Land and Environment Court
New South Wales

Case Name:	Aveo North Shore Retirement Villages Pty Ltd v Northern Beaches Council
Medium Neutral Citation:	**[2020] NSWLEC 1035**
Hearing Date(s):	16 – 17 December 2019; Conditions and submissions on disputed conditions filed 18 December 2019
Date of Orders:	23 January 2020
Date of Decision:	23 January 2020
Jurisdiction:	Class 1
Before:	Smithson C
Decision:	The orders of the Court are: (1) The applicant is granted leave to rely upon the amended plans referred to in condition 7 of Part A of the conditions in Annexure "A". (2) The appeal is upheld. (3) The modification application to amend development consent 82/149 for an approved seniors living facility at 79 Cabbage Tree Road, Bayview is approved subject to the conditions in Annexure "A". (4) The exhibits are returned except Exhibits A, B, G and 6.
Catchwords:	MODIFICATION APPLICATION – whether substantially the same as approved development; site suitability
Legislation Cited:	Biodiversity Conservation Act 2016 Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Local Government Act 1919 Pittwater Local Environmental Plan 2014 Rural Fires Act 1997 State Environmental Planning Policy (Housing for Seniors and People with a Disability) State Environmental Planning Policy No. 5 – Housing for Aged or Disabled Persons 1982 Water Management Act 2000

Cases Cited:	1643 Pittwater Road Pty Ltd v Pittwater Council 11 Elvina Avenue Pty Ltd v Pittwater Council Doering v Pittwater Council 1643 Pittwater Road Pty Ltd v Pittwater Council [2004] NSWLEC 685 Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No. 3) [2015] NSWLEC 75 Australian Super Developments Pty Ltd v Pittwater Council [2004] NSWLEC 632 Australian Super Developments Pty Ltd v Pittwater Council [2005] NSWLEC 642 Geoffrey Twibill & Associates v Warringah Shire Council LEC No. 10431 of 1981 Moto Projects (No 2) Pty Ltd V North Sydney Council (1999) 106 LGERA 298 North Sydney Council v Michael Standley and Associates Pty Ltd (1998) 43 NSWLR 468 The Satellite Group (Ultimo) Pty Ltd v Sydney City Council [1998] NSWLEC 244 Trinvass Pty Ltd v The Council of the City of Sydney [2018] NSWLEC 77 Vacik Pty Ltd v Penrith City Council [1992] NSWLEC 8
Texts Cited:	Australian Standard AS 1428.1 Planning for Bushfire Protection, RFS, 2019
Category:	Principal judgment
Parties:	Aveo North Shore Retirement Villages Pty Ltd (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: A Pickles, SC (Applicant) A Stafford (Respondent) Solicitors: Allens (Applicant) King & Wood Mallesons (Respondent)
File Number(s):	2018/295642
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER:** This is an appeal lodged under s 8.9 of the *Environmental Planning and Assessment Act 1979* (the EPA Act) against the deemed refusal of a modification application by the respondent, Northern Beaches Council (the Council), for an approved development. The modification is to consent number 82/149 and is associated with the final stage of development of a seniors living facility, known as Peninsula Gardens, situated at 79 Cabbage Tree Road, Bayview (the site).

2 The existing Peninsula Gardens development was built following a decision of the Court by (then) Senior Assessor Bignold granting consent to the overall development of the site in 1982: *Geoffrey Twibill & Associates v Warringah Shire Council* LEC No. 10431 of 1981 (*Geoffrey Twibill*) (the approved development). However, only part of the approved development was constructed. The balance is the subject of the modification application.

3 A threshold issue associated with the modification application is whether the proposed modification to the development results in "substantially the same" development for which consent was originally granted under s 4.56 of the EPA Act. If so, whether the modification ought to be allowed having regard to the suitability of the site for the development now proposed.

4 Unusually for modifications applications, the proposed modification results in a substantial reduction in the scale and density of what has been approved and an agreed overall beneficial environmental outcome.

5 However, the Council contended that there is still a jurisdictional test for the applicant to meet that the development as now proposed is substantially the same as that approved. The only merit or other contention raised by the Council, following amended plans and expert reporting, was that reducing the density of the development proposed, and therefore the amount of housing available to seniors, proportional to the environmental impacts the modified development will still have, is not justified.

The site and surrounds

6 The Peninsula Gardens site is 5.6ha in area and generally rectangular in shape other than its two battle-axe handles which provide access comprising the main vehicular access to Cabbage Tree Road and a secondary access for pedestrians and emergency vehicles to Gulia Street.

7 Undeveloped areas of the site are heavily vegetated and there are two watercourses which converge at the centre of the site before being piped to Council drainage infrastructure.

8 Below is an aerial image of the site and surrounds, sourced from the internet:

9 At the commencement of the hearing, the Court viewed the site and surrounds in the presence of the parties and their experts who had all come to agreement on resolution of the merit contentions save for the expert planners: Ms Buchanan for the applicant and Ms Englund for the Council. The opinions of the experts were articulated in filed expert Joint Reports and none of the experts were required to give oral evidence in the proceedings.

10 According to the amended Statement of Facts and Contentions (SFC) filed by the Council with the Court on November 20, 2019, and as evident from the

site view, the site contains a seniors housing development (a retirement village) comprising the majority of the approved development.

11 In *Geoffrey Twibill*, it is stated that the development the subject of the original consent contained 185 self-care units, which I will refer to as Independent Living Units, or ILUs, in clusters of buildings, a hostel with 40 units, a village centre with related communal facilities, parking, access and landscaping. Through latter Court orders, which I will refer to shortly, the approved development was said to comprise 186 ILUs not 185. Of these, 113 have not been constructed and comprise the only component of the approved development not constructed.

12 The existing retirement village, referenced in the proceedings as Stage 1 to distinguish it from the proposed development the subject of the modification application (referenced as Stage 2), contains: 73 ILUs with associated parking in the south-eastern part of the site; a village centre, hostel and associated parking central to the site; a 6 hole mini-golf course; and associated private roads, paths, infrastructure and landscaping. The undeveloped portion of the site largely remains heavily vegetated, including the area approved for Stage 2 (or the balance of the development).

13 The modification application proposed to construct 24 additional ILUs as comprising Stage 2 (the last stage) of the approved development. With the leave of the Court, and no objection from the Council, the application was amended to reduce the number of proposed ILUs from 24 to 23 to meet updated bushfire and riparian corridor requirements, with associated changes to access and landscaping.

14 This revised number of total ILUs in the village would therefore be some 90 less than originally approved in 1982. The amended SFC contended that this results in changes to the clustering proposed, to the clearing and landscaping to be undertaken in association with Stage 2, and to access and parking arrangements associated with this aspect of the approved development. No other changes to the existing retirement village are proposed.

Background to the appeal

15 As the key issue in the proceedings was whether or not what is proposed is substantially the same as the development originally approved, a critical issue was to determine what was originally approved in terms of plans, and dwelling numbers and design, and on what basis it was approved. Documentation filed by the parties was not definitive in this regard.

16 What was agreed was that, on March 9 1982, the Court issued the consent for the originally approved development: *Geoffrey Twibill*. Condition 14 of that consent required that:

> 'The development shall be generally in accordance with the plans as tendered to the Land and Environment Court as Exhibit 2 as amended by Exhibit H.'

17 There was much debate as to what comprised Exhibit 2 and Exhibit H as referred to in condition 14 and there was no conclusive evidence before me in that regard.

18 It was agreed however, that in December 1986 and again in March 2002, the original consent was modified by orders of the Registrar of the Court.

19 The 1986 modification order was by consent of the then parties (the State Superannuation Board and the Shire of Warringah). The order deleted condition 14 and replaced it with, as relevant, the following condition 14:

> '14. (a) The development shall be generally in accordance with exhibit 2 as amended by the following:
>
> The drawings subject to the respondents building approval No 1486/86 dated 4th March 1986 excluding therefrom drawings AO1.R1 dated November 1984 (revision 19.1.85) and AH.38 dated November 1984 and adding thereto drawing No WD.11 dated 6th August 1986.
>
> (b) The 112 self-contained units not included in stage 1 shall be the subject of a separate application under the Environmental Planning and Assessment Act 1979 before any building approval is given for the same'.

20 The orders also required that the parties file with the Court copies of plans uplifted, to serve as a permanent Court record of the details of the orders. However, copies of those referenced plans were not locatable for the proceedings before me.

21 It appears evident however, that condition 14(a) refers to the constructed development, by then known as Stage 1, built in accordance with a building approval following the Court approved development application in 1982, whilst condition 14(b) details the requirement for a future development application and building approval for the balance unconstructed approved development, effectively Stage 2 (or future stages).

22 The 2002 modification order was also issued by the Court Registrar with the consent of the then parties (United Super Investments and Pittwater Council). The order deleted condition 14(b) and replaced it with a new condition 14(b):

> '14(b) Any desired redesign or relocation of the 112 self-contained units not included in stage 1 shall be the subject of a separate application under Section 96 of the Environmental Planning and Assessment Act 1979 before any construction certificate is given for the same'.

23 In 2004, the Court was asked to issue an order confirming what the approved plans referred to as *'Exhibit 2 as amended by Exhibit H'* in condition 14 of the original consent comprised. This question was the subject of contested proceedings: *Australian Super Developments Pty Ltd v Pittwater Council* [2004] NSWLEC 632 (*Australian Super Developments 2004)*. In her judgment arising from those proceedings, Justice Pain indicated that the parties came to an agreement that Exhibit 2 was a plan referred to as Annexure A to a Notice of Motion (NoM) in those proceedings but she indicated that the referenced Exhibit H could not be located.

24 In the proceedings before me, the parties were not able to confirm what the Exhibit 2 plan referenced in Justice Pain's decision was.

25 Ultimately, Justice Pain found that an "All Stages Plan" annexed to the NoM and marked "B" was representative of Exhibit H for the (undeveloped)

northern portion of the site and she made an order that this plan therefore reflected Exhibit H, being the originally approved plan. This plan was agreed by the parties to likely be a plan tendered in the proceedings before me as folio 50 of the applicant's bundle (Exhibit D).

26 As a result of Justice Pain's decision, the approved development proposed the construction of 186, not 185, self-care units (or ILUs) within 57 separate buildings with associated attached and detached shared carports. It also proposed the village centre, hostel, access from Cabbage Tree Road, internal driveways, visitor parking, associated infrastructure, and landscaping. The ILU buildings each contained clusters of between 2 to 5 dwellings.

27 In 2005, the Court granted consent to a modification application which reduced the number of approved but not yet constructed ILUs, stated to be from 112 (but as determined by Justice Pain to be 113) to 73 in *Australian Super Developments Pty Ltd v Pittwater Council* [2005] NSWLEC 642 (*Australian Super Developments 2005)*. In that decision, (by then) Justice Bignold determined that the modification resulted in substantially the same development as that approved, with such a finding not in contention.

28 At some point, the All Stages Plan referenced in the 2004 proceedings was updated to a plan which enlarged the development layout, included a scale, and showed an amended hostel configuration. This plan was prepared by SD masterplan and titled "Exhibit H – Allocation Plan of Approved Design – reproduced for clarity" Revision E with the Revision E date of September 25, 2003. This plan became Exhibit E in the proceedings before me. It was the "originally approved plan" referred to by the expert planners in their Joint Report and used by them to compare the modified proposal with the originally approved development.

29 I asked the parties to confirm that the Exhibit E plan was materially the same plan as the approved plan of the development as determined by Justice Pain in *Australian Super Developments 2004* save for a change in the details of the hostel. If they could not confirm this (which was the case), that they agree that

I should accept that the Exhibit E plan, for the purposes of the current proceedings, reflected the originally approved development (which they did agree).

30 However, it was also agreed that there was no reference to particular stages of the development in a plan form until the All Stages Plan was produced for the 2004 proceedings.

31 On February 16 2018, the current modification application was lodged seeking consent under s 4.56(2), of the EPA Act. Following the amendments undertaken prior to the proceedings commencing and with the leave of the Court, the modification application for which approval was sought, seeks to replace the 113 ILUs in 36 separate buildings approved but not yet constructed in the undeveloped northern portion of the site with 23 ILUs in 7 separate buildings. As a consequence of the changed density and built form, the approved driveway layout, parking arrangements, landscaping, and associated infrastructure, are also sought to be modified.

32 The modification application was referred to Water NSW in accordance with s 89 of the *Water Management Act 2000* and to the NSW Rural Fire Service (RFS) in accordance with s 100B of the *Rural Fires Act 1997*. General terms of agreement (or GTAs) were subsequently issued by both these authorities to the modification application, including as amended.

33 The modification application as lodged was publicly exhibited and 8 submissions were received raising concerns with: impacts on flora and fauna and bushland views; bushfire risk; stormwater management and flooding; traffic, parking and vehicular and emergency access, visual privacy, permissibility of the use, application of State Environmental Planning Policy (Housing for Seniors and People with a Disability) (the Seniors Living SEPP), the clustering of housing, the burden on emergency services, and the proposed height. The modification application was subsequently amended, including to address a number of these concerns. The amended application was re-notified and no submissions were lodged.

The statutory context

34 A pre-condition to granting of consent to the modification application is that I must find that the modified development proposed will be substantially the same as that originally approved. Specifically, the relevant provisions at s 4.56 of the EPA Act are as follows:

> '**4.56 Modification by consent authorities of consents granted by the Court**
> (cf previous s 96AA)
>
> (1) A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the development consent if:
>
> (a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and
>
> (b) it has notified the application in accordance with:
>
> (i) the regulations, if the regulations so require, and
>
> (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and
>
> (c) it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person, and
>
> (d) it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be.'

35 There was no issue with the requirements of s 4.56(1) being met other than in terms of subs (a).

36 In determining an application for modification of a consent, the consent authority, in this case the Court, must, at s 4.56(1A), take into consideration such of the matters referred to in s 4.15(1) as are relevant to the development the subject of the application. Section 4.15(1) contains the evaluating matters

for consideration in an assessment of a development application. The Court must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

37 The relevant evaluating provisions of s 4.15(1) were contended to be as follows:

> '**4.15 Evaluation**
> (cf previous s 79C)
>
> **(1) Matters for consideration—general** In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—
> (a) the provisions of—
> (i) any environmental planning instrument, and
> (ii) -
> that apply to the land to which the development application relates,
> (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
> (c) the suitability of the site for the development,
> (d) any submissions made in accordance with this Act or the regulations,
> (e) the public interest.'

38 The site is zoned RU2 Rural Landscape under the Pittwater Local Environmental Plan 2014 (the LEP). There are environmental constraints to the development of the site reflected in a number of applicable LEP provisions including the provisions of cl 7.3 (Flood Planning) and cl 74.4 (Floodplain Risk Management) as the site is flood affected. The majority of the site is included on the LEP Biodiversity Map, and therefore subject to the provisions of cl 7.6 (Biodiversity) and contains land identified as having geotechnical hazards on the Geotechnical Hazard Map and therefore subject to the provisions of cl 7.7.

39 The site is also identified as being bushfire prone as shown on the NSW RFS Bushfire Prone Land Map established pursuant to s 10.3 of the EPA Act.

40 Development for seniors living is subject to the provisions of the Seniors Living SEPP. The original development was approved under an earlier version of this SEPP titled State Environmental Planning Policy No. 5 – Housing for Aged or Disabled Persons 1982 (SEPP 5).

41 It was agreed that the approvals process has changed since the date of the original consent (1982), when a building application was generally required following approval of a development application and often contained substantially more detail than the development application. Now that detail is required at development application stage.

42 Further, SEPP 5 has been repealed and replaced by the current Seniors Living SEPP. The applicable standards and policies applying to seniors living development and on the site are thus different.

43 The significance of the vegetation on the site has also increased as the site is now known to have critically endangered vegetation under the *Biodiversity Conservation Act 2016* and more stringent provisions exist in terms of managing hazards and risks, such as bushfire risk.

Is the development substantially the same?

The original Court consent

44 In order to understand the basis of the original consent, or the reasons for it, the key reference document was the written decision of then Senior Assessor Bignold in *Geoffrey Twibold*.

45 The Senior Assessor describes the site at the time as being *'covered by native forest'* and that *'Its proposed development attracted a number of objections from local residents who had enjoyed the use of the appeal site both visually and physically'*.

46 The description of the proposed development was as follows:

> 'The proposed development as described in the environmental statement forming part of the development application comprises 185 self-care units, 40 hostel units, a village centre and related community facilities, car parking, roads and extensive landscaping. The self-care units are of one and two-storey construction clustered to form domestic scale buildings with parking underneath. There are some forty clusters of five two-storey units. The hostel units are clustered in a two-storey pavilion structure linked by common spaces and ramp. The village centre is a step structure located at five levels linked by a lift and located in the middle of the site. .... Outdoor village

> facilities will include a croquet lawn, a six-hole ... golfcourse, access to walking trails, vegetable gardens, potting facilities etc. A detailed pedestrian network to the site is proposed with a maximum grade of 1:12."

47 There was substantial community opposition to the development including in terms of its visual impact and the traffic and access associated with it.

48 Of relevance, the only reference to staging was in terms of when the village centre complex should be built as it contained a number of recreational, administrative and support services for residents of the village.

