



SECTION 4.55(8) MODIFICATION

Address: Nos. 27 & 29 North Avalon Road, Avalon Beach

Proposal: Seniors Housing

APRIL 2023

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The Land and Environment Court of NSW
Level 4, No. 225 Macquarie Street
SYDNEY NSW 2000

STATEMENT OF ENVIRONMENTAL EFFECTS

SECTION 4.55(8) MODIFICATION DA NO. 2019/1260 NOS. 27 & 29 NORTH AVALON ROAD, AVALON BEACH

Dear Sir/Madam,

Application is made pursuant to Section 4.55(8) of the Environmental Planning and Assessment Act 1979 (EPAA), seeking modification to a consent issued by the NSW Land and Environment Court.

This modification seeks approval for the deletion of Condition Nos. 18(d), 20 and 20A of the consent issued to Development Application No. 2019/1260.

This Statement of Environmental Effects has been prepared with reference to the following documentation:

- Transport Assessment, prepared by arc traffic + transport; and
- Accessibility Statement, prepared by Accessible Building Solutions, dated 24 January 2023.

Background

Site:	Nos. 27 and 29 North Avalon Road, Avalon Beach Lots 32 and 33 Deposited Plan 8394
Local Government Area:	Northern Beaches Council
Approved Development:	Demolition of existing structures and construction of a seniors housing development comprising 10 dwellings.
Reference:	Development Application No. DA2019/1620 Land and Environment Court Appeal No. 2019/00404226 Consent issued 26 August 2021
Approved Modification:	Development Application No. MOD2022/0397 Land and Environment Court Appeal No. 2022/199709 Consent issued 20 October 2022

Proposed Modification

This modification seeks to rely upon Keoride as a public transport service to satisfy the requirements of Clause 26 of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

The application consequently seeks modification of the development consent issued to Development Application No. DA2019/1620 by deletion of Condition Nos. 18(d), 20 and 20A.

In the Land and Environment Court judgement that relates to the substantive development consent (*Armada Avalon Pty Ltd v Northern Beaches Council* [2021] NSWLEC 1490), Commissioner Horton determined that Keoride was not a public transport service:

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

(1) Firstly, while the Applicant submits otherwise, I find that the Court cannot be satisfied, by written evidence, that the Keoride service will utilise the waiting area proposed in the road reserve at the subject site. The result may therefore be that residents are required to walk a distance for the service that is greater than 400m.

(2) I do not consider the email exchange at [35(3)] to provide sufficient certainty that those operating the Keoride service will prioritise use of the waiting area because the service is not 'door to door', but is instead, as I understand it, a route that may be described as a 'line of best fit' determined by all of those seeking to use the service at the time. On the basis of the limited, and general email exchange at [35(3)], I cannot conclude that Keoride undertakes, whether or not a person has mobility issues, to be bound to an agreement to pick and drop off at the waiting area, or within a distance of 400m.

(3) I also do not have any written evidence before me to satisfy the Court that Keoride has any incentive or requirement to ensure that the point of pick up, if not at the waiting area, would be at a location that is accessible via a suitable access pathway in the terms required by cl 26(4)(a) of the SEPP HSPD.

However, following these proceedings and as identified in the attached Transport Assessment, the State Government in October 2021 designated Keoride as a permanent public transport service. Keolis Downer were awarded an 8 year contract to operate this service (until October 2029) across Region 8 of the broader Sydney bus network.

Subsequent to designation of Keoride as a permanent public transport service, on 27 July 2022 Acting Commissioner Pullinger in *Mona Vale Holdings (NSW) Pty Ltd v Northern Beaches Council* [2022] NSWLEC 1399 recognised that Keoride had been made a public transport service which satisfies the requirements of Clause 26 of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors):

22 Clause 26 of SEPP Seniors provides that, prior to the grant of consent, the consent authority must be satisfied that residents of the proposed development will have appropriate access to shops, bank service providers and other retail and commercial services, community services and recreation facilities, and the practice of a general medical practitioner.

23 Although the site is situated more than 400m away from the services identified at cl 26(1), the proposed development complies with these access requirements in accordance with cl 26(2)(b), since there is a public transport service, being the on- demand "Keo Ride" service,

available to residents who occupy the proposed development, located not more than 400m from the site by means of a suitable access pathway. The amended DA includes footpath upgrades and pedestrian refuges within the vicinity of the development site necessary to meet the requirements of cl 26 of SEPP Seniors.

