

19th May 2022

Chief Executive Officer
Northern Beaches Council
PO Box 82
Manly NSW 2095

Dear Sir,

Statement of Environmental Effects
Section 4.55(1A) Modification of Consent DA2020/0816
Construction of Seniors Housing Development (Residential Care Facility)
Lot 38 DP 7236 and Lot 2 DP 748426 - 23 and 33 Bassett Street, Mona Vale

1.0 Introduction

On 26th April 2021 development application DA2020/0816 was approved by Council proposing the demolition of the existing structures and the construction of a seniors housing development (residential care facility) on the consolidated allotment.

This Statement of Environmental Effects has been prepared in support of an application seeking a refinement in the detailing of the approved development pursuant to Section 4.55(1A) of the Environmental Planning and Assessment Act 1979 (the Act). Specifically, the application seeks to delete conditions that require the part construction of a new pedestrian pathway and part upgrade of the existing pathway between the subject site and the bus stop outside 72 Barrenjoey Road.

State Environmental Planning Policy (Housing) 2021 (**SEPP Housing**) has been gazetted in the time since the development application was approved, which changes the access requirements in relation to residential care facilities, such that an accessible path of travel to a bus stop is no longer required.

Nonetheless, Council can be satisfied that residents of the care facility will still have suitable access to the required services and facilities, with a shuttle bus provided by the operator of the premises. The shuttle bus service is in addition to the provision of on-site services, including access to medical staff and a hair salon.

The overall height, setbacks and general form of the development are maintained with no changes proposed to the design or use of the approved building.

As such, Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved. Accordingly, the application is appropriately dealt with by way of s4.55(1A) of the Act.

2.0 Proposed modifications

The application seeks to delete conditions that require the part construction of a new pedestrian pathway and part upgrade of the existing pathway between the subject site and the bus stop outside 72 Barrenjoey Road. Specifically, the application seeks to:

- Modify Condition 1(a) to:
 - remove reference to “A-12 Bus Stop Access Path, Rev. A, 20 January 2021, Gartner Trovato Architects”,
 - Make reference to the updated Statement of Compliance by Accessible Building Solutions dated 10th March 2022 provided with the subject application.
- Modify Condition 20 to remove reference to “the revised footpath plan prepared by Gartner Trovato Architects, drawing number A 12 Revision A dated 20/01/2021” and the following bullet points:
 - *Removal of existing concrete footpath and provision of a new 1.5 metre wide concrete footpath fronting the development site and extended to the bus stop located in front of 72 Barrenjoey Road to provide for safe pedestrian access to public transport. The footpath grade shall be not be more than 1:14 except in accordance with the requirements of Clause 26 of HSPD 2004. Any trees/vegetation which need to be removed must be approved by Council with suitable replacement trees provided.*
 - *Provision of a DDA compliant bus stop outside of 72 Barrenjoey Road.*
 - *The design of the new elevated footpath/ramp must also address the following matters:*
 - *Delineation of pedestrian pathways from vehicles using shared driveway, protection of the walkway structure from vehicle impact and appropriate design of balustrading.*
 - *Surface drainage of stormwater.*
 - *Integrated access from ramp landing to ground level at Barrenjoey Road.*
 - *Obtain concurrence from RMS/TfNSW as state road authority for Barrenjoey Road.*
 - *Confirmation that the structure will not impact existing utilities.*
 - *Confirmation that the shared driveway from Bassett Street meets the required standards, including signage, and that the structure will not reduce the availability of off-street parking.*
 - *Address the poor condition of the existing asphalt surface of the driveway that has been used by the current facility for many years.*

- Modify Condition 39 to remove any reference to an Addendum to the Arboricultural Impact Assessment, noting that the addendum is limited to the works associated with the construction of the footpath.
- Delete Condition 45, which approved removal of trees associated with the construction of the footpath.
- Modify Condition 62 to remove any reference to the Addendum to the Arboricultural Impact Assessment.

3.0 Section 4.55 of the Environmental Planning and Assessment Act 1979

Section 4.55(1A) of the Act provides that:

- (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 consent authority and subject to and in accordance with the regulations, modify the consent if:*
 - (a) *it is satisfied that the proposed modification is of minimal environmental impact, and*
 - (b) *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*
 - (c) *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*
 - (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.*
- (3) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15 (1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.*

In answering the above threshold question, we have formed the considered opinion that the modifications sought are of minimal environmental impact given that the application is limited to the deletion of works external to the site, with no change to the overall building height, setbacks, envelope or landscaped outcome approved pursuant to DA2020/0816.

The works required to upgrade the footpath were not insignificant and necessitated the removal of existing canopy trees, which can be safely retained if the upgrade works do not proceed.

In answering the threshold question as to whether the proposal represents “substantially the same” development the proposal must be compared to the development for which consent was originally granted, and the applicable planning controls. In order for Council to be satisfied that the proposal is “substantially the same” there must be a finding that the modified development is “essentially” or “materially” the same as the (currently) approved development - *Moto Projects (no. 2) Pty Ltd v North Sydney Council* [1999] 106 LGERA 298 per Bignold J.

The above reference by Bignold J to “essentially” and “materially” the same is taken from Stein J in *Vacik Pty Ltd v Penrith City Council* (unreported), Land and Environment Court NSW, 24 February 1992, where his honour said in reference to Section 102 of the Act (the predecessor to Section 96):

“Substantially when used in the Section means essentially or materially or having the same essence.”

In *Moto Projects*, Bignold J also found 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 compared in their proper contexts (including the circumstances in which the development consent was granted).