49 The Senior Assessor issued the consent and upheld the appeal referencing 11 findings that formed the basis of his decision. Of relevance to determining whether the development now proposed is substantially the same as that which he approved, including in terms of the essential and material aspects of the approved development, are the following 6 findings:

> '(2) The proposed development would not adversely affect the landscape and scenic quality of the locality.
>
> (3) The fact and substance of local opposition does not of itself justify refusal of the proposal on grounds of public interest.
>
> (4) The proposed development is harmonious with the existing and likely future amenity of the locality.
>
> (5) In resolving the dispute as to staging of the proposed development it is a relevant factor that the village centre is not essential to the provision of support services in connection with the proposed development.
>
> (6) Financial considerations may be taken into account as relevant to the question of staging.
>
> (7) The village centre should be required to be completed and available for use before more than 50 per cent of the small flats have been occupied or within four years after occupation of the first flat, whichever first occurs.'

50 A condition was imposed specifying when the village centre was to be constructed, and it was subsequently built. The centre houses the administrative functions of the village as well as support services for village residents, including indoor and adjacent outdoor recreational facilities.

51 The judgment refers to the development as a "retirement village" and describes the site in the following terms:

> 'The subject land is amphitheatre in shape and land form, being a low lying basin in the vicinity of its eastern boundary with rising slopes to the North, South and West. The low lying basin area is not covered by any substantial trees but more than half of the overall area of the site involving the whole of Lot 9 is a heavily timbered bushland hillside.'

52 In terms of the merits of what was then proposed, the following extracts are instructive when considering the current modification proposal:

> 'Turning then to consider the impact of the proposed development on the landscape and scenic quality of the locality, the court has concluded that the proposal will not adversely affect the landscape and scenic quality of the locality, and in particular will not prejudice the planning objective of seeking to preserve or protect the visual integrity of the escarpment, which is clearly a matter of regional planning significance. In reaching these conclusions which are consistent with the preponderating views of the expert witnesses, the court has been influenced by the fact that generally speaking the proposed development will be located on areas of the site not above the 100ft contour line...
>
> A further physical constraint on the visual impact of the proposal is the fact that by virtue of its amphitheatre land form the site is not generally viewable from the west, south or north.'

53 The Senior Assessor then refers to the proposal as a 'cluster style housing development' and that this feature of the development,

> '...(d)iminishes the visual environmental impact because of the ability to selectively distribute the clusters of development on the site in a manner which maximises opportunity for extensive landscaping and proper treatment of the site.'

54 Those comments were made on the basis of the expert advice at the time as to the quality of the existing vegetation, including that most of the mature trees on the site did not have a significant expected lifespan, and the Council therefore sought the preservation of natural regeneration, considering the landscape features of the site to be typical of the landscape of the lower escarpment. The Senior Assessor found that the proposed development would therefore convert the *'visual forest effect of the existing site to an open*

woodland provided that proper landscaping treatment was implemented by the applicant as proposed.'

55 He also concluded that the adverse traffic impacts raised in community objections appeared to have been resolved by amending the site access arrangements to confine vehicular access to Cabbage Tree Road and by denying vehicle access from Gulia Street except for emergency vehicles (as remains the access arrangements today, and proposed). Further, objector concerns with possible flooding appeared to be satisfied by the applicant's proposal for stormwater retention reflected in the agreed conditions of consent.

56 There is reference in the judgement to the density of the development as this was a concern also raised by objectors. What was proposed approximated residential densities for dwelling houses being some 42 persons per hectare. It was noted by the Senior Assessor that density could not be a basis for refusal given the provisions of SEPP 5 which allowed significantly higher densities than were proposed.

57 He concluded that there was no evidence before the Court of matters likely to result in any change in the likely future amenity of the neighbourhood. Accordingly, the proposal was harmonious with the existing and likely future amenity of the locality and none of the grounds of opposition from the Council were substantiated. He states that the Council noted that, otherwise, what was proposed represented an exemplary type of aged persons retirement village, which he agreed with, as the proposal involved a high standard of living and support services for aged persons.

58 The agreed conditions of consent were attached as Annexure A to the judgement. Of relevance, these included conditions that no trees be removed prior to the release of approved building plans and that a tree survey be submitted at the building application stage identifying all major trees on the site and those to be removed to permit the development. Other conditions included: the colour, texture and substance of all external components of the

buildings to be included on the building plans; the development remaining as aged persons in accordance with SEPP 5 for the life of the development; compliance with minimum setbacks of buildings to boundaries; and compliance with the reasonable recommendations of the Board of Fire Commissioners and with specified fire control officer requirements. Finally, a condition required that not less than one pedestrian pathway be available (which may include steps) with a gradient not exceeding 1:12 (excluding steps) to provide access between buildings within the development.

The relevant considerations

59 Mr Stafford, counsel for the Council, referenced the Court's decision in *Agricultural Equity Investments Pty Ltd v Westlime Pty Ltd (No 3)* [2015] NSWLEC 75 *(Agricultural Equity Investments)* where Pepper J at [173] usefully summarises the legal principles governing the power to modify consents (under then s 96 of the EPA Act), being ten principles as follows:

> '173. The applicable legal principles governing the exercise of the power contained in s 96(2)(a) of the EPAA may be stated as follows:
>
> (1) first, the power contained in the provision is to "modify the consent". Originally the power was restricted to modifying the details of the consent but the power was enlarged in 1985 (*North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475 and *Scrap Realty Pty Ltd v Botany Bay City Council* [2008] NSWLEC 333; (2008) 166 LGERA 342 at [13]). Parliament has therefore "chosen to facilitate the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity" (*Michael Standley* at 440);
>
> (2) the modification power is beneficial and facultative (*Michael Standley* at 440);
>
> (3) the condition precedent to the exercise of the power to modify consents is directed to "the development", making the comparison between the development as modified and the development as originally consented to (*Scrap Reality* at [16]);
>
> (4) the applicant for the modification bears the onus of showing that the modified development is substantially the same as the original development (*Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8);
>
> (5) the term "substantially" means "essentially or materially having the same essence" (*Vacik* endorsed in *Michael Standley* at 440 and *Moto Projects (No 2) Pty Ltd v North Sydney Council* [1999] NSWLEC 280; (1999) 106 LGERA 298 at [30]);
>
> (6) the formation of the requisite mental state by the consent authority will involve questions of fact and degree which will reasonably admit of different conclusions (*Scrap Realty* at [19]);

(7) the term "modify" means "to alter without radical transformation" (*Sydney City Council v Ilenace Pty Ltd* [1984] 3 NSWLR 414 at 42, *Michael Standley* at 474, *Scrap Realty* at [13] and *Moto Projects* at [27]);
(8) in approaching the comparison exercise "one should not fall into the trap" of stating that because the development was for a certain use and that as amended it will be for precisely the same use, it is substantially the same development. But the use of land will be relevant to the assessment made under s 96(2)(a) (*Vacik*);
(9) the comparative task involves more than a comparison of the physical features or components of the development as currently approved and modified. The comparison should involve a qualitative and quantitative appreciation of the developments in their "proper contexts (including the circumstances in which the development consent was granted)" (*Moto Projects* at [56]); and
(10) a numeric or quantitative evaluation of the modification when compared to the original consent absent any qualitative assessment will be "legally flawed" (*Moto Projects* at [52]).'

60 Reference was also made by Mr Stafford, and by Mr Pickles SC (counsel for the applicant) to a number of the authorities referenced in the 10 principles. This included a reference to *Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8 *(Vacik)* which requires a comparison of the modification against the whole of the development and a determination of that comparison being a finding that the modified development is "essentially or materially"" the same as the approved development.

61 Specific reference was also made to *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 *(Michael Standley)* where the Court found the word 'substantially' to mean 'essentially or materially having the same essence'. Further, in *Moto Projects (No 2) Pty Ltd v North Sydney Council* (1999) 106 LGERA 298; [1999] NSWLEC 280 *(Moto Projects)*, where the Court found, at [56], that:

> 'The comparative task does not merely involve a comparison of the physical features or components of the development as currently approved and modified where that comparative exercise is undertaken in some type of sterile vacuum. Rather, the comparison involves an appreciation, qualitative, as well as quantitative, of the developments being prepared in their proper contexts (including the circumstances in which the development consent was granted).'

The Council's submissions

62 As indicated, the Council was of the view that the development was not substantially the same as the approved development as required by s 4.56(1)(a) of the EPA Act. Therefore the Court had no power to consent to the modification application.

63 Further, as required by s 4.56(1A), regard had to be given to the reasons behind the grant of the Court consent now sought to be modified. It was therefore necessary to provide background to the Court approval.

64 Mr Stafford noted that the comparison is between the whole of the development as modified, being the whole of the facility on the site including that part which has already been constructed, and the whole of the development as originally approved. However, that does not mean eclipsing a particular feature of the development if that feature is found to be 'important, material or essential'. Further, as outlined in the ten principles, the fact that the use may be the same is not of itself a proper basis on which to conclude that the development is substantially the same (Principle 8).

65 It was further submitted that, whilst often proceedings diminish the importance of a quantitative assessment relying on Principles 9 and 10, it is clear from the principles that both qualitative and quantitative consideration of the development is important. This is noting an argument by the applicant that the proposed amendments represent only a fraction of the overall development and so should be considered to be substantially the same. Such an argument is legally flawed.

66 Further, the fact that the modification power is beneficial and facultative (Principle 2) does not mean the asserted beneficial changes to the proposal in some planning or environmental sense should be treated favourably in answering the 'substantially the same' question. The power is beneficial in the sense of being intended to allow flexibility to an applicant rather than being beneficial in the sense of somehow favouring development proposals that are, allegedly, made better in some way. The environmental impacts of the

proposed modifications are however, relevant to the ultimate factual finding of whether the proposal is substantially the same.

67 Given this finding of fact is required, it is only of illustrative assistance to consider other modification cases involving their own factual findings.

68 The Council accepted that the consent had been earlier modified by the Court in *Australian Super Developments 2005* involving a reduction in the number of ILUs from the Court determined 113 to 73, where (then) Justice Bignold found that this reduction still resulted in substantially the same development. However, in that instance there was no contention that the developments were not substantially the same and a reason given for this was that the anticipated population yielded by the modified development would likely be similar to that originally contemplated. It is not apparent that the same could be said of the current modification application noting Ms Englund's written evidence (Planners Joint Report, Exhibit 2) that there would likely be less people accommodated by the modified development. Further, a reduction in the number of units now proposed to be constructed to only 23 is a substantial reduction in the modified proposal that the Court granted consent to in 2005.

69 Mr Stafford also referenced *The Satellite Group (Ultimo) Pty Ltd v Sydney City Council* [1998] NSWLEC 244 *(The Satellite Group)* where Justice Talbot found a modification was not for substantially the same development as the development would undergo 'radical change' in terms of its use and substantial change in the type of occupiers and the built form outcome. Further, at [29], depending on the factual circumstances of the modification, the focus of enquiry might be on a critical element of the development which is to be the subject of change in order to determine whether the entire development is substantially the same development.

70 Therefore the change does not necessarily need to be large for the test not to be met. What is now proposed involves changes which are so widespread that it is not even so much a question as to which critical elements may have changed but whether anything of the old design has in fact been retained.

71 In *The Satellite Group*, the Court considered that a change to the external appearance of the building and class of occupiers was such that the required test was found not to be satisfied notwithstanding that the approved development remained a 9 storey residential flat building.

72 In the modification application now before the Court, it was accepted in *Australian Super Developments 2004* that the first stage of the development was generally consistent with the Exhibit H plan. What is now proposed for the balance of the development (Stage 2) is not.

73 Subsequent modifications to the original consent are irrelevant to the "substantially the same" test given the terms of subc 4.56(1)(a). This includes the changes to condition 14 which refer to different stages, different plans and/or different approval requirements. What is shown on the approved plans is what was required to be carried out by condition 14 of the original consent or the developer would be in breach of s 76(2) of the EPA Act as it was at the time which required development to be carried out *'in accordance with the provisions of any conditions subject to which that consent was granted'*. That is to say, condition 14 had to be complied with and the form of final development had to be generally consistent with the originally approved plans and consent.

74 In this regard, the appearance and outlook of the modified elements are substantially changed from that in the approved development as follows.

Density

75 If modified as proposed, only 23 ILUs would constitute the uncompleted stage of the development. This would result in a total of 96 ILUs on the site compared with 186 approved in the original consent, and 90 fewer ILUs in the final stage. The quantitative and qualitative changes that follow from a considerably smaller development accommodating considerably fewer people are so drastic that it is difficult to see how this could be considered to have the same "essence".

76 In *Australian Super Developments 2005*, Justice Bignold was comforted that the population density was going to be similar notwithstanding the modification then proposed. However, there is no evidence in the current modification application suggesting that this will be the case with only 96 ILUs compared with the 149 ILUs that he approved.

77 Ms Englund anticipated that there will be a change in patronage of the retirement village of between 90 and 180 people and that this will alter the intensity of use of communal facilities, the number of vehicles at the site, staffing levels, and the provision of services across the site. This is not merely a quantitative change but is a qualitative one in the way the village is managed and experienced, compared with what was contemplated in the approved development. Moreover, the higher density of the originally approved development is a 'material' feature of the development because the extent of the impacts on the natural environment can to some extent be justified in the context of a higher density.

Scale and footprint

78 The footprint of the approved development was a term used by the planning experts to refer to the area affected by the modification application. Ms Englund estimated a 40% reduction in development footprint across the whole site as a consequence of the modification. Whilst the applicant did not provide calculations to confirm that figure, the Council maintained the extent of the proposed reduction in developed area was evident.

79 Further, the ILUs approved in the original consent are considerably smaller than now proposed, which are all 2 bedrooms rather than 1. Whilst there might have been some change in areas as part of the detailed design (ie. for the building application which followed the development consent), it is not apparent that the ILUs would have increased in size so as to be as large as those now proposed, with fewer dwellings. This is given the requirement of condition 14 of the original consent that the development was to be

undertaken generally in accordance with the approved plans. The existing ILUs are generally also in locations consistent with the original approval.

80 Further, the original cluster buildings had a width of up to 28m whereas the proposed buildings have a width of up to 40m with individual building pads for each of these building self-evidently bigger.

81 The reduction in dwelling numbers is also not explained solely by changes in regulation or controls since the original approval. In this regard, it was the evidence of the applicant's planner, Ms Buchanan, that only 30 dwellings were lost as a result of such requirements, being increased APZs and riparian zones.

82 Even if the total reduction was a consequence of such requirements, this is not a proper basis in which to consider the 'substantially the same' test where changes are, allegedly or otherwise, brought about by new controls in force at the time the modification application is considered. If changes are necessary to accommodate current substantially altered regulatory requirements, these should be made by way of a fresh development application and not by modifying an ageing development consent.

Internal driveway layout

83 Whilst site access is unchanged from the approved development, the approved internal roads have a two-way 'tree-like' appearance whereas what is proposed will have multiple connections to the main internal road, including a new one-way loop road. Ms Englund's evidence was also that traffic generation would reduce from some 390 daily trips to 202 daily trips.

84 Access to the proposed ILUs would therefore operate in a fundamentally different way. Access is capable of being a 'material' feature of an approved development for the purpose of considering whether the development is substantially the same.

Building context and visual impact

85 The modification would see fewer, larger buildings constructed in a more concentrated area than originally approved with both planning experts acknowledging that the building clusters would likely have been terraced up the slope of the hill in the approved development.

86 Specifically, Ms Englund argued that the intention in the original consent was to have buildings that were not constructed on the same level but rather would be at different levels following the contours of the land and minimising the need for cut or fill whilst allowing for trees between buildings.

87 Further, what was proposed would look very different from a number of viewing points given the significant retention in vegetation. Whilst the applicant argued the benefits of greater separation between buildings, with more vegetation retained and density reduced, Ms Englund argued that this was a material difference in visual impact and outlook. What is proposed is now unlikely to be seen at all from properties to the north-west and the outlook from dwellings within the village will also be different.

88 In addition to the changes to the size and mix of the ILUs, different architectural designs were now proposed with shared parking areas replaced with garage parking attached to each dwelling and internally accessed, modulated pitch rooves being replaced with elongated skillion rooves, and, instead of 1-2 storey buildings nestled into the hillside, the development would include dwellings elevated above ground level with piers.

89 Finally, the applicant's argument appeared to be based on the assertion that what was approved was conceptual only, which the Council disputed.

90 In summary, the development as modified would not be substantially the same and the proper course for the Council or the Court to have power to approve the proposal would have been to lodge an application for a site compatibility certificate under the Seniors Living SEPP and then lodge a fresh development application.

The applicant's submissions

91 As indicated, the applicant was of the view that the development was substantially the same as the approved development as required by s 4.56(1)(a) of the EPA Act. Therefore the Court had power to consent to the modification application. Further the modifications were a clear and unique example of beneficial and facultative reasons to modify a consent.

92 Mr Pickles submitted that the development would not undergo radical transformation as a result of the modification. He also referenced *Moto Projects* where Justice Bignold considered that there was undue reliance upon the quantitative comparison rather than whether it qualitatively changed the development.

93 Reference was also made to the Court's decision in *Trinvass Pty Ltd v The Council of the City of Sydney* [2018] NSWLEC 77 (*Trinvass*) where Justice Moore notes the requirement to have regard to the matters to be assessed in s 4.15 of the EPA Act, including merit considerations.

