclusions, I am satisfied that an acid sulfate soils management plan is not required, as provided for by cl 7.1(4) of the PLEP.
- 118 On the basis of the amended stormwater management plans prepared by ACOR Consultants (Exhibit B, Tab 7), Exhibit C and the letter prepared by STS

Geotechnics dated 14 July 2021 (Exhibit R), I consider those matters set out at cl 7.2(3) to be addressed.

119 The Respondent identifies the site as being within the PMF extent, according to the Avalon to Palm Beach Floodplain Risk Management Study and Plan 2017 (Exhibit 1, folio 39). Table 5 of the Amended Flood Risk Management Report prepared by ACOR Consultants (Exhibit B, Tab 16) identifies the PMF level and proposed floor level of affected dwellings 1-3 (p12), concluding that compliance with Section 3.11 of the PDCP is achieved. On this basis, I am satisfied that the development will not, in flood events exceeding the flood planning level, affect the safe occupation of, and evacuation from, the land in accordance with cl 7.4(3)(j) of the PLEP.

120 For reasons similar to those at [110], and on the basis of conditions of consent at Conditions 17 and 54, I am satisfied that adequate arrangements have been made for the essential services identified at cl 7.10 of the PLEP, that I do not understand to be inconsistent with cl 28 of the SEPP HSPD.

State Environmental Planning Policy No 55 – Remediation of land

121 Clause 7 of the State Environmental Planning Policy No 55—Remediation of Land requires a consent authority to consider whether the land is contaminated and requires remediation. On the basis of the Respondent's own assessment (Exhibit 1, folio 42), and the assessment of the likelihood of contamination at p 18 of the Amended Statement of Environmental Effects (Exhibit B, Tab 9), I am satisfied that the site is not contaminated.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

122 I am satisfied that the application is accompanied by a BASIX certificate (Cert No. 1017780M_06), prepared by Efficient Living Pty Ltd dated 15 July 2021 in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the Environmental Planning and Assessment Regulation 2000 (EPA Regulations).

Public submissions

- 123 SEPP HSPD clearly seeks to increase the supply and diversity of housing for seniors or people with a disability in areas that have not been zoned for such housing in the past.
- 124 To achieve the aims of the SEPP HSPD, certain local planning controls that would prevent the development of such housing are set aside.
- 125 This does not, however, result in de facto rezoning as suggested in public submissions. Nor does development consent in one particular matter set a precedent for other forms of housing that are not permitted in the R2 zone unless, like seniors housing, an application is made under a relevant State Environmental Planning Policy.
- 126 While the proposed development will result in the removal of mature trees, four new Angophora canopy trees are proposed in the front setback which the experts agree will, in time, contribute to the landscape character of the North Avalon Road, and three native trees are proposed to replace those street trees to be removed which, again, the experts agree, will adequately provide streetscape amenity.
- 127 Contrary to the submissions from residents in Urara Road, I find the arrangement of built form on the site will not impact privacy in the north-facing rear yards of those properties. The upper storey of the dwellings to the rear of the subject site is set back in excess of 15m, with windows in bedrooms only, and not in living areas where residents may be expected to spend more time.
- 128 Finally, while the development has a character that varies from the single detached dwellings in North Avalon Road currently, I consider the balance of landscape and built form, and the particular pitched roof appearance of the dwellings fronting the street to result in a good 'neighbourhood fit'.

Conditions are not agreed

- 129 At the conclusion of the hearing, parties were directed to settle and file agreed conditions of consent by 4pm 23 July 2021, or, in the event that conditions were not wholly agreed, to provide short written submissions setting out the parties' competing positions on those in dispute.

130 The parties reached agreement but for the following conditions:

- Condition 8A – Footpath widening bond
- Condition 13 – Flooding
- Condition 18 – Roads Act s138 Application
- Condition 50 – Access to services (Clause 4.6 Option only)
- Condition 50A – Access to services (Keoride Option only, or together with Clause 4.6 Option)

131 The Applicant also proposes additional amendments to the following conditions:

- Cover page – reference to the Site.
- Condition 1 – inclusion of the ACOR Flood Risk Management Report
- Condition 10 – a reference to ‘trims’.
- Condition 10C – to ensure proper numbering.

132 The Respondent provides commentary in the proposed conditions of consent in respect of the following conditions, that is adopted:

- Condition 10A – nominates a minimum dimension of 3m for private open space, consistent with cl 50(f)(i) of the SEPP HSPD.
- Condition 10C – seeks removal of what is described as ‘unnecessary detail’ in what the Respondent identifies otherwise as clear language as to full height windows.

133 In comments added to the disputed conditions of consent, the parties submit varying assessments on the quantum of security bond that should be applied to the construction associated with stormwater and footpaths in Conditions 6A and 7. On the basis of the method provided by the Respondent, the Respondent’s preferred condition is adopted.

Condition 8A – Footpath widening

134 As stated at [41], the Applicant proposes to widen the existing footpath between Tasman Avenue and Catalina Crescent. The method by which this is to be achieved is shown on Drawing P18, Revision H (Exhibit 19). In simple terms, it involves the scabbling back of the edge of the existing concrete footpath, and use of a bonding agent to adhere new concrete to the existing concrete.