Consistent with the findings in *Mona Vale Holdings (NSW) Pty Ltd v Northern Beaches Council*, this application seeks to rely on Keoride as a public transport service in satisfaction of the requirements of Clause 26 of SEPP Seniors, and to delete Condition Nos. 18(d), 20 and 20A of the development consent. Condition 1 is also proposed to be modified to delete reference to public works plans that are no longer relevant being:

- P3 – Path Detail Plan Sheet No.1
- P4 – Path Detail Plan Sheet No.2
- P5 – Path Detail Plan Sheet No.3
- P6 – Path Detail Plan Sheet No.4

Statutory Planning Framework

Section 4.55(8) of the EPAA enables the Court to consider modifications to development consents granted by the Court:

(8) Modifications by the Court *The provisions of this section extend, subject to the regulations, to enable the Court to modify a consent granted by it but, in the extension of those provisions, the functions imposed on a consent authority under subsection (1A)(c) or subsection (2)(b) and (c) are to be exercised by the relevant consent authority and not the Court.*

The proposed modification otherwise needs to satisfy the relevant provisions of Section 4.55(2) of the EPAA:

(2) 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 development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and*
- (b) *it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent*
- (c) *it has notified the application in accordance with—*
 - (i) *the regulations, if the regulations so require, or*
 - (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 the period prescribed by the regulations or provided by the development control plan, as the case may be.*

In accordance with the relevant provision at Section 4.55(2)(a), it is confirmed the proposal is 'substantially the same development' as:

- There is no change to the proposed building height, gross floor area, setbacks, car parking, landscaping, materials or finishes
- There is no change to the proposed layout of units or total number of units
- There is no change to the approved use, being for seniors housing
- The modifications proposed are external to the site, and seek to modify the approved civil works as the application seeks to rely on Keoride services for the purposes of satisfying Clause 26 of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors), which has the effect of reducing the total footprint of development (reduced construction work within the public domain).

Impact of Proposed Modifications

In accordance with the requirements at Section 4.55(3) of the EPAA, 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 impact of the proposed modification has been assessed in accordance with Section 4.15 of the EPAA below.

1. Statutory Planning Framework

1.1 State Environmental Planning Policy (Housing 2021)

State Environmental Planning Policy (Housing) 2021 (SEPP Housing) came into effect on 26 November 2021, and repealed State Environmental Planning Policy (Housing for Seniors or People with a Disability 2004). Schedule 7A of SEPP Housing is a savings and transitional provision which relates:

2 General savings provision

(1) *This Policy does not apply to the following matters—*

(a) *a development application made, but not yet determined, on or before the commencement date,*

(b) *a concept development application made, but not yet determined, on or before the commencement date,*

(c) *a staged development application made subsequent to a concept development application approval granted on or before the commencement date,*

(d) *a development consent granted on or before the commencement date,*

(da) an application to modify a development consent granted after the commencement date, if it relates to a development application made, but not determined, on or before the commencement date,

...

(2) The provisions of a repealed instrument, as in force immediately before the repeal of the repealed instrument, continue to apply to a matter referred to in subsection (1).

The implication of this provision is that SEPP Housing does not apply to the approved development, nor any subsequent modifications sought to the approved development.

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

There is no change proposed to the subject site, site area, built form, setbacks, floor area, building height, composition of units, landscaped area or car parking. It is therefore suggested there is no change to compliance of the development with respect to site related requirements of SEPP Seniors, or in relation to any development standards prescribed by the SEPP.

The proposed modification relates specifically to Clauses 26 of SEPP Seniors which prescribes requirements for location and access to facilities:

(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to—

(a) shops, bank service providers and other retail and commercial services that residents may reasonably require, and

(b) community services and recreation facilities, and

(c) the practice of a general medical practitioner.

(2) Access complies with this clause if—

(b) in the case of a proposed development on land in a local government area within the Greater Sydney (Greater Capital City Statistical Area)—there is a public transport service available to the residents who will occupy the proposed development—

(i) that is located at a distance of not more than 400 metres from the site of the proposed development and the distance is accessible by means of a suitable access pathway, and

(ii) that will take those residents to a place that is located at a distance of not more than 400 metres from the facilities and services referred to in subclause (1), and

(iii) that is available both to and from the proposed development at least once between 8am and 12pm per day and at least once between 12pm and 6pm each day from Monday to Friday (both days inclusive),

and the gradient along the pathway from the site to the public transport services (and from the public transport services to the facilities and services referred to in subclause (1)) complies with subclause (3), or

The modified application relies on Keoride to satisfy these requirements.

arc traffic + transport reviewed the intended deletion of these conditions, and have prepared a Transport Assessment, affirming deletion of these conditions would result in the developments continued satisfaction of Clause 26 of the SEPP. The Assessment concludes as follows:

The Keoride services in the Northern Beaches meet all of the requirements for public transport as detailed in Clause 26, including compliance as a permanent public transport service, and compliance with walk distances between the Site and set down locations.