94 When the original consent was granted, the applicable statutory regime was different to what exists today. It was required that a building approval be subsequently obtained under the *Local Government Act 1919* (the LG Act) after development consent was granted under the EPA Act. The material required to accompany a development application was therefore considerably less than is now required. Mr Pickles submitted that, as a result, the plans approved in 1982 were more akin to what might now be regarded as 'concept' plans. There were no building elevations, nominated RLs for buildings, or detailed plans for construction. These would have been required and approved as part of the building application process under the LG Act.

95 On March 4, 1986 a building approval was issued and the existing development on the site constructed. Whilst the original consent did not contemplate staging, the approved development was subsequently split into a Stage 1, which is that stage constructed and evident today, and Stage 2 which is yet to be constructed and the subject of the proceedings

96 As indicated, the original consent has since been modified on a number of occasions including in 1986 by the Court requiring a future development application for the proposed ILUs in Stage 2 before building approval was granted and with the concept of staging first introduced. In 2002, the Court further required a modification application for the unconstructed ILUs rather than a new development application.

97 It was common in modification application appeals for a council to overstate the changes by reference to percentage changes or numerical calculations. This is reflected in the amended SFC. Such an approach often detracts from the correct test to be applied. Equally, applicants often focus on the use being unchanged. Care is therefore required to ensure that there is a focus on the correct test.

98 Whether or not the development is substantially the same depends on the specific circumstances of each matter. Given there is a comparison with the originally approved development, the focus must be on the whole of the development not just that part undergoing change. In this regard, the Council's description of the changes proposed focuses heavily on the changes to Stage 2 only which diverts the Court from the proper statutory test.

99 Whether the proposed development is substantially the same is not a question capable of scientific or mathematical precision, but rather a judgement based on an overall quantitative and qualitative assessment. The qualitative assessment involves some overlap with the task of considering the matters of relevance under s 4.15 of the EPA Act as found in *Trinvass* at [32].

100 However, as found in *Michael Standley*, the modification power is beneficial and facultative as well as "free-standing" (at [481] and [482]). In *Michael Stanley*, for example, the scope of the architectural change was significant but not so as to radically alter the fundamental essence of the development. This was despite the fairly significant changes in that case, including the addition of two additional floors and a changed unit mix, yet the Court held that the development remained substantially the same.

101 In the current proceedings, condition 14 of the original consent required the development to be *'generally in accordance with'* the plans as tendered to the Court, as modified. The plans that comprised the application had a hand drawn artistic quality that makes determination of what was approved with any specificity impossible. For example, the floor plans were "typical layouts" only. The terminology used of "generally", and the lack of RLs for all buildings, meant that there was a considerable measure of latitude in what was approved. In addition, condition 14 was later amended by the Court to require further consent being obtained for Stage 2 before building approval. This further supports the proposition that what was approved was largely conceptual in nature as a further consent was required even before building approval. Finally, the consent was again amended by the Court in 2002 to expressly require that the ILUs in Stage 2 be the subject of a modification application before any construction certificate was issued for that stage.

102 This is important because, while the comparison exercise must be between the proposal and the consent as originally granted, the consent in its modified form dictates that any redesign should be by way of modification of the consent. Further, the Stage 2 development must now be constructed in accordance with the consent, as modified not as originally issued.

103 It can be inferred from the terms of condition 14 as modified, that the modification of Stage 2 was contemplated by both the original consent and the consent as modified. The consent itself thus invites modification before Stage 2 can be carried out and the facts support the proposition that the original consent was conceptual in nature or, at the least, was expressed with sufficient generality so as to permit and anticipate a significant level of modification.

104 In this regard, it is relevant that: the development will continue to be for seniors housing comprising a mix of hostel apartments and self-care units (the ILUs); site access will be from the same unchanged access routes; the footprint of the development, albeit smaller, will be contained within that which has been approved for development of Stage 2; and the development will

continue to provide all of the approved on-site services and communal facilities, including the club room, pool, kiosk, hair salon and golf course.

105 It is axiomatic that modifications to a development will result in some change. However, this does not mean that even quite extensive changes will result in the overall development becoming something other than substantially the same. It is necessary to focus not on the extent of the changes but the overall development. In this regard, Stage 1 remains fundamentally unaltered from that which was approved. It comprised 73 ILUs and 40 hostel or serviced apartments as well as the communal facilities designed to service the whole development. Stage 1 comprises in excess of 50% of the total number of dwellings as well as all of the communal facilities. As a percentage, it equates to some 60-65% of the whole or total development. Therefore, as a starting point, the development is already quite substantially unchanged.

106 The beneficial effects of the modification are important not only in an assessment of the impacts under s 4.15 of the EPA Act but also in considering the qualitative assessment. This is an unusual case where the changes proposed will make the development smaller rather than larger, in both overall footprint and in the number of dwellings built, resulting in less environmental impacts than that which was approved.

107 By contrast, the Council's contentions focus too narrowly on what is different in Stage 2 rather than a genuine comparison of the whole of the development as originally approved against the whole of the development as now proposed. This comparison must focus on the essential matters.

108 Further the Council's contentions seek to contend against the modification sought despite the fact that the qualitative assessment is entirely one-way, namely that the modifications are beneficial.

Density

109 The approved development contained 113 additional ILUs. This was reduced by the Court in 2005 to 73 ILUs but, as Justice Bignold noted at the time, this

did not have the effect of significantly reducing the on-site population because the modified dwellings were *'more capacious and commodious'* than those originally approved. The proposal now seeks to reduce the number of ILUs in Stage 2 from 73 to 23. However, in a similar fashion to the 2005 modification, the ILUs have been designed to be even more capacious and commodious than they were in 2005 to meet the adaptable and resident requirements for contemporary seniors housing.

110 It would therefore be wrong to focus upon the number of dwellings and not to consider, as Justice Bignold did in 2005, the expected population resulting from the development and the improved amenity to the future occupants. The amended ILUs are larger and allow for a greater occupancy ratio for each ILU. It is therefore more relevant to compare bedrooms not units. The proposed ILUs comprise 2 bedroom units whereas the original consent was primarily for 1 bedroom units.

111 Further, improved amenity is a trade-off for a lesser number of dwellings and it is undeniable that the modifications will result in improved amenity for the future residents compared to the ILUs approved.

112 Whilst a change in the number of units has a consequential effect, this does not mean that the development ceases to be materially or essentially the same.

113 There is nothing in the statutory scheme absent a condition that would compel an applicant to complete all stages of a development. It could not be said that a failure to build all that a consent allows results in a development not substantially the same as that which was approved. This is a case where the modification effectively seeks not to build part of the development for which consent has been obtained. It would be an odd consequence to conclude that this should not be allowed when it would be equally open to simply not complete the development as approved without any formal modification. This is especially so given that the authorities have repeatedly stated that the

power to modify consents is beneficial and facultative and permits modifications that might involve cost savings and improvements.

114 The reduction in the number of dwellings in Stage 2 must also be weighed against retaining the broader environmental values of the site. Whilst quantitatively the change in density in Stage 2 may be large, on one view, this is balanced by the not inconsiderable quantitative reduction in the area impacted and the not insignificant qualitative reduction in building footprint.

Scale and footprint

115 The scale and footprint comparison with the approved development needs to be based on the development as a whole. In this regard, the change to the footprint was not as marked as the Council contended affecting some 35% of the total site. Excluding areas now proposed to be built upon, the area of change is limited to no more than 20% of the total site.

116 Focusing in detail on the footprint of individual buildings is not the relevant test given the approved buildings lacked elevations and levels and were shown as "typical" unit clusters. It is more appropriate to focus on the fact that the approved plans essentially did no more than conceptually outline buildings, parking areas and driveways over a certain footprint. The overall footprint now proposed, albeit smaller, lies entirely within that footprint as approved.

117 Further, Ms Buchanan estimated that more than 30 ILUs had to be removed to achieve compliance with current bushfire and riparian corridor planning requirements, with significantly enlarged APZs in particular. Bushfire planning compliance was a requirement of the original consent and remains a relevant consideration in developing the site.

Internal driveway layout

118 The site access is unchanged from the approved development. Further, the internal driveway layout is not radically different from that approved. A one-way loop road rather than a dead-end two-way road is not a particularly

significant change in the overall scheme. It is internal to the site, has no external ramifications for traffic flow and, as with the buildings, lies entirely within the approved footprint for development. Moreover, most of the driveways and roads throughout the development remain unchanged given that they exist.

119 The Council focuses too narrowly on the western end of the access rather than considering the development as a whole. What is proposed is a beneficial change given the site disturbance from roads will be less extensive than what has been approved, allowing significant additional vegetation retention.

Building context and visual impact

120 The Council claims that the built outcome for Stage 2 would be dissimilar to Stage 1. However, what was constructed in Stage 1 reflected the building approval rather than the development consent itself.

121 What was approved was a retirement village with ILUs. Only some of these ILUs will undergo redesign as a consequence of this application with the balance remaining unchanged. Furthermore, changes to the proposed ILU layouts to be '*more capacious and commodious*' were accepted by the Court in 2005 as resulting in a development that was substantially the same. It is difficult to see why a different conclusion should now be reached, with ILUs even more capacious and commodious, such as including ensuites to master bedrooms. They nevertheless remain a maximum of 2 storeys in height.

122 In terms of visual impact, the original consent did not contain detailed elevations, and plans of the likely built form outcome comprised artistic representations. However, what was approved had a greater overall footprint of built form requiring significant additional vegetation clearing than now proposed. There is therefore every prospect that the approved development in the Stage 2 area had a greater visual impact on views from dwellings within the site than will now occur.

123 At the very least, the approved development reached far greater in elevation up the escarpment than is now proposed. It had no setbacks from the northern boundary and would be visible from adjoining properties whereas what is now proposed retains a significant landscaped buffer to the northern boundary such that the development is unlikely to be visible beyond the site.

124 Whilst the style of the built form may be different to that approved, the overall visual impact arising from consolidating built forms and fewer buildings therefore has a significant qualitative reduction in terms of visual impact and retaining a vegetated backdrop. The visual impact of the development on the escarpment vegetation was the principal contested issue between the parties when the Court first approved the development. It was evident from that decision, that the Court approved the development despite the significant loss of vegetation and recognised that any vegetation between buildings would be new rather than remnant.

125 Further, Ms Buchanan noted that, in the notification of the original modification application the subject of the proceedings, only one objection from an existing resident raised a concern in terms of the visual impact of what was proposed, whilst broader concern was expressed with any further clearing of the site.

Other factors

126 Mr Pickles submitted that it was not possible for the Council to conclude that the approved development required more or less disturbance to natural ground levels. The approved development contained no RLs for buildings and there was no cut and fill plans or civil drawings for the road. Subsequent modifications presumably recognised this fact by expressly requiring separate development consents for the Stage 2 ILUs. Presumably this was in recognition that the consent for Stage 2 was essentially conceptual and virtually devoid of any detail.

127 However, it is abundantly clear that the approved development would involve more disturbance than now proposed. The original consent contemplated buildings spread across the landscape including in an area now not proposed

to be built upon. This would have a far greater impact on the overall environmental values of the site than the more confined proposal for which consent is now sought. This was acknowledged by the Council's planner.

128 The fact that SEPP 5 has been replaced by more stringent provisions in the Seniors Living SEPP mostly supports the amendments proposed to the design which satisfy more modern standards including for buildings, parking and access. Rather than leading to a conclusion that the development is not substantially the same as a consequence, many of these standards relate to access within the site and to building design and justify the amendments now sought. Further, the onsite vegetation which can be cleared under the original consent is now recognised to contain critically endangered species which justifies modifying the consent in a way that avoids impacting that vegetation.

129 Contentions raised in the SFC but resolved during expert joint conferencing related to vegetation assessment and retention, flooding, and bushfire protection. There are no other identifiable risks that would now make the different statutory considerations a basis to conclude that the development is not substantially the same. Further, s 4.56 of the EPA Act requires an assessment of the merits of the application by considering the matters of relevance under s 4.15 of that Act. In this regard, the relevant matters have been the subject of consideration by the Council and all of the merit contentions raised have been resolved other than in terms of the site suitability issue, namely the proportionality issue of clearing versus density.

130 In summary, the development will still remain quantitatively substantially the same in particular as:

(a) The use will continue to be the same as the approved use, being for seniors housing;

(b) Approximately 60% of the approved development is unaffected by the modification;

(c) The area of the site to which the modification relates is only some 35% of the site area; and

(d) The footprint of the proposal lies within that which was approved.

131 The qualitative changes must also be considered and will be beneficial. In particular:

(a) The physical spread of the development now proposed will be substantially less than approved and thus a significant amount of native vegetation will be retained;

(b) The access arrangements to and from the site are unchanged;

(c) The vegetation on the site will be managed according to the modern standards contained in the RFS guide, Planning for Bushfire Protection; and

(d) The development will comply with modern accessibility standards under the Seniors Living SEPP.

132 Finally, Mr Pickles submitted that, in in the absence of any remaining merit contentions for refusal, the Council's position is an unusual one, particularly given the beneficial and facultative nature of the power to be exercised. This type of circumstance, where the modification is accepted by the Council as beneficial, is precisely the type of circumstance envisaged by the authorities that warrant the exercise of the power.

133 This is not overcome by the Council argument that the applicant should lodge a new development application under the Seniors Living SEPP rather than the modification application. The fact that there may be another pathway available to the applicant is not relevant to a proper weighing of the quantitative and qualitative considerations that answer the jurisdictional question of substantially the same.

134 When considering not only Stage 2 but the whole of the development, the development as proposed to be modified is substantially the same development as that which was approved and is therefore lawfully capable of approval.

Merit considerations (site suitability)

135 The merit considerations were confined to one issue: whether or not the extent of vegetation to be cleared was justified given the reduced number of dwellings now proposed to be constructed.

The Council's submissions

136 The Council submitted that the site is not suitable for the proposed modified development in that the reduction in dwellings and associated number of people accommodated by the development is not proportional to the reduction in impact on native vegetation. This is in circumstances where the value and significance of the vegetation has increased since the approved development consent was issued. Clause 7.6 of the LEP now applies to the site and aims to protect and conserve the natural environment.

137 The consent issued was for 90 more dwellings that are now proposed with the proposed clearing of vegetation only facilitating 23 additional dwellings. The suitability of the site to the proposed development is, in this context, a real consideration albeit one that takes place in the shadow of an existing consent.

138 Mr Stafford referenced the Court's decision in *1643 Pittwater Road Pty Ltd v Pittwater Council 11 Elvina Avenue Pty Ltd v Pittwater Council Doering v Pittwater Council 1643 Pittwater Road Pty Ltd v Pittwater Council* [2004] NSWLEC 685 where, at [53], the proposition is supported that the decision-maker can only consider the s 4.15 considerations relevant to the modification application not the whole development. However, this does not mean that site suitability should not be taken into account. Here the built form of the whole development is being modified so the suitability of the site for the modified proposal ought to be relevant.

The applicant's submissions

139 It was not readily apparent to the applicant why it matters that the reduction in impact be proportional to the reduced number of dwellings. In any event, this was not a fair comparison. More relevant would be to compare bedrooms not units considering the proposal for 2 bedroom ILUs to replace 1 bedroom ILUs.

140 Further, the impact of the modified scheme on the vegetation may arguably be greater per unit however, this is simply a reflection of the need to apply modern bushfire risk standards and APZs around the retained vegetation.

141 Mr Pickles also submitted that site suitability for the type of development proposed is not a question that arises for consideration in a modification application. Consent has been granted for the development and it could be carried out without further modification. Further, the approved development would have an agreed far greater impact on the vegetation than the proposed development. Accordingly, to the extent the question of site suitability could be relevant, the balance would favour the grant of consent to modify because to do so would lessen the impact on vegetation.

142 The only matter standing in the way of carrying out the development in its unamended form is the need for the Council to satisfy itself that the documents submitted by the applicant in the proceedings (as Exhibit H) address the remaining conditions of consent. Even unamended, it cannot be said that the site would be unsuitable for development. Whether the development as modified represents a proportionally greater impact to the environment for the resultant density, is irrelevant.

143 The site is suitable for the approved development or for the modified development with the environmental impacts arising acceptable. Once it is accepted, as it has been by the Council, that what is proposed has a lesser environmental impact than what has been approved, the suitability of the site is conclusively established.

144 The proportionality argument might be relevant if the approved density was a fundamental element of the approved development but this was not evident from the 1982 judgement of the Senior Assessor who makes no mention of the proportionality argument is his decision to grant the original consent.

145 The requirement that consideration be given to the reasons for granting the original consent is a new provision in the EPA Act. In this regard, the Court's 1982 decision is documented and affords insight into the reasons for granting the consent. A principal matter raised by the Council in those proceedings was the visual impact of the development. Relevantly, the Senior Assessor concluded that the proposal would not adversely affect the landscape and scenic quality of the area. This was, firstly, because the proposal is in the foothills of the escarpment and, secondly, because the amphitheatre landform means that it was not readily viewable from the west, south or north. He noted that, by the development of compact clusters, there would be less impact than traditional suburban housing and because it was located lower on the escarpment than surrounding development. These considerations are relevant to the modified proposal as what is proposed is even more clustered and even lower in elevation than the approved buildings, allowing the amended Stage 2 to now be located even more in the foothills of the escarpment.