- 135 The Respondent proposes a financial bond of \$25,000 as a form of security on the continuing condition of the path that is subject to the widening. The bond period is proposed by the Council to be 2 years.
- 136 The Applicant accepts the bond period, and the amount as being a reasonable estimate of the cost of work required to remediate any failure of the bonding agent. However as security is also the subject of Condition 7 and 8, the Applicant submits that the Respondent is 'double-dipping' on bonds already required for damage to footpaths and, if the scope is not limited to failure of the bonding agent alone, the Applicant is unreasonably liable for any damage that results to the footpath over a two-year period.
- 137 The Respondent submits that if the security bond relates solely to the adhesive method between two separate concrete surfaces, it would not cover instances where the bond was to remain but the footpath cracked or fell away on either side, and so the bond should apply to the footpath as a whole.
- 138 The security bond required by Condition 7 is in respect of damage to, or failure to complete, vehicular crossings, kerb and gutter, any footpath works and the like required by the consent. The security bond required by Condition 8 is in respect of the construction of stormwater drainage works and footpath in the road reserve, to be released after a six month maintenance period.
- 139 I accept the Applicant's position that damage arising from widening works to the footpath is the subject of Condition 8, in which a six month maintenance bond applies, and is only released if work has been completed in accordance with the approved plans and to the satisfaction of Council.
- 140 I consider it reasonable for any adverse impacts to the footpath that arise from the widening works to be evident in the six month maintenance period the subject of Condition 8, while the method of adhesion to appropriately be the subject of a longer period of security. I adopt the Applicant's proposed wording in Condition 8A.

Condition 10 - Amended Schedule of Colours and Finishes

- 141 As stated earlier in the judgment at [84], the parties agreed that contentions as to the colours and finishes of the proposed development were capable of resolution by condition of consent.
- 142 The Respondent submits that amendments to the condition as proposed by the Applicant would result in the colour 'white' being used to excess, despite the agreement of the town planning experts that a darker colour scheme was preferred.
- 143 The Applicant seeks to extend the exemption on the use of white to the application of 'trims'. I note the condition proposed by the Council permits the colour 'white' to be applied to eave linings, window/door frames and balustrades. Considering the agreement reached between the experts, I accept that the Respondent's wording may more faithfully represent this agreement. The Respondent's preferred wording is adopted.

Condition 13 - Flooding

- 144 The Respondent seeks to impose a condition that it submits is a standard condition generally requiring further detail to be incorporated into the plans submitted to the Principal Certifying Authority with the Construction Certificate, and because the necessary matters have not been demonstrated in the plans presented thus far that arise from the flood affectation of the site and the provisions of clause B3.11 of PDCP and cl 6.3 of PLEP.
- 145 As identified at [118], I accept the Applicant's submission that the proposal has been designed having regard to the PMF levels identified by ACOR Consultants in the Flood Investigation Report and Flood Risk Management Plan, in which the documents and standards proposed in the Respondent's condition are identified. On this basis, I adopt the Applicant's preferred wording, which is for the Applicant to provide structural certification and details demonstrating compliance with the Flood Investigation Report and Flood Risk Management Plan prior to the Construction Certificate stage, to which no objection was taken in the proceedings.

Condition 18

- 146 The Respondent proposes what it regards as a standard condition of consent in respect of an Application for Works in the Public Road pursuant to ss 138 and 139 of the *Roads Act 1993*. The required works are listed by the Respondent so that the condition can be read in isolation, so that if any necessary changes arise through the assessment of the s138 application, the reviewing officer is aware of which works are required (and which may not be).
- 147 The Applicant considers the works are not contested by the Respondent's engineering experts, and are properly the subject of Condition 1 of the conditions of consent.
- 148 I accept the Respondent's submission that as an application under the *Roads Act* is a separate application, there is value in identifying the work in a long hand fashion. The Respondent's preferred wording is adopted.

Condition 50 and 50A – Access to services

- 149 For the reasons stated in this decision, Condition 50 is applicable to the grant of consent as the Keoride service is not more than an adjunct service.
- 150 The Respondent proposes wording in Condition 50 to require written confirmation of Councils satisfaction as to the completion of the works prior to the issue by a PCA of the occupation certificate.
- 151 The Applicant submits that it is open to the PCA to be satisfied as to a matter to which cl 161 of the EPA Regulations applies, and so written confirmation from the Council is not required.
- 152 Given the nature of the works proposed, being to widen existing footpaths, the overlap is new and existing works is aided, in my view, by the Council confirming in writing its satisfaction. The Respondent's preferred wording is adopted.

Orders

- 153 The Court orders that:
- (1) The Applicant is granted leave to amend the application and rely upon amended plans and other documents at [3] and [7] of this judgment, subject to the Applicant paying the Respondent's costs thrown away as

agreed or assessed in accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.

- (2) The Applicant's written request to justify the contravention of cl 26(2)(b)(i) of the State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 pursuant to cl 4.6 of the Pittwater Local Environmental Plan 2014, is upheld.
- (3) The appeal is upheld.
- (4) Development consent for Development Application No. DA2019/1260 for demolition works and construction of a seniors housing development comprising ten (10) self-contained dwellings for seniors or people with a disability and basement parking for twenty resident vehicles and two visitor spaces, site consolidation, and the removal of 45 trees at Nos 27 and 29 North Avalon Road, Avalon is granted, subject to conditions of consent at Annexure A.
- (5) All Exhibits are returned, except for Exhibits A, B, Q and S.

.....

T Horton

Commissioner of the Court

[Annexure A \(358456, pdf\)](#)

[Plans \(3819392,](#)

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