Keoride provides significantly superior public transport outcomes than are available to most seniors living sites across Sydney, including on-demand services operating for more than 12 hours every day of the week; access to accessible (wheelchair capable) services; and access to numerous centres with Keoride hubs across the Northern Beaches which provide all of the essential services required in Clause 26.

There is very significant kerbside space in the vicinity of the Site for a Keoride vehicle to set down in close proximity to the Site, including the new and upgraded footpaths in North Avalon Road between the Site and Catalina Crescent which are not affected by the Modification.

Further to the Bassett Proceedings, both the LEC and Council have agreed that Keoride does provide a permanent public transport service that provides full compliance with Clause 26.

As a result, the conditioned works to provide access to the Barrenjoey Road bus stops are no longer required to provide access to public transport in full accordance with Clause 26.

The Transport Assessment further notes that despite the Keoride public transport service guaranteeing set down locations within 400 metres of the site (complying with the requirements of the SEPP), test trips have revealed the pick up and drop off locations have essentially been to the door:

Significant kerbside space for Keoride set down is available in North Avalon Road, and also in Tasman Road, within 400m of the Site. Notwithstanding, a number of Keoride trips were undertaken in February 2023 to determine the exact locations where pick-up and drop-off occurred in the vicinity of the Site.

While a more detailed record of each of these trips is provided in Appendix F, the Keoride records (and accompanying photos provided by Armada Avalon Pty Ltd) show that all trips to and from the Site had a set down location immediately adjacent to the Site on the southern side of North Avalon Road, i.e. the walk distance to the Site was essentially zero.

Accessible Building Solutions (ABS) have also reviewed the proposal and confirm that deletion of Condition Nos. 20 and 20A still allow for a development that provides a suitable access pathway to access transport and subsequent necessary services in accordance with Clause 26 of SEPP Seniors:

It is proposed that the footpath upgrade works required in North Avalon Rd will be implemented allowing the pick up point to be located within this area of footpath. This provides a travel distance of less than 350m from the site on an accessible path to the pickup/drop off point.

Conclusion

On the basis of the above, I consider that a suitable access pathway by means of a sealed footpath which is safe and suitable for access by means of an electric wheelchair, motorised cart or the like, and in accordance with the distance of 400m and average gradient of less than 1:14

will be achieved from the site to a pickup point located between the site and Barrenjoey Rd. I also believe that the Keoride service will be suitable as a means of public transport.

It is concluded the proposed modification does not alter the compliance of the approved development with Clause 26 of SEPP Seniors, and as the modification results in a development that is considered substantially the same, where no works are proposed, other than reduction in civil works, it is advised the proposed modification ensures satisfaction of standards and requirements of SEPP Seniors in accordance with the approved development.

1.3 Pittwater Local Environmental Plan 2014

The proposed modification continues to ensure the development complies with all relevant development standards and requirements of the Pittwater Local Environmental Plan 2014 (LEP).

The proposed modification does not alter compliance of the approved development when assessed against the prescribed requirements of the LEP, and is consistent with its stated aims which include to improve access throughout Pittwater by facilitating the use of public transport, and encourage a range of housing in appropriate locations that provides for the needs of the community both now and in the future.

1.4 Pittwater 21 Development Control Plan

The purpose of this plan is to provide best practice standards for development.

There is however no change proposed to the built form, setbacks, floor area, building height, composition of units, landscaped area or car parking. It is therefore suggested there is no change to compliance of the development with respect to the requirements of the Pittwater DCP.

The proposed modification does not alter the built form, but rather relates to accessibility of facilities and services as prescribed by State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

The subject site is located in the Avalon Beach locality as identified at Part A4.1 of the DCP. Controls for this locality are established at Part D1 of the DCP. Controls in this part relate to character, colours and materials, building lines, building envelopes, landscaping, fencing and retaining walls. No changes are proposed to these elements of the approved development, and therefore no further assessment against this chapter of the DCP is required.

Part B6 provides controls relating to Access and Parking. These controls relate to vehicular access and do not prescribe requirements for accessibility to services within the public domain for seniors housing developments. No change is proposed to the approved vehicular access or car parking arrangements upon the site.

Part C1 of the DCP establishes design criteria for all forms of residential development, including seniors housing, and Part C1.21 establishes controls that explicitly relate to development for the purposes of seniors housing.