146 Further, in agreeing to modify the development consent in 2005, Justice Bignold in *Australian Super Developments 2005,* despite objections from then residents of Stage 1 of the village, observed at [7]:

> '7. The development site is amphitheatre in physical configuration, and the stage two development will be located on the slopes of the amphitheatre, generally to the north and west of the existing development. It is an undeniable fact that the entire development including the modified stage two, will significantly lead to the loss of most of the tree canopy of a very densely forested area on the unbuilt-upon area. Naturally, for residents of the existing stage one, that will have a profound physical and aesthetic impact. Many of their concerns were directed at that physical change which will be inevitable...'

147 Despite the significant loss of much of the tree canopy in the north-western area of the site, this did not preclude Justice Bignold granting the original

consent when he was Senior Assessor. However, the modified proposal now proposes to retain a significant amount of this vegetation resulting in an improved environmental outcome. It could hardly be argued that these reasons for granting consent would support a merit refusal of the modification.

Disputed conditions

148 Following the hearing, the parties filed conditions of consent should consent be granted. These conditions would then comprise the consent as modified. The conditions were all agreed save for proposed conditions 14 and 106 in Part A, and condition 17 in Part B, where the wording was in dispute. All of the disputed conditions relate to the provision of equitable access within the development.

149 Condition 14 in Part A as proposed by the Council reads as follows:

> '14 There must be provided a continuous path of travel between all of the units in Stage 2, internal roads and the village amenities in accordance with the requirements of AS 1428.1 (2009). Details are to be provided with the construction certificate application.'

150 The applicant argued that the words "all of the units" should be replaced with "74% of the units". The current consent (that is, as modified) at condition 24 requires 50% of the ILUs in Stage 2 to comply with AS1428.1.

151 Condition 106 in Part A as proposed by the Council reads as follows:

> 'Prior to the issue of the occupation certificate, a suitably qualified access consultant is to provide certification to the Principal Certifying Authority that the as-built development in Stage 2 complies with the standards prescribed in Schedule 3 of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*.'

152 The applicant argued that the words "except as provided in condition 14" should be added to the end of the condition.

153 Condition 17 in Part B as proposed by the Council reads as follows:

'17 Access for the disabled shall be provided to units, hostel and Village Centre in accordance with the provisions of Clause 10(4) of the SEPP No. 5.'

154 The applicant argued that the words "within Stage 1" should be added after the word "provided".

155 Clause 41(1) of the Seniors Living SEPP is as follows:

> '**41 Standards for hostels and self-contained dwellings**
> (1) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development for the purpose of a hostel or self-contained dwelling unless the proposed development complies with the standards specified in Schedule 3 for such development.'

156 Clause 2 of Schedule 3 of the SEPP contains the applicable requirements:

> '**2 Siting standards**
>
> (1) **Wheelchair access** If the whole of the site has a gradient of less than 1:10, 100% of the dwellings must have wheelchair access by a continuous accessible path of travel (within the meaning of AS 1428.1) to an adjoining public road.
>
> (2) If the whole of the site does not have a gradient of less than 1:10—
> (a) the percentage of dwellings that must have wheelchair access must equal the proportion of the site that has a gradient of less than 1:10, or 50%, whichever is the greater, and
> (b) the wheelchair access provided must be by a continuous accessible path of travel (within the meaning of AS 1428.1) to an adjoining public road or an internal road or a driveway that is accessible to all residents.
>
> **Note.** For example, if 70% of the site has a gradient of less than 1:10, then 70% of the dwellings must have wheelchair access as required by this subclause. If more than 50% of the site has a gradient greater than 1:10, development for the purposes of seniors housing is likely to be unable to meet these requirements.
>
> (3) **Common areas** Access must be provided in accordance with AS 1428.1 so that a person using a wheelchair can use common areas and common facilities associated with the development.'

157 A letter from accredited access consultants Lindsay Perry Access (LPA) was submitted by the applicant during the proceedings (the September 2019 letter - Exhibit G Tab 14). The letter states that the layout of the proposed ILUs generally reflects the design requirements of Schedule 3 of the Seniors Living SEPP in terms of meeting the needs of seniors or people with a disability.

158 The parties filed written submissions in support of their proposed wording of the conditions.

159 The applicant's submissions attached an updated letter from LPA (the December 2019 letter). This states that the development complies with the requirement of cl 2(2) of Schedule 3 and that cl 2(3) of Schedule 3 does not require a continuous accessible path of travel to be provided from the proposed ILUs to the communal facilities (or common areas) but rather requires wheelchair access within the communal facilities themselves. However, if this is not the correct interpretation, LPA is satisfied that all of the ILUs to the west of the existing internal road offer a continuous path of travel to the communal facilities. However, the 6 ILUs on the eastern side (units 7, 14, 18, 19, 22 and 23) do not because they rely on access via the existing internal road which does not meet the grade requirements.

The Council's submissions

160 The Council submitted that the main effect of the applicant's proposed wording is that 26% of the proposed ILUs in Stage 2 need not have access in accordance with the Australian Standard AS 1428.1 and that this would not comply with cl 41(1) and Schedule 3.

161 The issue is that the existing internal road does not provide accessible access from the proposed ILUs to the eastern side of the existing road across that road to the common areas and facilities in the village, including the village centre and golf course as required by cl 2(3) of Schedule 3. The Council considers this a serious failing that makes the development not fit for purpose.

162 Further, and more importantly, it appeared that mailboxes and some bin storage areas are shown to the east of the existing road and it is not apparent how residents on the western side of the existing road will have accessible access to these facilities. It is a specific requirement of cl 21 of the Seniors Living SEPP that a garbage storage area must be provided in an accessible location. If the conditions are imposed as sought by the applicant, none of the

ILU residents on the western side of the existing road would have accessible access to the garbage areas or to their mailboxes.

163 Whilst the Council submitted that cl 41 and Schedule 3 of the Seniors Living SEPP do not have mandatory effect in the context of a s 4.56 modification application, they remain relevant consideration under s 4.56(1A) and 4.15(1) of the EPA Act. From a simple amenity perspective this proposal is not fit for purpose without appropriate access from dwellings to communal facilities or to mailboxes.

164 Further, the Council had raised a contention in terms of accessibility but this was resolved on the basis of the certification from the applicant's access consultants, LPA in their September 2019 letter. This advised that:

> '(r)oadways have been designed to facilitate an accessible path of travel between the independent living unit entrances, visitor car parking, lift and accessible ramp, letterboxes, and garbage storage areas. The maximum nominated gradient of the roadway between these facilities is 1:20'.

165 If this statement is not correct and additional ramping or a lift is required to comply, then this should be provided in any construction certificate detail by imposing the conditions the Council seeks. Otherwise the Council would press the contention and LPA should be called to give evidence on their certification.

166 Finally, given the terms of (former) SEPP 5 cl 10(4), there is no basis to amend condition 17 of Part B as sought by the applicant given the requirements in condition 14 of Part A are more onerous.

The applicant's submissions

167 Schedule 3 at cl 2(2) of the Seniors Living SEPP sets out standards concerning access for self-contained dwellings where the whole of the site does not have a gradient of less than 1:10, as is the case with the site. The December 2019 letter indicates compliance with these requirements, which

under the SEPP and the existing modified consent only requires such access for 50% of the ILUs in Stage 2.

168 Nevertheless the applicant has agreed to amend the existing consent condition 24 so that the percentage of ILUs in Stage 2 compliant with accessibility requirements is increased from a required 50% to 74%. This percentage represents all of the ILUs to the west of the existing access road.

169 Schedule 3 at cl 2(3) sets out standards for common areas. The applicant contends that this clause is concerned with the standard of access required to be provided within the common areas not to them. To read the clause otherwise, and to require all ILUs to have a compliant standard of access to these areas, would mean cl 2(2) would have no work to do.

170 LPA agrees with this interpretation and their December 2019 letter advises that the development complies with the requirements of cl 2(3). The Council's proposed condition 14 therefore imposes a more stringent accessibility control than is required under the Seniors Living SEPP and should not therefore be imposed.

171 However, if the Court prefers a different interpretation of cl 2(3), the development cannot comply with that requirement or with condition 14 as proposed by the Council in terms of accessing the village centre amenities.

172 For the ILUs to the east of the road, a continuous accessible path of travel exists from these units to the existing road. However, a continuous accessible path of travel from 6 of the ILUs to the village centre amenities is unable to be provided due to the grade of the existing road along which the residents would need to travel to gain access to these amenities.

173 LPA state in their December 2019 letter that these 6 proposed ILUs have pedestrian access provided in accordance with the requirements of cl 2(2) of Schedule 3. Further, that the roads have been "designed" to facilitate an accessible path of travel and have a maximum nominated grade of 1:20. This

statement, referring as it does to "design" can only be referring to the new internal roads designed and to be constructed as part of the modification application.

174 No part of the modification application involves any alteration to the grades of, or design work in relation to, the existing internal roads. The September 2019 LPA letter cannot sensibly be read as referring to the grade of the existing internal road. It is the grade of that road which leads to the inability to provide a continuous path of travel from every ILU to the village's amenities and it is therefore not possible for the development to comply with condition 14 in the form proposed by the Council.

175 In terms of access to mailboxes and rubbish storage facilities, the applicant advised that the plans may not correctly show that such access will be provided for all proposed ILUs. In this regard, all ILUs have access to bin storage areas and mailboxes which are located on both sides of the existing road. It is therefore not necessary for residents of any of the proposed ILUs to traverse the existing road to access bin storage areas or their mailboxes. The plans have been mislabelled in this regard and this omission can be corrected by a condition.

176 If the Court accepted the applicant's version of condition 14, the applicant submitted that the changes required to conditions 106 and condition 17 must be undertaken so that there are not inconsistent obligations in the conditions and to make it clear that references to SEPP 5 can and do only relate to the Stage 1 ILUs whilst the accessibility requirements for Stage 2 are addressed in Part A.

Findings

177 In order to grant consent to the modification application as sought by the applicant, I must first be satisfied, under s 4.56 of the EPA Act, that the development as modified will be substantially the same development as that originally approved by the Court in 1982.

178 I must do so having regard to the reasons given by the Court for granting that consent, being the consent before it was modified.

179 This modification application is unlike most, if not all, that have come before the Court whereby the modification reduces the extent and impact of the development and improves the environmental outcomes accordingly.

180 In the almost 40 years since the original consent was granted much has changed, not only in terms of the regulatory regime applying to determination of applications involving development but also in terms of the extent of the environmental assessment required, and the evaluation of such applications.

181 Whilst it may have been preferable for the applicant to lodge a new development application for the balance of the development, as the Council sought, that is not the application before me to determine. What is before me is consistent with the Court's orders in 2002 that Stage 2 be the subject of a modification application rather than a development application.

182 Further, a modification application does not obviate the requirement for the applicant to still address the current requirements of the EPA Act in terms of the modified proposal, and for me, in evaluating the application, to consider the provisions of s 4.15 of the EPA Act as are relevant to the development the subject of the application, including the environmental and social impacts.

183 This is an important consideration given that much of the applicant's evidence was that the modifications sought are largely in response to the need or desire to meet current environmental requirements for development as well as contemporary design standards for seniors housing.

184 In this regard, Attachment A to the planner's Joint Report (Exhibit 2) shows the impact of the revised and required increased bushfire APZs and the expanded riparian corridor to be provided on the site. Ms Buchanan estimated in the Joint Report that this results in the need to remove more than 30 approved ILUs in several building clusters. My review of Attachment A

suggests that significantly more than 30 ILUs, and associated clusters, would in fact be affected by the revised requirements.

185 To modify the development to address these requirements is, in my view, a beneficial and important outcome whilst still enabling a further 23 ILUs to be developed on the site. This can be achieved without materially altering the approved elements of, activities on, or overall use of, the site.

186 In *Vacik,* Justice Stein found that it is not sufficient that, simply because the nature of the development (in this case seniors living) if amended would be the same use, it would therefore be substantially the same development. It is also necessary to consider whether the proposed modified development would be essentially the same or materially have the same essence as that originally approved. However, the use of the land is still a relevant consideration in determining if the development is substantially the same.

187 In all respects, the use of the land, including the range of facilities provided, is the same as that originally approved. It is only the quantum of one aspect of that use, being the ILU component, that is sought to be modified. However, that component is still provided, albeit in a modified form, and it will remain an important element of the originally approved retirement village.

188 In *Moto Projects*, Justice Bignold found that the comparative task to establish if a development is substantially the same if modified does not merely involve referencing the physical features or components of the approved development. Rather, comparison involves an appreciation of the development's qualitative as well as quantitative aspects compared in their proper context, including the circumstances in which approval was granted.

189 Ultimately, the question therefore is:

> 'What did the original approved development comprise in substance, or what were its substantial and key elements, and are any of these elements amended by the modification application to the extent that the development would be found to be not substantially the same as that originally approved?'

190 This is noting that the original (1982) consent only required the development to be *'generally in accordance with'* the approved plans, the exact form of which was not in evidence before me.

191 I must therefore answer this question without the benefit of the details of the dwellings in Stage 2 that were originally approved or indeed the agreed approved plans.

192 The parties did agree that I should assume that the Exhibit E plan is an improved version of the "All Stages Plan" which was determined by a Court decision in 2004 to likely reflect the approved plan. However, Exhibit E is only one plan which, in today's evaluation of the required detail in application plans, would better be described as a 'master plan' with limited detail.

193 The parties therefore also agreed that I should have regard to the plans said to be the application plans the subject of the 1982 Court deliberations, but without being able to confirm that these plans were those ultimately approved. The plans do, however, provide an overall indication of building envelopes, typical unit layouts in a clustered, terraced form, and internal access arrangements, and include artistic impressions of the intended built form and landscaped outcome for the site.

194 Given the uncertainty over the exact nature of the approved plans, it is both reasonable and necessary in determining satisfaction with s 4.56 that I focus instead on whether or not the key elements of the originally approved development are retained as derived from the Court's written decision in *Geoffrey Twibill,* which I have earlier summarised.

195 In this regard, the development as proposed to be modified will retain a series of buildings of the same maximum height as approved and in a terraced form responding to the topography of the site, and located at the lower level of the escarpment within the area approved for development.

196 The development will continue to comprise ILUs in a cluster form albeit the clusters in Stage 2 are now smaller. However, the size of the clusters was not a material aspect of the development in the Court's decision to grant consent. What was a key consideration in the Court's decision was the objective to reduce the visual impact of the development given the objections to this aspect of the proposed development at that time. In this regard, what is proposed will be even less visible to surrounding development than the approved development.

197 The development will also retain a backdrop of the vegetated ridge and an amphitheatre setting, features noted in the Court's deliberation at the time.

198 Further, the number or mix of dwellings provided, or the number of residents required to be accommodated, was not raised as a reason for granting the consent, in terms of making the retirement village viable or justifiable, or otherwise. Importantly, the facilities and services provided for village residents, which were considered to be important elements of the development, remain unaltered irrespective of potential reduction in patronage levels, and also remain in their approved and developed location.

199 What was also a key or material aspect of the Court's decision in granting the original consent, being another key area of concern for neighbours, was the access to and from the site. This is not proposed to be altered. Conversely, the form of the internal access roads (including as proposed in the Stage 2 area) was not highlighted in the reasons for granting consent as a material or essential part of the development.

200 The original consent contained conditions to address a number of the environmental constraints of the site which remain relevant in considering the modification now proposed. These include managing bushfire risk, controlling onsite flooding and drainage, and protecting riparian corridors. It is these latter considerations in particular, and the current compliance requirements, that result in much of the previously approved developable area no longer being capable of development under current provisions as a consequence of

enlarged APZs and revised stormwater and flood management requirements. Irrespective of whether the applicant has to comply with these more stringent requirements in a modification application, it is prudent and appropriate that such compliance is achieved, as is proposed.

201 On the basis of the above comparison with the matters considered as important by the Court in the original granting of consent, and largely for the reasons advanced by the applicant, I am satisfied that the development as proposed to be modified will be substantially the same in all material aspects, as that approved, but now addresses the merit requirements of s 4.15 of the EPA Act as are relevant to the modification proposed.

202 In summary, these material aspects, or elements, are as follows:

(1) The development will continue to be a seniors living development comprising a retirement village with the same services offered as were originally approved. In particular, there will be no diminution in the services or facilities provided as these were constructed as part of the first stage of the development and will continue to operate without modification.

(2) There will be no change to vehicular access to and from the site or to emergency access arrangements.

(3) The development will continue to achieve the intended type and range of residential accommodation, being a mixture of independent dwellings (the ILUs) and hostel or serviced apartments developed in a landscaped setting.

(4) The proposed Stage 2 development is confined to the same location on the site as was earmarked for it, albeit on a smaller footprint. It retains clusters of buildings in a landscaped setting, located at the lower levels of the vegetated hillside.

(5) Minimising visual impact on surrounding residents was a key consideration in, and outcome of, the original consent. In this regard, the modified development will have no adverse visual impact in terms of how the development is viewed from adjacent developments or the public domain. In particular, the development will continue to be, to quote the findings of the Senior Assessor in issuing the 1982 consent, *'harmonious with the existing and likely future amenity of the locality'.* To existing village residents, there will be no material evidence of the modified works undertaken other than an improved outlook from their dwellings and a potential reduction in traffic to and from the site, which could only be seen as a beneficial outcome for the broader community.