Development Consent DA2018/0816 was issued under the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**SEPP HSPD**), which required seniors housing developments to be within 400m of a regularly serviced bus stop accessed by means of an accessible path of travel. SEPP HSPD did not distinguish between the types of seniors housing developments or the mobility of residents, with clause 26 of SEPP HSPD prescribing a blanket requirement that all seniors development must achieve.

In *Principal Healthcare Finance Pty Ltd v Council of the City of Ryde* [2016] NSWLEC 153, Robson J held that the access requirements of clause 26 of SEPP HSPD are a development standard that are open to be varied under the provisions of clause 4.6 of the relevant LEP.

In the time since the application was approved, SEPP HSPD has been repealed and SEPP Housing has been gazetted. Amongst other changes, SEPP Housing acknowledges the different access requirements of the differing forms of seniors housing development, such that the access requirements of the former clause 26 of SEPP HSPD are no longer applicable in relation to residential care facilities. Rather, clause 94(1) of SEPP Housing prescribes:

Development consent must not be granted for development for the purposes of a residential care facility unless the consent authority is satisfied that residents of the facility will have access to facilities and services—

- (a) on-site, or*
- (b) by a transport service other than a passenger service.*

We can confirm that the approved on-site facilities will be complemented by a transport service operated by the aged care service provider, with no objection to the imposition of a condition of consent in this regard. This position has been endorsed in the accompanying Statement of Compliance by Accessible Building Solutions dated 10th March 2022, which confirms that the modified development is consistent with the access requirements of the BCA and SEPP Housing. As such, the requirement to undertake the not insignificant works within the public road reserve to achieve consistency with the standards of the now repealed policy is, in our opinion, unreasonable.

Residents of the development will maintain appropriate access to facilities and services, and the approved form and use of the development remains entirely unchanged. As such, we have formed the considered opinion that the modified development is essentially and materially the same as that which was originally approved such that the application is appropriately categorised as being “substantially the same” and appropriately dealt with by way of Section 4.55(1A) of the Act.

4.0 Pittwater Local Environmental Plan 2014

Zoning and permissibility

The subject site is zoned R2 Low Density Residential pursuant to the provisions of Pittwater Local Environmental Plan 2014 (PLEP) with the modifications to the approved seniors housing development remaining permissible with consent pursuant to the savings provisions contained within the recently repealed SEPP HSPD.

The proposed residential care facility also remains permissible on the land under the provisions of SEPP Housing.

5.0 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004

The removal of the requirement to upgrade the footpath between the site and the bus stop outside 72 Barrenjoey Road will result in non-compliance with the provisions of clause 26(3) of SEPP HSPD, which required:

For the purposes of subclause (2)(b) and (c), the overall average gradient along a pathway from the site of the proposed development to the public transport services (and from the transport services to the facilities and services referred to in subclause (1)) is to be no more than 1:14, although the following gradients along the pathway are also acceptable—

- (i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,*
- (ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,*
- (iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time.*

Specifically, the existing footpath is inconsistent with the provisions of subclause (ii), in that sections of the existing pathway have a gradient of 1:10 for a distance of more than 5m.

Whilst we are of the opinion that the new provisions of SEPP Housing provide adequate justification for the proposed modifications, the application is supported by a clause 4.6 request to vary the development standard of clause 26 of SEPP HSPD. We appreciate that clause 4.6 does not apply with respect to applications made pursuant to s4.55 of the Act, however it provides an appropriate format to justify the proposed modifications and allows for an outcome consistent with that anticipated by the Northern Beaches Local Planning Panel in their deferral of the determination on 16th December 2020.

6.0 State Environmental Planning Policy (Housing) 2021

For the avoidance of doubt, we can confirm that there are no provisions of SEPP Housing that would prohibit the construction of a residential care facility at the subject site. Further, there are no provisions that would necessitate any physical changes to the development as approved.

We also confirm that the modified development is consistent with all access requirements of SEPP Housing, as confirmed in the accompanying Statement of Compliance by Accessible Building Solutions, dated 10th March 2022.

7.0 Conclusion

This Statement of Environmental Effects has been prepared in support of an application seeking a refinement of the approved development pursuant to Section 4.55(1A) of the Act. Specifically, the application seeks to delete conditions that require the part construction of a new pedestrian pathway and part upgrade of the existing pathway between the subject site and the bus stop outside 72 Barrenjoey Road.

SEPP Housing has been gazetted in the time since the development application was approved, which changes the access requirements in relation to residential care facilities, such that an accessible path of travel to a bus stop is no longer required.

Nonetheless, Council can be satisfied that residents of the care facility will still have suitable access to the required services and facilities, with a shuttle bus provided by the operator of the premises. The shuttle bus service is in addition to the provision of on-site services, including 24 hour medical care, hairdressing/ nail and beauty services, meals, a cinema and a café from which papers, magazines and day to day consumables can be purchased.

The overall height, setbacks and general form of the development are maintained with no changes proposed to the design or use of the approved building.

As such, Council can be satisfied that the modifications involve minimal environmental impact and the development as modified represents substantially the same development as originally approved. Accordingly, the application is appropriately dealt with by way of s4.55(1A) of the Act.

Having given due consideration to the relevant considerations pursuant to s4.15(1) of the Act it is considered that the application, the subject of this document, succeeds on merit and is appropriate for the granting of consent.

Yours faithfully

Boston Blyth Fleming Pty Limited

A handwritten signature in black ink, appearing to read 'Greg Boston', written over a horizontal line.

Greg Boston
B Urb & Reg Plan (UNE) MPIA
B Env Hlth (UWS)
Director