Controls are prescribed in relation to the cumulative impacts of seniors housing within a locality, requiring consideration to be given to bulk, building height, scale and character, and to impacts relating to accumulation of Seniors Housing developments to create a dominant social type in the surrounding neighbourhood.

There is however no change to the approved composition bulk, building height, scale or character of the approved development.

Part C1.24 establishes controls that relate to development within the road reserve, and seeks to ensure that development is consistent with the desired character of the Pittwater streetscape, and is consistent in the design and construction of landscape works in the road reserve.

The following controls are established for the approved development type:

Residential Development - comprising 6 or more dwellings

Infrastructure General

Development with a frontage within a residential street is required to design and construct (Section 139 approval required from Council):

- a footpath 1.5m wide, or
- where a multi-use pathway is required the footpath is to be constructed to a 2.1m width, and
- kerb and gutter to Council specification, and the making good of the road pavement from the kerb and guttering to the road centreline, and (See note below)
- streetlighting and
- landscaping for the full width of the development site on the public road reserve.

There are no changes to the proposed public domain works or landscaping approved adjacent the site's frontage to North Avalon Road (i.e. Approved Plan P11 – Path Detail Plan Sheet No. 9 (Revision F) prepared by ACOR Consultants Pty Ltd, dated 6 July 2021, as referenced by Condition No. 1 of the Development Consent).

2. Impacts of the Development

2.1 Location & Access to Facilities

Condition Nos. 18(d), 20 and 20A relate to requirements for public domain works to ensure the site is able to be serviced in accordance with Clause 26 of SEPP Seniors.

arc traffic + transport reviewed the intended deletion of these conditions, and have prepared a Transport Assessment, affirming deletion of these conditions would result in the developments continued satisfaction of Clause 26 of the SEPP. The Assessment concludes as follows:

The Keoride services in the Northern Beaches meet all of the requirements for public transport as detailed in Clause 26, including compliance as a permanent public transport service, and compliance with walk distances between the Site and set down locations.

Keoride provides significantly superior public transport outcomes than are available to most seniors living sites across Sydney, including on-demand services operating for more than 12 hours every day of the week; access to accessible (wheelchair capable) services; and access to numerous centres with Keoride hubs across the Northern Beaches which provide all of the essential services required in Clause 26.

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Accessible Building Solutions (ABS) have also reviewed the proposal and confirm that deletion of Condition Nos. 20 and 20A still allow for a development that provides a suitable access pathway to access transport and subsequent necessary services in accordance with Clause 26 of SEPP Seniors:

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Conclusion

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No change is proposed to the remainder of Condition No. 18 of the development consent which requires a vehicular crossing, construction of a 1.5 metre wide footpath between proposed pedestrian pathways at the frontage of the site and the Tasman Road/North Avalon Road intersection, including the necessary kerb ramp at the corner, and widening of the existing footpath on the southern side of North Avalon Road that runs immediately adjacent to the kerb (in front of Nos. 5, 7, 9, 11 and 13 North Avalon Road and No. 64 Tasman Road) to achieve a width of 1.5 metres.

The modification removes elements of public domain infrastructure prescribed by conditions of the development consent that are no longer necessary to satisfy requirements relating to location and access to facilities, as there is no longer a nexus by which to demand these facilities be provided. The modification is therefore determined to have a negligible environmental impact.

3. Suitability of the site

The site is not affected by any natural or technological constraint that would prevent development for the purpose of seniors housing in accordance with the zone objectives.

The modification proposed has no impact on determining the suitability of the site to accommodate the seniors housing development.

4. Submissions

Any submissions arising from public exhibition, notification of adjoining property owners, or perhaps via notification to those that made submissions to the previous application, will be responded to when the content of such submissions in relation to this modification are made available.

5. Public Interest

The proposed modification is considered to be in the public interest, as the development promotes the provision of housing which meets the diverse needs of the community, whilst making efficient use of existing infrastructure and services, and is otherwise demonstrated to be consistent with the requirements for accessibility of facilities and services as prescribed by State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004.

Threshold Test

The proposal remains substantially the same development as that approved in Development Application No. 2019/1260, being for demolition of existing structures and construction of a seniors housing development comprising 10 dwellings.

The modification of conditions relates to impacts of a new public transport regime being available in the locality, which has the effect of reducing the amount of public domain infrastructure required by the proponent to satisfy requirements of the SEPP in relation to location and access to facilities.

Conclusion

The proposed modification will have a negligible environmental impact.

The development to which the consent as modified relates is otherwise substantially the same development as that for which the consent was originally granted.

Yours sincerely



Daniel McNamara
Director