(6) The development continues to be designed to respond to the site's environmental constraints but addresses contemporary design requirements which vary substantially from those that existed in 1982. The assessment of compliance of the modification application with these requirements is required under s 4.15(1)(b) of the EPA Act. Of particular relevance, is that the original conditions of consent established required bushfire APZs in which development could not occur. The APZ requirements are now more stringent, increasing the width of these zones and therefore decreasing the amount of the site able to be developed relative to the original approval. The significance of the remnant vegetation onsite has also increased. The same is the case for the protection of and setback to the riparian corridors on the site, again decreasing the extent of development that would be approved under current environmental requirements.

203 Whilst I do not accept that the 1982 consent was for a "concept" development only, as argued by the applicant, I do accept that an amount of detail of the development, including of the ILU design, was left to the building application approval stage, as was common practice under the 1982 legislative regime and as the applicant argued. Therefore, the architectural design of the individual ILUs, internal access to them, and provision of associated parking facilities, are all matters which I consider to be questions of detail rather than

of form and substance and which, in being altered, do not render what is proposed now not substantially the same as what was approved.

204 This includes how the dwellings are clustered and where they are specifically located within the area designated for their development in the original consent.

205 Clearly, there will be a reduction in the total number of ILUs within the development. However, as I have already indicated, I do not accept that the number of ILUs or of residents living within the village was an essential or material aspect of the approved development, as there was no evidence to support this proposition and given that there is no proposed adjustment or changes to the services offered within (or operation of) the village in response to the modified proposal.

206 Qualitatively, the impact can only be considered beneficial in terms of the impact on the environment and on existing residents, to the applicant in terms of the cost of construction, and to future residents in terms of the revised contemporary designs of the ILUs and their access and parking arrangements.

207 In 2005, the Court granted consent to modify the development enabling a reduction of 40 ILUs in Stage 2 and therefore in the overall development. At the time, Justice Bignold considered that, notwithstanding the reduced number of dwellings, the development remained substantially the same as approved, albeit he considered that potentially the same population could be achieved notwithstanding the reduction. This was because the revised ILUs proposed were more *'capacious and commodious'*. Similarly, what is now proposed are ILUs that are more capacious and commodious, that is more spacious and comfortable, for example offering 2 bedrooms with 2 bathrooms, including ensuites, as distinct from predominantly 1 bedroom without ensuites. I accept this is a response to contemporary design requirements for future village residents, as also appeared to be the case in the Court approved 2005 modification application.

208 Whilst it is likely that the population residing onsite will be reduced, there was no evidence that this would adversely or materially impact on the access arrangements to and from the site, the mix of uses provided, or the range of facilities available to residents of the development. Therefore, in my view, it is not the quantum of ILUs that comprise an essential element of the approved development when considered overall, but rather that such dwellings are still provided and will continue to comprise a significant element of the development.

209 Further, Justice Bignold's 2005 judgment does not indicate that the likely outcome of achieving a similar number of residents onsite was the basis on which he determined that what was proposed was substantially the same. It is also interesting and relevant that the Council did not contend in those proceedings that reducing the proposed number of ILUs in Stage 2 from 113 to 73 would result in a development that was not substantially the same as that approved, despite the quantum drop in the number of ILUs.

210 Interestingly, the Court approved 2005 modified development plans (Exhibit K) also show vegetation retention in the north-western corner of the site, a feature not evident in the original consent, but now also responded to in the current modified development proposal.

211 There is limited commentary in Justice Bignold's 2005 decision in terms of the design of the ILUs, and the buildings in which they are located. However, the approved development clearly changed in terms of the ILU numbers, design and mix, in parking arrangements, and in the proposal to retain remnant vegetation, at least in a portion of the upper slopes of the Stage 2 area.

212 Refusal of the current modification application based simply on the numerics and contemporary design features of a reduced number of ILUs relative to the original consent, absent qualitative considerations, would be legally flawed as *Moto Projects* determined at [52]. Any qualitative assessment as to the outcomes arising from the modification can only conclude that what is proposed is the same as what has been approved in substance and essence

and is an appropriate response to developing the balance of the retirement village under 2020 requirements.

213 Finally, in considering the remaining principles at [59], I find that what is proposed alters the approved development "without radical transformation" (Principle 7). No evidence of a radical transformation of the overall development was provided nor will it eventuate. Indeed, to the residents of the existing and adjoining development, the village will continue to operate as it always has with just less additional ILUs than could otherwise have been built. This reinforces my finding that what is proposed is therefore also not materially different to that which has been approved (Principle 5).

214 This then leads to the beneficial and facultative intent of the modification power (Principles 1 and 2). The Court's decision in *Michael Standley* was that the legislation facilitates the modification of consents, conscious that such modifications may involve beneficial cost savings and/or improvements to amenity. Although there was no specific evidence in terms of cost savings associated with the modification, there appears little doubt that it would result in beneficial cost savings to the applicant given the decrease in the extent of construction involved. It will also improve the overall amenity for village residents with substantially more areas of the site retained as natural vegetation, less buildings and traffic on the site, and less residents seeking to access village facilities.

215 In my view, these outcomes cannot be considered anything other than beneficial, and to permit the modification is an appropriate beneficial and facultative application of the power available at s 4.56.

216 Further, the Council did not dispute that what was proposed was not a better development, just that it was not the same development. As Mr Pickles submitted, if the beneficial and facultative powers conferred by the EPA Act to modify an approved development were not applied in circumstances where the outcome was more beneficial environmentally and thus met the objects of the Act, such as is proposed, when would they be applied?

217 I have also considered the fact that the applicant could have lodged this modification application as comprising only Stage 2 of the development and left the balance of the approved developable area earmarked as a potential future stage, or Stage 3, subject to more detailed environmental assessment. Given the only merit issue raised by the Council related to the number of residents ultimately accommodated relative to the environmental impacts, it seems unlikely the Council would have refused such an application. Stage 3 would then never be developed given it would be unlikely to satisfy environmental assessment requirements under s 4.15 of the EPA Act, and I find it difficult to accept that the Council would have required it to be developed relying on the original consent in order to maximise resident numbers, given the environmental impacts that would result.

218 Further, and as Mr Pickles also pointed out, the applicant could technically construct the full development under the existing consent, subject to meeting outstanding current consent requirements, as an alternative should this modification application not be approved. He tendered documentation said to address these outstanding requirements relying on the current consent and environmental approvals (Exhibit H). The Council did not, and could not, contend that this would be a better environmental outcome than what is now proposed.

219 Having been satisfied that the development is substantially the same as the originally approved development for the purposes of s 4.56, there is only one merit issue raised by the Council to consider. That is, whether the reduced number of additional residents able to be accommodated on the site justifies the additional environmental impacts associated with accommodating these future residents.

220 I find this a difficult argument to understand. Whilst I accept that providing as much seniors housing as possible whilst minimising environmental impacts is an appropriate environmental and social outcome having regard to the evaluation criteria under s 4.15 of the Act, there was no environmental expert

evidence before me to suggest the ratio of environmental impact relative to the additional population housed was unacceptable.

221 Nor is there a development standard or legislative requirement that I was advised of or am aware of that requires such a comparison to be assessed and considered in determining the application.

222 Further, the converse argument to that advanced by the Council could equally apply – that is, that each additional ILU developed up to the maximum permitted by the original consent would have a disproportional increase in adverse environmental impacts.

223 I also find it difficult to accept that the applicant, being a known aged care provider, would not seek to provide the maximum number of additional ILUs on the site that could reasonably be accommodated whilst still meeting current environmental and regulatory requirements and achieving contemporary design outcomes.

224 In any event, there was no expert evidence (social, environmental and financial), such as in the form of a cost-benefit analysis, for me to assess or accept the Council's proposition that not enough ILUs are provided relative to the environmental impacts of what is proposed. Further, that additional ILUs should be provided, notwithstanding the additional environmental impacts that would arise. Put another way, that the modification application should be refused because having additional ILUs would justify the additional environmental impacts that would result. Those impacts are associated with developing the full building envelope approved in the original consent and involve clearing much more of the site of remnant native vegetation than is now proposed. That outcome would be antipathetic to the objects of the EPA Act.

225 I therefore do not accept that the sole "merit" issue contended by the Council is a basis to refuse the modification application and consider the site remains suitable for the development as modified.

226 Given there are no material adverse impacts, contended or envisaged, on either the amenity of existing residents of the village or on adjoining properties associated with modifying the development as proposed, there are no merit grounds to refuse the application, and it ought to be approved accordingly.

227 Given my findings that the modification application should be approved, I now turn to the disputed conditions of consent relating to equitable access.

228 In this regard, I impose the disputed conditions in the form as sought by the applicant, save for the requirement for all ILUs in Stage 2 to have accessible access to a communal bin storage area and to their mailboxes.

229 I impose these conditions for the following reasons and having regard to the written submissions of the parties and to the advice of the applicant's access consultants, LPA.

230 Firstly, in terms of the wording of condition 14 in Part A, the current (as modified) consent only requires accessible access to be provided to 50% of Stage 2 and the applicant has agreed to increase this to 74%.

231 Secondly, based on the evidence submitted, I accept the submissions of the applicant, and am therefore satisfied, that the modified development will meet the requirements of cl 2(2) of Schedule 3 of the Seniors Living SEPP. This means the modified development remains fit for purpose.

232 Thirdly, I agree with the applicant's submissions that cl 2(3) of Schedule 3 should be interpreted as relating only to accessible access within the common or communal areas, not to them, as otherwise cl 2(2) of that schedule would have no work to do.

233 Whilst I accept that it may be desirable that all ILUs have accessible access to the communal facilities, this is not required by the SEPP and cannot be achieved without undertaking modifications to an already constructed and key operational component of the retirement village, being the major internal

access road. Such modifications would cause significant disruption to the existing operation of the village and adversely impact the amenity of the existing residents. It is not in my view appropriate to in effect retrospectively require such works to the existing development to achieve an outcome not mandated by the SEPP.

234 I do however, accept the Council's position that accessible paths of travel should be provided from all new ILUs to their mailboxes, as well as to communal bin storage areas, the latter being required by cl 21 of Schedule 3. The applicant accepts that this is appropriate but indicated that the plans do not accurately reflect achievement of this requirement as was intended. Accordingly, I have added a new condition 14A in Part A so that bin storage areas and the mailboxes associated with all of the ILUs in Stage 2 must be accessible as follows:

> '14A Notwithstanding condition 14, all of the proposed new units are to have a continuous accessible path of travel from each unit to communal bin storage areas and to the letterbox of that unit.'

235 I do not consider it necessary to call LPA to give evidence in terms of the disputed conditions, as their advice is clear. The only dispute between the parties relates to the interpretation and applicability of Schedule 3, and LPA have indicated that their interpretation of that schedule reflects that submitted by the applicant, and with which I agree.

236 As I have found that condition 14 in Part A should be as worded by the applicant, I also consider it appropriate to modify condition 106 of Part A so that the requirements are consistent with condition 14. I also agree that condition 17 of Part B should be modified to relate to Stage 1 only as it is not appropriate to require Stage 2 to have to comply with a SEPP that has since been repealed.

Orders

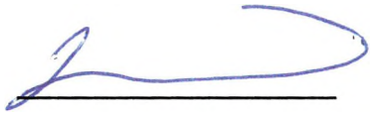
237 The orders of the Court are:

(1) The applicant is granted leave to rely upon the amended plans referred to in condition 7 of Part A of the conditions in Annexure "A".

(2) The appeal is upheld.

(3) The modification application to amend development consent 82/149 for an approved seniors living facility at 79 Cabbage Tree Road, Bayview is approved subject to the conditions in Annexure "A".

(4) The exhibits are returned except Exhibits A, B, G and 6.



Jenny Smithson

Commissioner of the Court

Annexure A

Aveo North Shore Retirement Villages Pty Ltd

v

Northern Beaches Council

Conditions of Consent

79 CABBAGE TREE ROAD, BAYVIEW

MODIFICATION OF CONSENT 82/149 GRANTED BY THE COURT ON 14 JULY 2005

PART A

A Prescribed Conditions:

1 All works are to be carried out in accordance with the requirements of the Building Code of Australia.

2 In the case of residential building work for which the Home Building Act 1989 requires there to be a contract of insurance in force in accordance with Part 6 of that Act, there is to be such a contract in force.

3 Critical stage inspections are to be carried out in accordance with clause 162A of the Environmental Planning & Assessment Regulation 2000. To allow the Principal Certifying Authority to carry out critical stage inspections required by the Principal Certifying Authority, the principal contractor for the building site, or the owner-builder must notify the Principal Certifying Authority at least 48 hours before building work is commenced and prior to further work being undertaken.

4 A sign must be erected in a prominent position on any site on which building work, subdivision work or demolition work is being carried out:

(a) showing the name, address and telephone number of the Principal Certifying Authority for the work, and

(b) showing the name of the principal contractor (if any) for any building work and a telephone number on which that person may be contacted outside working house, and

(c) stating that unauthorised entry to the work site is prohibited.

Any such sign is to be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.

5 Residential building work within the meaning of the Home Building Act 1989 must not be carried out unless the Council has been given written notice of the following information:

(a) in the case of work for which a principal contractor is required to be appointed:

(i) the name and licence number of the principal contractor, and

(ii) the name of the insurer by which the work is insured under Part 6 of that Act;

(b) in the case of work to be done by an owner-builder:

(i) the name of the owner-builder, and

(ii) if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

If arrangements for doing the residential building work are changed while the work is in progress so that the information notified becomes out of date, further work must not be carried out unless the Council has been given written notice of the updated information.

6 The hours of construction are restricted to between the hours of 7.00am and 5.00pm Monday- Friday and 7.00am to 1.00pm on Saturdays. No works are to be carried out on Sundays or Public Holidays. Internal building work may be carried out at any time outside these hours, subject to noise emissions from the building or works not being audible at any other dwelling, including any dwelling within Stage 1.

B Matters to be incorporated into the development and maintained over the life of the development:

7 The development is to be carried out in accordance with (except as amended by any other condition of consent) the following:

(a) **Approved Architectural Plans** prepared by Jackson Teece comprising:

- DA-001, Cover Page, Revision 10
- DA-006, Masterplan, Revision 10
- DA-007, ILU Number 20-23, Revision 5
- DA-008, Lower Ground Level, Revision 10
- DA-009, Ground Level, Revision 10
- DA-010, Scheme Comparison – May_Current, Revision 4
- DA-110, Independent Living Unit – Type 1A (Attached) – Plans, Revision 9
- DA-111, Independent Living Unit – Type 1A (Attached) – Elevations and Sections, Revision 8
- DA-112, Independent Living Unit – Type 1AA (Attached) – Plans, Revision 9
- DA-113, Independent Living Unit – Type 1AA (Attached) – Elevations and Sections, Revision 9
- DA-115, Independent Living Unit – Type 1B (Detached) – Plans, Elevations and Sections, Revision 11
- DA-130, Independent Living Unit – Type 3A – Plans, Revision 9
- DA-131, Independent Living Unit – Type 3A – Elevations and Sections, Revision 4
- DA-133, Independent Living Unit – Type 3A – Plans, Elevations and Sections, Revision 8
- DA-135, Independent Living Unit – Type 3B (Attached) – Plans, Revision 4
- DA-136, Independent Living Unit – Type 3B (Attached) – Elevations and Sections, Revision 4
- DA-150, Independent Living Unit – Type 5A (Attached) – Plans, Revision 9
- DA-151, Independent Living Unit – Type 5A (Attached) – Elevations and Sections, Revision 9
- DA-300, Elevations, Revision 10
- SK-101, Section 01, 02, 03, Revision 5
- SK-106, Accessible Path, Revision 5

(b) **Approved Landscape Plans** prepared by Sym Studio comprising:

- AVEO2-SK-001, Indicative Plant Schedule (Page 1 of 2), Revision F
- AVEO2-SK-001.1, Indicative Plant Schedule (Page 2 of 2), Revision B
- AVEO2-SK-003, Landscape Masterplan, Revision H
- AVEO2-SK-004, Landscape Planting Plan, Revision G

- AVEO2-SK-004.1, Landscape Detail Planting Plan (Sheet 1 of 6), Revision B
- AVEO2-SK-004.2, Landscape Detail Planting Plan (Sheet 2 of 6), Revision C
- AVEO2-SK-004.3, Landscape Detail Planting Plan (Sheet 3 of 6), Revision B
- AVEO2-SK-004.4, Landscape Detail Planting Plan (Sheet 4 of 6), Revision C
- AVEO2-SK-004.5, Landscape Detail Planting Plan (Sheet 5 of 6), Revision B
- AVEO2-SK-004.6, Landscape Detail Planting Plan (Sheet 6 of 6), Revision B
- AVEO2-SK-201, Tree Retention/Removal Plan, Revision C
- AVEO2-SK-202, Tree Protection Plan, Revision C

(c) **Approved Civil Plans** prepared by Northrop Consulting Engineers comprising:

- C01DA, Concept Sediment and Erosion Control Plan, Revision D
- C02DA, Concept Stormwater Management Plan, Revision D
- C03DA, Concept Road Design Setout Plan, Revision C
- C04DA, Concept Road Design Long Sections, Revision C
- C10DA, Concept Cut Fill Plan, Revision D
- C20DA, Concept Civil Details Sheet 1, Revision C
- C21DA, Concept Civil Details Sheet 2, Revision C

8 The development is to be to be carried out in compliance with (except as amended by any other condition of consent) the recommendations contained within the following Approved reports:

(a) Concept Stormwater Management Strategy, prepared by Northrop Consulting Engineers dated 27 September 2019;

(b) Revised Flood Impact Assessment, prepared by Northrop Consulting Engineers dated 4 December 2019;

(c) Structural Flooding Assessment, prepared by Northrop Consulting Engineers dated 18 April 2019;

(d) Flora and Fauna Assessment Report, prepared by Cumberland Ecology, dated 12 October 2019;

(e) Disability Access Report, prepared by Lindsay Perry Access, dated 13 February 2018 and Revised Accessibility Statement prepared by Lindsay Perry Access dated 29 September 2019;

(f) Geotechnical Investigation Report, prepared by Davies Geotechnical dated 15 February 2019;

(g) Waste Management Plan prepared by Aveo, dated January 2018;

(h) NatHERS Certificate dated 8 February 2018;

(i) Due Diligence Aboriginal Heritage Assessment prepared by Mary Dallas Consulting Archaeologists, dated 14 February 2019;

(j) Geotechnical Assessment / Landslide Risk Appraisal Report prepared by Davies Geotechnical, dated 29 January 2018 and Geotechnical Investigation Report prepared by Davies Geotechnical dated 15 February 2019;

(k) Construction Traffic Management Plan prepared by The Transport Planning Partnership dated 24 January 2018;

(l) Biodiversity Management Plan prepared by Eco Logical Australia, dated 7 February 2019; and

(m) BASIX certificate no 896601M_03 prepared by Frys Energywise dated 13 December 2019.

9 The following geotechnical conditions are to be complied with at all times.

(a) All buildings and major retaining structures are to be supported by piers founded on sound bedrock.

(b) All fills and cuts are to be supported by engineer designed retaining walls.

(c) All retaining walls are to have suitable drainage measures including subsoil drainage, gravel and geotextile protection.

(d) All roof and road runoff, stormwater, and overland flows are to be removed to the stormwater system using closed pipes or lined drains. No unlined detention ponds or "soak away" pits are to be used.

(e) The following maintenance is required over the life of the relevant structures:

Item	**Maintenance**	**Frequency**
Stormwater drains and pipes	Cleaning to remove debris and silt	6 monthly or as required
Gutters and down pipes	Cleaning to remove leaves and debris	6 monthly or as required
Subsoil drains	Flushing to remove silt and algae build up	12 monthly or as required
Gardens above or on slopes	Prevent over watering	Always
Weep holes	Flushing to remove silt and algae build up	12 monthly or as required
Exposed batters	Inspection by experienced geotechnical personnel	12 monthly for 2 years then every 48 months for life of batter
Undercroft batters	Inspected by experience geotechnical personnel	12 monthly for 2 years then every 48 months for life of batter
Leaking services	Repair	As soon as detected

(f) Indicators of reduced slope stability such as cracking or differential settlement of the structure; high ground water levels or poor drainage; erosion or changes to the batters; and other evidence of ground movement such as leaking services or leaning walls are to be investigated promptly by both a structural engineer and geotechnical engineers experienced in hillside developments.

10 The installation of in-sink food waste disposal units is prohibited due to the increased loading placed on the Warriewood Sewage Treatment Plant particularly during wet weather.

11 Noise from the operation of any plant or equipment at the premises (excluding during construction) shall not exceed 5dB(A) above the background noise level.

12 The development is to be carried out in accordance with the General Terms of Approval issued by the New South Wales Rural Fire Service, dated 2 December 2019, as follows:

(a) APZ 1

At the commencement of building works and in perpetuity, a 60 metre APZ shall be maintained around the proposed new buildings to the west, north west, and north.
On the northern elevation where 60 metres cannot be achieved within the property boundary, the APZ is not required to extend into the adjoining property.
The APZ shall be managed as outlined within Appendices 2 & 5 of 'Planning for Bush Fire Protection 2006' and the NSW Rural Fire Service's document 'Standards for asset protection zones'.
In forested areas a portion of the APZ may be maintained as an Outer Protection Area (OPA) as specified in Table A2.7 of 'Planning for Bush Fire Protection 2006'.

A minimum 20 metre APZ shall be provided to the riparian zone to the south and south west and shall be maintained as an Inner Protection Area (IPA).

(b) APZ 2

In order to achieve a better bush fire risk outcome for the existing facility, a 10 metre to 20 metre IPA shall be maintained around existing buildings, depending on the vegetation being identified as rainforest or forest.

(c) D&C 1

The proposed new buildings shall comply with Sections 3 and 5 (BAL 12.5) Australian Standard AS3959-2009 *Construction of buildings in bush fire-prone areas* or NASH Standard (1.7.14 updated) *National Standard Steel Framed Construction in Bushfire Areas – 2014* as appropriate and section A3.7 Addendum Appendix 3 of *Planning for Bush Fire Protection 2006*.

(d) ACC 1

Internal roads shall comply with section 4.2.7 of *Planning for Bush Fire Protection 2006*, except that a single road is permitted in this instance. The trafficable width shall comply with Table 4.1 of PBP-2006. Parking shall not obstruct the minimum paved width. The passing bay / layby located on the southern road shall be a minimum 2.6m wide and 20m long. Roll top kerbing shall be provided.

(e) W&U 1

The provision of water, electricity and gas shall comply with sections 4.1.3 and 4.2.7 of *Planning for Bush Fire Protection 2006*.

(f) L 1

Landscaping of the site shall comply with the following principles of Appendix 5 of 'Planning for Bush Fire Protection 2006':

- Suitable impervious areas are provided immediately surrounding the building such as courtyards, paths and driveways, including rock mulch.
- Grassed areas, mowed lawns or ground cover plantings are provided in close proximity to the building.
- Planting is limited in the immediate vicinity of the building.
- Planting does not provide a continuous canopy to the building (i.e. trees or shrubs should be isolated or located in small clusters).
- Landscape species are chosen in consideration of the needs of the estimated size of the plant at maturity.
- Species are avoided that have rough fibrous bark, or which keep/shed bark in long strips or retain dead material in their canopies.
- Smooth bark species of tree are chosen which generally do not carry a fire up the bark into the crown.
- Planting of deciduous species is avoided which may increase fuel at surface/ ground level (i.e. leaf litter).
- Climbing species are avoided to walls and pergolas.
- Combustible materials such as woodchips / mulch and flammable fuel are stored away from the building.
- Combustible structures such as garden sheds, pergolas and materials such as timber garden furniture are located way from the building.
- Low flammability vegetation species are used.

(g) E&E 1

A Bush Fire Emergency Management and Evacuation Plan shall be prepared for the facility in accordance with the guidelines, *Development Planning - A Guide to Developing a Bush Fire Emergency Management and Evacuation Plan December 2014*.

13 All buildings shall be finished in medium to dark colours of an earthy tone, excluding minor areas of trim, windows or doors.

14 There must be provided a continuous path of travel between 74% of the units in Stage 2, internal roads and the village amenities in accordance with the requirements of AS 1428.1 (2009). Details are to be provided with the Construction Certificate application.

14A Notwithstanding condition 14, all of the proposed new units are to have a continuous accessible path of travel from each unit to communal bin storage areas and to the letterbox of that unit.

15 All landscape components are to be maintained for the life of the development. A maintenance program is to be established. If any landscape materials/components or planting under this consent fails, they are to be replaced with similar materials/components and species to maintain the landscape theme and be generally in accordance with the Approved Landscape Plans referenced in Condition 7, as amended by Condition 43 of this Consent.

16 Stormwater treatment measures must be maintained at all times in accordance with the Stormwater Treatment Measure Operation and Maintenance Plan, manufacturer's specifications and as necessary to achieve the required stormwater quality targets for the development.

17 Any vegetation planted outside approved landscape zones is to be consistent with:

(a) Species listed in the approved Flora and Fauna Assessment Report referenced in Condition 8 of this Consent,

(b) Locally native species or locally native plants growing on site and / or selected from the list pertaining to vegetation community(s) on the site as per the Pittwater Book Native Plants for Your Garden - book available from Council and on the Northern Beaches Council web site.

18 All Priority weeds (as specified in the Greater Sydney Regional Strategic Weed Management Plan 2017 – 2022) within the development footprint are to be removed and regularly managed. All environmental weeds including Lantana camara are to be removed in accordance with the Approved Biodiversity Management Plan referenced in Condition 8 of this consent, as amended by any other condition of consent.

19 All management works and recommendations identified in the updated Biodiversity Management Plan prepared in accordance with Condition 46 are to be fully implemented at all times.

20 No environmental weeds are to be planted on the site. Information on weeds of the Northern Beaches can be found at the NSW WeedWise website (http://weeds.dpi.nsw.gov.au/).

21 All privacy screens shown on the Approved Architectural Plans referenced in Condition 7 of this Consent, and as required by any other condition of this Consent, are to be maintained for the life of the development.

C Other Matters to be satisfied prior to the issue of the Construction Certificate:

22 Civil engineering details of the proposed excavation/landfill are to be submitted to the Principal Certifying Authority with the Construction Certificate application. Each plan/sheet is to be signed by a qualified practising Civil Engineer who has corporate membership of the Institution of Engineers Australia (M.I.E) or who is eligible to become a corporate member and has appropriate experience and competence in the related field.

23 A Soil and Water Management Plan (SWMP) shall be prepared by a suitably qualified engineer, who has membership to the Engineers Australia, National Engineers Register and

implemented onsite prior to commencement. The SWMP must meet the requirements outlined in the Landcom publication Managing Urban Stormwater: Soils and Construction - Volume 1, 4th Edition (2004) and Council's Water Management for Development Policy.

The SWMP must include the following as a minimum:

(a) Site boundaries and contours

(b) Vehicle access points, proposed roads and other impervious areas (e.g. parking areas and site facilities)

(c) Location of all drains, pits, downpipes and waterways on and nearby the site

(d) Planned stages of excavation, site disturbance and building

(e) Stormwater management and discharge points

(f) Integration with onsite detention/infiltration

(g) Sediment control basin locations and volume (if proposed)

(h) Proposed erosion and sediment controls and their locations

(i) Location of washdown and stockpile areas including covering materials and methods

(j) Vegetation management including removal and revegetation

(k) A schedule and programme of the sequence of the sediment and erosion control works or devices to be installed and maintained

(l) Inspection and maintenance program

(m) North point and scale.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

24 Submission of construction plans and specifications and documentation which are consistent with the approved Development Consent plans, the requirements of the Building Code of Australia and satisfy all conditions shown in Part B above are to be submitted to the Principal Certifying Authority.

25 The Principal Certifying Authority must be provided with a copy of plans that a Quick Check agent/Sydney Water has stamped before the issue of any Construction Certificate.

26 The applicant is to consult with Sydney Water to establish whether there are any Section 73 Compliance Certificate requirements for this proposal, under the provisions of the Sydney Water Act, 1994. A copy of any Notice of Requirements letter which may be issued by Sydney Water, is to be provided to the Private Certifying Authority with the Construction Certificate application.

27 In accordance with Clause 94 of the Environmental Planning and Assessment Regulation 2000, plans are to be submitted with the Construction Certificate application demonstrating how the building will be brought into full conformity with fire and spread of fire requirements of the Building Code of Australia.

28 A satisfactory and complete schedule of essential fire safety measures required to be installed within and/or in association with the building including the minimum standard for performance of each measure is to be submitted to the Principal Certifying Authority prior to release of the Construction Certificate. The schedule is to include a signed statement from a suitably qualified person confirming that all essential fire safety measures as required by the Building Code of Australia have been listed so as to ensure the safety of persons in the building in the event of an outbreak of fire.

29 A Schedule of Works prepared by a qualified practising Engineer with corporate membership of Engineers Australia, National Engineers Register is to be submitted to Council in respect of the following items:

(i) The details and location of all intercept drains, provided uphill of the excavation, to control runoff through the cut area.

(ii) The proposed method of disposal of collected surface waters is to be clearly detailed;

(iii) Procedures for excavation and retention of cuts, to ensure the site stability is maintained during earthworks.

30 Certification from the Accredited Access Adviser that design details and specifications comply with the standards prescribed in Schedule 3 of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*, must be submitted to the Council with the Construction Certificate application.

31 Engineering details relating to the internal driveway, car park areas, and any retaining walls (including any cut and fill required for these works) are to be prepared by a qualified practising engineer with membership of Engineers Australia, National Engineers Register and has appropriate experience and competence in the related field and submitted to the Principal Certifying Authority prior to release of the Construction Certificate.

32 As the site is located in a slip liable area, the structural details relating to the internal driveway, car park areas, and any retaining walls (including any cut and fill required for these works) are to be endorsed by a suitably qualified practising Geotechnical Engineer . Evidence to satisfy this condition is to be provided to the Principal Certifying Authority prior to the issue of a Construction Certificate.

33 With the Construction Certificate Application the applicant is to submit details of the location, design, finish and materials to be used for all retaining walls. Such materials are to be chosen to be recessive in appearance, to allow the walls to blend into rather than dominate the landscaping.

34 Prior to issue of the Construction Certificate a comprehensive Construction Process Plan of Management (CPPM) is to be submitted to the Council that outlines statutory obligations and regulatory requirements affecting all site works and procedures that will be implemented for the duration of all demolition works, clearing works, earthworks and construction works associated with the approved development that will ensure the safety and amenity of the residents of the retirement village, the community and the environment are not adversely affected. In particular, the CPPM must address the following requirements:

(a) The sequence and timing of construction specifying either an overall period for completion of the whole of Stage 2 from the commencement date of construction such period to be not greater than 36 months unless a longer period is otherwise justified in writing and approved by the Council (such approval not to be unreasonably withheld) or for the carrying out of the Stage 2 development in further sub- stages, with a construction staging sequence and construction period for each such sub-stage being nominated, such periods of construction not to exceed 52 weeks for each such sub-stage unless a longer period is otherwise justified in writing and approved by the Council (such approval not to be unreasonably withheld).

(b) The CPPM must be accompanied by a report from a qualified/practising acoustic consultant addressing the objective of demonstrating that the Stage 2 development may be constructed in compliance with the requirement that the L10 level measured over a period of not less than 15 minutes when the construction site is operating must

not exceed the background level by more than 10 db(A) measured inside the nearest dwelling, including any dwelling in Stage 1, and outlining the measures necessary for this objective to be achieved, such as: selection of specific noise reduced plant and equipment; silencing of construction site plant and equipment; location of plant; regular site monitoring by the site manager and the acoustic consultant etc. There must also be no delivery of machinery, trucks, plant or equipment to the site outside of the approved work hours. If that acoustical report discloses that this objective cannot be satisfied, the report must identify the areas of non-compliance and must recommend the implementation of measures to achieve this objective insofar as reasonably practicable, all such measures to be to the reasonable satisfaction of the Council.

(c) Heavy vehicle access routes (plan required), site access availability off Cabbage Tree Rd only; containment of a heavy vehicle parking, construction vehicle parking and employee vehicles within the property; containment of all vehicle loading/unloading within the property; separation or control of all construction vehicles movements and parking from all resident and resident service vehicle movements associated with the Stage 1 retirement village; controllers for entry/exit operations as well as within the shared access corridor; provision of traffic barriers and lighting where necessary. The CPPM must also satisfactorily demonstrate that construction may be carried out with all construction access to be excluded from the area of Stage 1 of the development and must address the options, and advantages and disadvantages, of providing temporary (that is, during any period of construction) access and egress from Stage 1 of the development to the public road system through Gulia Street. The CPPM must be accompanied by a report from the persons responsible for the construction addressing these requirements.

(d) Site management in terms of delivery of materials, parking for workers, location of toilets and amenities, removal of excavated materials, how machinery will access building platforms, how temporary power will be supplied, and stabilisation of any temporary structures, stockpiles and stored materials.

(d1) Separation and protection of all resident pedestrian access from the works areas including enclosure of the perimeter of the site by a temporary construction barrier.

(e) Measures for air quality management and in particular the control of airborne dust (eg watering or temporary sealing of roads; screens or vehicle speed restrictions), litter and other contaminants in relation to the occupants of the existing retirement village and neighbouring properties.

(f) Waste management methodology including details of quantities of material to be transported and implementation of recycling measures (eg mulching of vegetative matter).

(g) Stormwater water, sediment and erosion control methodology.

(h) Provision of site management signage including contact names and telephone numbers for 24 hour contact by the public relating to site issues including the name and telephone contact of the Council.

(i) The CPPM must ensure there is a process of 'site induction' to be the responsibility of the site manager whereby each employee or contractor is advised of the procedures relating to the requirements of the CPPM.

(j) The CPPM must ensure there is a liaison committee whereby residents' queries or concerns during the construction of Stage 2 can be regularly and satisfactorily

addressed. Details of the constitution and operation of the liaison committee are to be submitted with the CPPM.

The construction of the Stage 2 development must be carried out in accordance with the CPPM approved by the Principal Certifying Authority as satisfactory to it.

35 All retaining structures (including temporary shoring and batters), details of which are to be lodged with the construction certificate application, are to be designed and/or approved by an engineer and geotechnical engineer experienced in hillside developments and are to comply with the design requirements of retaining structures and batters provided in the approved Geotechnical Assessment / Landslide Risk Appraisal Report referenced in Condition 8 of this consent.

36 The applicant is to demonstrate how stormwater from the new development within this consent is disposed of to an existing approved system or in accordance with Northern Beaches Council's *Pittwater 21 Development Control Plan*. Details by an appropriately qualified and practicing Civil Engineer demonstrating that the existing approved stormwater system can accommodate the additional flows are to be submitted to the Certifying Authority for approval prior to the issue of the Construction Certificate.

37 The Applicant is to provide a certification of drainage plans detailing the provision of on-site stormwater detention in accordance with Northern Beaches Council's *Pittwater 21 Development Control Plan*, and generally in accordance with the Concept Drainage Plans prepared by Northrop, drawing number C02DA, dated 27/9/19. Detailed drainage plans are to be prepared by a suitably qualified Civil Engineer, who has membership to the Institution of Engineers Australia, National Professional Engineers Register (NPER) and registered in the General Area of Practice for civil engineering.

Detailed drainage plans, including engineering certification, are to be submitted to the Certifying Authority for approval prior to the issue of the Construction Certificate.

A certificate from a Civil Engineer, stating that the stormwater treatment measures have been designed in accordance with the Approved Civil Plans referenced in Condition 7 of this Consent and Council's *Water Management for Development Policy* shall be submitted to the Certifying Authority prior to the release of the Construction Certificate.

38 The bio-retention basin must not have filter media and plantings installed, and the SPEL Hydrosystem must not be connected online, until 90 percent of the dwellings in Stage 2 have been completed, or two years has passed since the issue of the Occupation Certificate, whichever milestone occurs first.

39 The recommendations of the risk assessment required to manage the hazards as identified in the approved Geotechnical Assessment / Landslide Risk Appraisal Report referenced in Condition 8 of this Consent are to be incorporated into the construction plans. Prior to issue of the Construction Certificate, Form 2 of the Geotechnical Risk Management Policy for Pittwater (Appendix 5 of *Pittwater 21 Development Control Plan*) is to be completed and submitted to the Accredited Certifier. Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of the Construction Certificate.

40 The applicant is to lodge a bond with Council of $20,000 as security against any damage to Council's road reserve and downstream drainage network. Details confirming payment of the bond are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

41 The applicant must prepare and submit a pre-commencement dilapidation report providing an accurate record of the existing condition of adjoining public property and public infrastructure (including roads, gutter, footpaths, etc). A copy of the report must be provided to Council, any

other owners of public infrastructure and the owners of adjoining and affected private properties. The pre-construction / demolition dilapidation report must be submitted to Council and the Certifying Authority prior to the issue of the any Construction Certificate and the commencement of any works including demolition.

42 A Project Arborist with AQZ level 5 qualifications in arboriculture/horticulture shall submit a Tree Protection Plan to the Certifying Authority prior to the issue of the Construction Certificate, in accordance with AS4970-2009 Protection of trees on development sites, identifying existing trees within 5 metres of development, including:

(a) location of trees identified for retention and extent of canopy,

(b) location of tree protection fencing, tree trunk battens, ground protection and barriers,

(c) the tree protection plan will identify key stages or 'hold points' where monitoring, inspections, and approval for work activities are approved by the Project Arborist prior to continuing works,

(d) the tree protection plan will identify the scope of certification to be submitted by the Project Arborist to satisfy AS4970-2009, including:

- 5.3 Pre-Construction, sections 5.3.1 and 5.3.2
- 5.4 Construction Stage, sections 5.4.1, 5.4.2, 5.4.3, 5.4.4 and 5.4.5
- 5.5 Post-construction, section 5.5.2.

43 The Approved Landscape Plans referenced in Condition 7 of this Consent are to be amended, as follows:

(a) the documented path from the Lift between ILU 11 and ILU 12 shall be relocated closer to ILU11 to accommodate tall canopy/middle storey tree planting of at least one Eleocarpus reticulatus (100 litre pot size) and one Podocarpus elatus (75 litre pot container),

(b) the documented street tree planting of Tristaniopsis luscious shall be deleted and replaced with a combination of both or either Angophora costata and/or Syncarpia glomulifera, planted at a minimum 100 litre pot container,

(c) canopy tree planting shall be nominated by location within the Plant Mix Type 3 category between the proposed buildings, including:

(i) one Acmena smithii west of ILU8, planted at 100 litre pot size,

(ii) two Eleocarpus reticulatus between ILU9 and ILU10, planted at 100 litre pot size,

(iii) one Eleocarpus reticulatus (100 litre pot size) and one Podocarpus elatus (75 litre pot container), between ILU11 and ILU12,

(iv) three Angophora costata east of ILU13, planted at 100 litre pot size,

(v) three Angophora costata east of ILU14, planted at 100 litre pot size,

(vi) two Eleocarpus reticulatas west of ILU 19, planted at 100 litre pot size,

(vii) two Angophora costata (100 litre pot size) and one Allocasuarina torulosa (75 litre pot size) south-east of ILU18,

(viii) one Eleocarpus reticulatus (100 litre pot size) and one Allocasuarina torulosa (75 litre pot container), between ILU16 and ILU17,

(d) canopy tree planting shall be nominated by location within the Plant Mix Type 8 category associated with the pedestrian ramp,

(e) all tree planting shall be located approximately 4 to 5 metres from buildings and structures, and shall be protected by a 4-post tree guard with top and mid rail,

(f) The removal of the "existing maintenance track" and areas of gravel to the north of the creekline, to be revegetated in accordance with the Species listed in the approved Flora and Fauna Assessment Report referenced in Condition 8 of this Consent,

(g) all other planting works shall be in accordance with the landscape plans and schedules prepared by Sym Studios and referenced above.

The amended plans, accompanied by certification from a suitably qualified landscape architect confirming consistency with this condition, are to be submitted to the Certifying Authority prior to the issue of the construction certificate.

44 The Approved Architectural Plans referenced in Condition 7 of this Consent are to be amended as follows:

(a) A 1.8m high privacy screen is to be incorporated along the entire eastern elevation of the balcony of Unit 19. The screen is to comprise fixed horizontal or vertical batons, with maximum openings of 50mm to prevent overlooking of the adjoining properties to the east.

(b) The opening on the eastern elevation of the Lounge in Unit 23 is to be a window, with a minimum sill height of 1.5m.

(c) A 1.8m high privacy screen is to be incorporated along the entire eastern elevation of the patio of Unit 23. The screen is to comprise fixed horizontal or vertical batons, with maximum openings of 50mm to prevent overlooking of the adjoining properties to the east.

45 A Project Ecologist be employed for the duration of the approved works to ensure all bushland and riparian protection measures are carried out according to the conditions of consent.

The Project Ecologist will provide certification that recommendations and management works identified in the Approved Biodiversity Management Plan (referenced in Condition 8 of this Consent, and as amended by any other condition of this consent) are carried out. The Project Ecologist will ensure that all conditions relating to the biodiversity management of the property are fully implemented. The Project Ecologist is to be a suitably qualified expert with a minimum of five years relevant industry experience.

46 The Biodiversity Management Plan (BMP) referenced in Condition 8 of this Consent is to be updated in accordance with the recommendations of the Flora and Fauna Assessment Report also referenced in Condition 8 of this Consent.

The BMP must include a plan/map of all trees required to be removed and those to be retained for the completion of the Asset Protection Zone and building envelopes. The BMP must include measures for the restoration and management of all retained vegetation, including the revegetation of cleared and disturbed areas. The BMP must include a map clearly delineating vegetation management zones, with objectives for vegetation management and/or restoration for each zone. It will include a strategy for bushland restoration, plant species suitable for planting to recreate the original vegetation type, and ongoing management requirements.

The BMP must include provisions for management, monitoring and reporting of biodiversity pre-clearing, during clearing and post construction in perpetuity management of fire hazard Asset Protection Zones and retained vegetation.

Details demonstrating compliance are to be submitted to the Certifying Authority and Council prior to the issue of the Construction Certificate.

47 Prior to the issue of the relevant Construction Certificate or commencement of any clearing, the class and number of species credits must be retired. Credit retirement is based on the loss of 10 *Rhodamnia rubescens* associated with the development.

Evidence that the requirement to retire the class and number of biodiversity credits outlined in Table 1 has been satisfied in accordance with the *Biodiversity Conservation Act 2016* must be provided to the Principal Certifying Authority prior to release of the relevant Construction Certification or commencement of any clearing.

Table 1

Impacted Species	**Number of Biodiversity Credits**	**IBRA sub-region**
Rhodamnia rubescens (Scrub Turpentine)	30	Pittwater Sub Region OR any subregion within 100km of the subject site

48 Prior to the issue of the relevant Construction Certificate or commencement of any clearing, the class and number of ecosystem credits must be retired. Credit retirement is based on the area of clearing of relevant Plant Community Types associated with the development including Asset Protection Zones.

Evidence that the requirement to retire the class and number of biodiversity credits outlined in Table 2 has been satisfied in accordance with the Biodiversity Conservation Act 2016 must be provided to the Principal Certifying Authority prior to release of the relevant Construction Certification or commencement of any clearing.

Table 2

Impacted Plant Community Type (PCT)	**Number of Biodiversity Credits**	**IBRA sub-region**
PCT 1565 - Turpentine - Rough-barked Apple - Forest Oak moist shrubby tall open forest of the Central Coast	24	Pittwater Sub Region OR any subregion within 100km of the subject site
PCT 1529 - Lilly Pilly - Coachwood gully warm temperate rainforest on sandstone ranges of the Sydney Basin	7	Pittwater Sub Region OR any subregion within 100km of the subject site

49 All earthworks and drainage associated with the proposed development shall be in accordance with the approved Revised Flood Impact Assessment referenced in Condition 8 of this Consent. Certification from a suitably qualified flooding engineer confirming that the detailed design meets the outcomes of this approved report shall be provided to the Principal Certifying Authority prior to the issue of a Construction Certificate.

50 Having regard to the results of the approved Revised Flood Impact Assessment referenced in Condition 8 of this Consent, measures are to be proposed for incorporation within the development so as to ensure that:

(a) all habitable floor levels of proposed new buildings are above the Probable Maximum Flood Level; and

(b) the carrying out of the development results in no worsening impacts to the downstream of existing Stage 1 properties, as in line with the approved Revised Flood Impact Assessment referenced in Condition 8 of this Consent

Evidence confirming satisfaction of this condition is to be provided to the Principal Certifying Authority prior to the issue of the Construction Certificate.

51 Certification of the structural footings and superstructure shall be provided, certifying the design is suitable for the anticipated flood forces identified in the approved Structural Flooding Assessment Report referenced in Condition 8 of this Consent. Certification shall be provided by a suitably qualified Structural Engineer with corporate membership of the Institute of Engineers Australia (M.I.E), or who is eligible to become a corporate member and has

appropriate experience and competence in the related field, before the Construction Certificate is issued by the Principal Certifying Authority.

52 A Flood Emergency Response Plan is to be prepared in accordance with Council's "Flood Emergency Response Planning for Development in Pittwater Policy" to help minimise the risk to life on the site. It is to address aspects such as: flood awareness for occupants, flood signage, flood warning, evacuation routes, emergency response actions and the location of flood depth markers. A copy of the Flood Emergency Response Plan is to be provided to Council and the Principal Certifying Authority prior to the issue of the Construction Certificate.

53 All new development shall be designed and constructed as flood compatible buildings in accordance with Reducing Vulnerability of Buildings to Flood Damage: Guidance on Building in Flood Prone Areas, Hawkesbury-Nepean Floodplain Management Steering Committee (2006). Details demonstrating compliance in this regard are to be provided to the Certifying Authority prior to the issue of the Construction Certificate.

54 Any structures below the 1% AEP flood level are to be designed and constructed to allow clear passage of floodwaters, with a minimum of 50% of the area below the 1% AEP flood level open. Details demonstrating compliance in this regard are to be provided to the Certifying Authority prior to the issue of the Construction Certificate.

D Matters to be satisfied prior to the commencement of works and maintained during the works:

55 All excess excavated material is to be removed from the site. This is due to the site's location in an area identified as being subject to possible landslip.

56 Any fill material imported to the site is to consist of clean fill material only, that is, non-contaminated excavated material and soil, rock or similar material. Putrescible and non-putrescible solid waste (including demolition material) is not permitted.

57 Any fill shall be deposited and works carried out in strict compliance with the NSW Department of Land and Water Conservation's Urban Erosion and Sediment Control manual.

58 No fill is to be introduced within the drip line of canopy trees on the site.

59 No fill is to be introduced in the area of native vegetation or habitat remaining on the site.

60 All excavations and backfilling associated with the erection or demolition of a building must be executed safely and in accordance with appropriate professional standards.

61 All excavations associated with the erection or demolition of a building must be properly guarded and protected to prevent them from being dangerous to life or property.

62 Temporary sedimentation and erosion controls are to be constructed prior to commencement of any work to eliminate the discharge of sediment from the site.

63 Sedimentation and erosion controls are to be effectively maintained at all times during the course of construction and shall not be removed until the site has been stabilised or landscaped to the Principal Certifying Authority's satisfaction.

64 An all-weather accessway is to be provided to the construction area consisting of 50-75mm aggregate or similar material at a minimum thickness of 200mm and 15metres long laid over geotechnical fabric. This is to be constructed prior to commencement of works and maintained over the works period.

65 Adequate measures shall be undertaken to remove clay from vehicles leaving the site so as to maintain public roads in a clean condition.

66 Waste materials generated through demolition, excavation and construction works are to be minimised by re-use on-site, recycling or where re-use or recycling is not practical, disposal at an appropriate authorised waste facility.

67 The site is to be fully secured by a fence to all perimeters to the site to prevent unauthorised access both during the course of the works and after hours.

68 No works are to be carried out in Council's Road Reserve without the written approval of the Council.

69 A Road Opening Permit, issued by Council, must be obtained for any road openings, or excavation within Councils Road Reserve associated with the development on the site, including stormwater drainage, water, sewer, electricity, gas and communication connections. During the course of the road opening works the Road Opening Permit must be visibly displayed at the site.

70 No skip bins or materials are to be stored on Council's Road Reserve.

71 A clearly legible Site Management Sign is to be erected and maintained throughout the course of the works. The sign is to be centrally located on the main street frontage of the site and is to clearly state in legible lettering the following:

(a) The builder's name and telephone contact number both during work hours and after hours.

(b) That no works are to be carried out in Council's Road Reserve without the written approval of the Council.

(c) That a Road Opening Permit issued by Council must be obtained for any road openings or excavation within Council's Road Reserve associated with development of the site, including stormwater drainage, water, sewer, electricity, gas and communication connections. During the course of the road opening works the Road Opening Permit must be visibly displayed at the site.

(d) That no skip bins or materials are to be stored on Council's Road Reserve.

(e) That the contact number for Council for permits is1300 434 434.

72 A stamped copy of the approved plans is to be kept on the site at all times, during construction.

73 Toilet facilities are to be provided in a location which will not detrimentally affect the amenity of any adjoining residents at or in the vicinity of the work site during the duration of construction.

74 Where excavations extend below the level of the base of the footings of a building on an adjoining allotment of land, the person causing the excavation must give the owner of the adjoining property at least seven (7) days written notice of their intention to excavate below the level of the base of the footing and furnish the adjoining property owner with particulars of the proposed work.

75 Prior to commencement of works, at least three photographs of the road reserve and footpath area adjoining the site, one front-on and one from each side of the property, are to be submitted to Council with the notification of commencement of works, showing the condition of the street trees and road reserve. The photographs must be dated, and accompanied by a statement that they are a true and accurate representation of the scene depicted.

76 Any proposed demolition works shall be carried out in accordance with the requirements of AS2601-1991 "The Demolition of Structures".

77 Precautions to be taken shall include compliance with the requirements of the WorkCover Authority of New South Wales, including but not limited to:

(i) Protection of site workers and the general public.

(ii) Erection of hoardings where appropriate.

(iii) Asbestos handling and disposal where applicable.

(iv) Any disused service connections shall be capped off.

Council is to be given 48 hours written notice of the destination/s of any excavation or demolition material. The disposal of refuse is to be to an approved waste disposal depot.

78 All natural landscape features, including natural rock outcrops, natural vegetation, soil and watercourses, are to remain undisturbed except where affected by necessary works detailed on approved plans.

79 The developer or contractor will take all measures to prevent damage to trees to be retained and their root systems during site works and construction activities including provision of water, sewerage and stormwater drainage services. In particular, works, erection of structures, excavation or changes to soil levels within 5 metres of the trunks of trees to be retained are not permitted unless part of the development as approved, and the storage of spoil, building materials, soils or the driving or parking of any vehicle or machinery within 5 metres of the trunk of a tree to be retained, is not permitted.

80 When working within the drip line of the trees, hand digging is to occur within the dripline of all trees to be retained. Liaison on a daily basis is to be maintained during the excavation works between the Builder and Arborist. No filling or compaction shall occur over tree roots within the area defined by the outer drip line of the crown. Root protection/ compaction mitigation in the form of planks or metal decking supported clear of the ground fixed to scaffolding is to be installed as required.

81 A suitable warning sign must be placed to advise contractors and visitors to the site of the purpose for the tree/native vegetation/habitat protection/exclusion fencing installed in accordance with this consent.

82 A Project Arborist with AQZ level 5 qualifications in arboriculture/horticulture is to be appointed prior to commencement of works.

The Project Arborist is to oversee all tree protection measures, removals and works adjacent to protected trees as required by AS4970-2009 Protection of trees on development sites, with particular attention to section 4, and AS4373-2007 Pruning of amenity trees,

The Project Arborist is to familiarise themselves with and ensure compliance, as relevant, with any other tree and environmental requirements conditioned under this consent,

All works in the vicinity of the identified existing trees to be retained, shall be conducted under the supervision of the Project Arborist, to comply with the recommendations in the Tree Protection Plan required by Condition 42 of this Consent.

83 Existing trees and vegetation shall be retained as follows:

(a) all trees and vegetation within the site, nominated for retention, shall be protected during all construction stages, excluding exempt trees under the relevant planning instruments or legislation,

(b) all other trees and vegetation located on adjoining properties,

(c) all road reserve trees and vegetation.

Tree protection shall be generally undertaken as follows:

(a) all tree protection shall be in accordance with AS4970-2009 Protection of trees on development sites, with particular attention to section 4, and AS4373-2007 Pruning of amenity trees,

(b) any tree roots exposed during excavation with a diameter greater than 25mm within the TPZ must be assessed by an Arborist,

(c) to minimise the impact on trees and vegetation to be retained and protected, no excavated material, building material storage, site facilities, nor landscape materials are to be placed within the canopy dripline of trees and other vegetation required to be retained,

(d) no tree roots greater than 25mm diameter are to be cut from protected trees unless authorized by the Project Arborist on site,

(e) all structures are to bridge tree roots greater than 25mm diameter unless directed by a AQF Level 5 Arborist on site,

(f) should either or both (d) and (e) occur during site establishment and construction works, a AQF Level 5 Arborist shall provide recommendations and shall report on the tree protection action undertaken, including photographic evidence,

(g) any temporary access to, or location of scaffolding within the tree protection zone of a protected tree or any other tree to be retained during the construction, is to be undertaken using the protection measures specified in sections 4.5.3 and 4.5.6 of AS 4970-2009.

84 The exposed batters and foundations are to be inspected by a geotechnical engineer experienced in hillside developments during construction to confirm the assumptions made in the approved Geotechnical Assessment / Landslide Risk Appraisal Report referenced in Condition 8 of this consent are valid and the proposed support measures are appropriate for the actual conditions on site.

85 All site drainage and sediment and erosion control works and measures as described in the Soil and Water Management Plan and any other pollution controls, as required by these conditions shall be implemented prior to commencement of any other works at the Site. Erosion and sediment controls are to be adequately maintained and monitored at all times, particularly after periods of rain, and shall remain in proper operation until all development activities have been completed and vegetation cover has been re-established across 70 percent of the site, and the remaining areas have been stabilised with ongoing measures such as jute mesh or matting.

86 Prior to the commencement of any onsite building works or commencement of vegetation clearance/modification, the boundary between the APZ, and the construction areas is to be fenced with temporary exclusion fencing as identified in Section 5 of the Biodiversity Management Plan (referenced in Condition 8 of this Consent, as amended by these conditions). The project ecologist must supervise installation and locations of the fencing. Details demonstrating compliance are to be submitted to the Principal Certifying Authority.

87 Clearing of native vegetation is to be undertaken in accordance with the protocols and recommendations specified in the Biodiversity Management Plan (referenced in Condition 8 of this Consent, as amended by these conditions of consent). Details confirming compliance are to be certified by the project ecologist and submitted to the Principal Certifying Authority prior to the issue of any Occupation Certificate.

Tree Hollow Inspection by Ecologist - All tree hollows proposed for clearing are to be inspected by the project ecologist prior to removal. Inspection of tree hollows is to be

facilitated by a qualified and experienced tree climber or arborist with the use of an elevated work platform where necessary.

Details prepared by the project ecologist in writing demonstrating compliance are to be submitted to the Principal Certifying Authority prior to commencement of tree removals.

88 During any vegetation clearance for Asset Protection Zones and construction works the Project Ecologist is to be present to re-locate any displaced fauna that may be disturbed during this activity.

Tree hollows are to be salvaged from trees within the development area and placed within the retained vegetation areas within the Lot. This is to be done by a qualified and experienced Arborist, under the direction of the Project Ecologist.

Details prepared by the project ecologist in writing demonstrating compliance is to be submitted to the Principal Certifying Authority.

89 Prior to the commencement of any onsite building works or commencement of vegetation clearance/modification, the extent of the Asset Protection Zone must be clearly delineated with permanent bollards/posts. Fireproof, 50mm round galvanized steel posts are to be installed at 10m intervals. Posts are to be concreted into the ground identifying the boundary of the Asset Protection Zones, Riparian Buffer Zones and retained vegetation as identified in the Biodiversity Management Plan (referenced in Condition 8 of this Consent, as amended in accordance with these conditions). Permanent signage is to be attached to the bollards clearly denoting the boundary of the Asset Protection Zone and retained vegetation identified as 'Bushland Conservation Area, no access'.

The installation of the posts to delineate the Asset Protection Zone is to be supervised by the Project Ecologist. Alternative design options must be agreed by Council in writing. Details demonstrating compliance are to be submitted to the Principal Certifying Authority.

E Matters to be satisfied prior to the issue of Occupation Certificate:

Note: It is an offence to occupy the building or part thereof to which this consent relates prior to the issue of an Occupation Certificate.

90 Prior to issue of an Occupation Certificate, photographic evidence of the condition of the street trees and road reserve and area adjoining the site after the completion of all construction, must be submitted to the Council showing that no damage has been done and if damage has been done that it has been fully remediated. The photographs shall be accompanied by a statement that no damage has been done (or where damage has been remediated that Council has approved that work). In this regard Council's written agreement that all restorations have been completed satisfactorily must be obtained prior to the issue of any Occupation Certificate.

91 Restoration of all damaged public infrastructure caused as a result of the development is to occur to Council's satisfaction. Council's written approval that all restorations have been completed satisfactorily must be obtained must be provided to the Principal Certifying Authority with the Occupation Certificate application.

92 An Occupation Certificate application stating that the development complies with the Development Consent, the requirements of the Building Code of Australia and that a Construction Certificate has been issued must be obtained before the building is occupied or on completion of the construction work approved by this Development Consent.

93 A copy of the Section 73 Compliance Certificate issued under the provisions of the Sydney Water Act, 1994, is to be forwarded to the Principal Certifying Authority with the Occupation Certificate.

94 Prior to the issue of the Occupation Certificate, a Suitably Qualified Bushfire Consultant is to provide certification to the Principal Certifying Authority to confirm that the requirements of the NSW Rural Fire Service, as outlined in Condition 12 of this Consent, have been satisfied.

95 The Applicant is to submit the completed Form 3 of the Geotechnical Risk Management Policy (Appendix 5 of *Pittwater 21 Development Control Plan*) to the Principal Certifying Authority prior to issue of the Occupation Certificate.

96 The Applicant shall lodge the Legal Documents Authorisation Application with the original completed request forms (NSW Land Registry standard forms 13PC and/or 13RPA) to Council and a copy of the Works-as-Executed plan (details overdrawn on a copy of the approved drainage plan), hydraulic engineers' certification.

The Applicant shall create on the Title a restriction on the use of land and a positive covenant in respect to the ongoing maintenance and restriction of the on-site stormwater disposal structures within this development consent. The terms of the positive covenant and restriction are to be prepared to Council's standard requirements at the applicant's expense and endorsed by Northern Beaches Council's delegate prior to lodgement with the NSW Land Registry Services. Northern Beaches Council shall be nominated as the party to release, vary or modify such covenant.

A copy of the certificate of title demonstrating the creation of the positive covenant and restriction for on-site storm water detention as to user is to be submitted.

Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to the issue of the Occupation Certificate.

97 A certificate from a suitably qualified engineer, who has membership to the Engineers Australia and the National Engineers Register must be provided, stating that the stormwater treatment measures have been installed in accordance with the Approved Civil Plans referenced in Condition 7 of this Consent. The certificate shall be submitted to the Principal Certifying Authority prior to the release of the Occupation Certificate.

98 A positive covenant shall be created on the title of the land requiring the proprietor of the land to maintain the stormwater treatment measures in accordance with the standard requirements of Council, the manufacturer and as required by the Stormwater Treatment Measures Operation and Maintenance Plan.

A restriction as to user shall be created on the title over the stormwater treatment measures, restricting any alteration to the measures.

The terms of the positive covenant and restriction as to user are to be prepared to Council's standard requirements, (available from Council), at the applicant's expense and endorsed by the Northern Beaches Council's delegate prior to lodgement with the Department of Lands. Northern Beaches Council shall be nominated as the party to release, vary or modify such covenant.

A copy of the certificate of title demonstrating the creation of the positive covenant and restriction as to user is to be submitted to the Principal Certifying Authority prior to the issue of the Occupation Certificate.

99 Prior to the issue of the Occupation Certificate, a landscape report prepared by a landscape architect or landscape designer shall be submitted to the Principal Certifying Authority certifying that the landscape works have been completed in accordance with the Approved Landscape Plans referenced in Condition 7, as amended by Condition 43 of this Consent.

100 Prior to the issue of the Occupation Certificate, a report prepared by an Arborist with AQZ level 5 qualifications in arboriculture/horticulture shall be submitted to the Certifying Authority,

assessing the health and impact of trees required to be retained as a result of the proposed development, including the following information:

(a) compliance to Arborist recommendations for tree protection and excavation works,

(b) extent of damage sustained by vegetation as a result of the construction works,

(c) any subsequent remedial works required to ensure the long term retention of the vegetation.

101 An Operation and Maintenance Plan is to be prepared to ensure the proposed stormwater quality system remains effective.

The Plan must contain the following:

(a) Inspection and maintenance schedule of all stormwater treatment measures

(b) Maintenance requirements for establishment period

(c) Routine maintenance requirements

(d) Funding arrangements for the maintenance of all stormwater treatment measures

(e) Identification of maintenance and management responsibilities

(f) Vegetation species list associated with each type of vegetated stormwater treatment measure

(g) Waste management and disposal

(h) Traffic control (if required)

(i) Maintenance and emergency contact information

(j) Renewal, decommissioning and replacement timelines and activities of all stormwater treatment measures (please note that a DA may be required if an alternative stormwater treatment measure is proposed)

(k) Work Health and Safety requirements

(l) Requirements for inspection and maintenance records, noting that these records are required to be maintained and made available to Council upon request.

Details demonstrating compliance shall be submitted to the Principal Certifying Authority prior to the release of the Occupation Certificate.

102 All Priority weeds (as specified in the Greater Sydney Regional Strategic Weed Management Plan 2017 – 2022) within the development footprint are to be removed and continuously managed. All environmental weeds including large areas of Lantana camara are to be removed from the site by qualified bush regenerators. Any disturbed ground within the riparian zone (the riparian zone extends 10m from Top of Bank) is to be stabilised with jute matting, secured with stakes, and replanted at a rate of at least four tube stock per square metre. New plantings must be maintained for the life of the development. Details demonstrating compliance are to be submitted to the Principal Certifying Authority prior to issue of the Occupation Certificate.

103 Details demonstrating compliance with the Biodiversity Management Plan (referenced in Condition 8 of this Consent, as amended by these conditions) are to be submitted to the Certifying Authority prior to the issue of the Occupation Certificate.

104 Portions of the riparian corridor adjacent to the development (including informal parking area) but outside of proposed Asset Protection Zones are to be rehabilitated consistent with the adjoining retained native vegetation (Coastal Warm Temperate Rainforest). The cleared area is to be revegetated with species listed in the Flora and Fauna Report referenced in Condition

8 of this Consent. Details prepared by the project ecologist in writing demonstrating compliance are to be submitted to the Principal Certifying Authority.

105 A Bush Regeneration contract is to be entered into to ensure that works required by the Biodiversity Management Plan (as referenced in Condition 8 of this consent, as amended by these conditions) to occur post Occupation Certificate are adequately completed.

The bush regeneration company is to provide certification of contract engagement at commencement and for a minimum of (3) years post Occupation Certificate. The contract is to be certified by the Principal Certifying Authority prior to issue of the Occupation Certificate.

106 Prior to the issue of the occupation certificate, a suitably qualified access consultant is to provide certification to the Principal Certifying Authority that the as-built development in Stage 2 complies with the standards prescribed in Schedule 3 of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* except as provided in condition 14.

F Advice:

107 Failure to comply with the relevant provisions of the Environmental Planning and Assessment Act, 1979 (as amended) and/or the conditions of this Development Consent may result in the serving of penalty notices (on-the-spot fines) under the summary offences provisions of the above legislation or legal action through the Land and Environment Court, again pursuant to the above legislation.

108 You are reminded of your obligations under the objectives of the Disability Discrimination Act (DDA) 1992.

CONDITIONS OF CONSENT 82/149 GRANTED BY THE COURT ON 9 MARCH 1982, AS MODIFIED BY THE COURT ON 31 DECEMBER 1986 AND 27 MARCH 2002

1 Landscaped, communal, visitor's car parking and the like areas being kept permanently available for such use and not being allocated to any one person or persons. Visitors' parking to be clearly marked as such.

2 All accessways and parking bays are to remain clear of all obstructions.

3 All parking areas on approved building plans being used solely for this purpose.

4 No signs to be displayed without a separate approval from Council.

5 The development shall remain as seniors housing as defined in State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 for the life of the development except as otherwise permitted.

6 Strata titling of any part of the development shall be prohibited unless the lots in any strata subdivision are consistent with this consent.

7 (a) Provision shall be made to assure residents of priority of admission to suitable nursing home accommodation off site as and when required. Evidence of such provision shall be provided to the reasonable satisfaction of Council prior to the occupation of any part of the development.

(b) Occupiers of self-care units shall be given priority to purchase or reside in hostel units as they become available.

(c) A majority of the hostel units shall be occupied only by persons who have been certified by a qualified Medical Practitioner or social worker as being in need due to health or other factors of hostel accommodation and the care and supervision provided therewith.

(d) Domiciliary assistance such as meals, laundry and home help shall be available to all residents as and when required including those in self-care units.

(e) Adequate arrangements shall be made for the provision of medical and home nursing services to residents as and when required. Permanent arrangements shall be made to have a medical practitioner on call for emergencies and a physiotherapist to visit as needed.

(f) Prior to occupation of any part of the development, documentary evidence shall be furnished to Council of the existence of a Contractual commitment by the proprietor or operator of the development to provide the facilities referred to in this condition to residents on a continuing basis.

8 (a) The hostel shall be completed within three (3) years of the occupation of the first self-contained unit and shall conform to the definition of hostel contained in Clause 2 of SEPP No. 5.

(b) The Village Centre shall be completed before more than 50% of the self-contained units are residentially occupied or within four (4) years of the first residential occupation of the first available self-contained unit – whichever event first occurs.

9 At least one live-in administrator shall be resident on-site, such administrator to be experienced in nursing or social work.

10 All self-care and hostel units shall be equipped with an emergency communication device connected to the administrator's residence and to the office.

11 Prior to release of the approved building plans the applicant shall furnish a report from a practicing Geotechnical Engineer acceptable to Council to the effect that the design of the foundations of the Village Centre will overcome any probability that the site of the Centre would be affected by landslip or site instability, and a certificate from a Structural Engineer that the Village Centre, if erected in accordance with the said Geotechnical Engineers recommendations, will be structurally adequate.

12 From Monday to Friday (both days inclusive) the aged care service provider is to facilitate access, by means of a serviced courtesy car, mini-bus or other vehicle, for all residents, 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.

13 Each habitable floor of the hostel shall contain a furnished common room containing tea making facilities and amenities for use of the hostel occupants.

14 Treatment of all driveways, pathways and car parking surfaces shall blend with the landscape of the area and be dark earthy tones.

15 A consulting room shall be provided within the Village Centre for use by medical practitioners and the like.

16 Subject to condition 34(c), vehicular access from Gulia Street shall be restricted to emergency fire-fighting vehicles only. A locking post type vehicle barrier capable of being removed to

allow access by emergency vehicles shall be erected at the end of Gulia Street, and a key for same shall be supplied to the relevant fire-fighting authorities.

17 Access for the disabled shall be provided within Stage 1 to units, hostel and Village Centre in accordance with the provisions of Clause 10(4) of the SEPP No. 5.

18 The building comprising the development shall be classified for the purposes of Ordinance 70, as follows:

(a) Hostel - Class III;

(b) Village Centre - Class IX(b);

(c) Self-contained units – (i) Class I for single detached units; and (ii) Class II for all other units.

19 Buildings shall be located clear of any pipeline, natural watercourse or Council easement. Footings of any building adjacent to an easement shall be a minimum of 300mm below the invert of the pipe and may rise by 300mm for each 300mm removed therefrom.