Land and Environment Court
New South Wales

Case Name:	Waterbrook Bayview Pty Ltd v Northern Beaches Council
Medium Neutral Citation:	**[2019] NSWLEC 1112**
Hearing Date(s):	21 – 25 January and 15 February 2019
Date of Orders:	22 March 2019
Date of Decision:	22 March 2019
Jurisdiction:	Class 1
Before:	Gray C
Decision:	The Court orders that: (1) The appeal is dismissed. (2) The development application (DA2017/1274) for a golf course redevelopment and the construction of a seniors housing development and associated works at 1825 Pittwater Road and 52 Cabbage Tree Road, Bayview, is refused. (3) The exhibits are returned, except for Exhibits 1, 2, 3, 5, 6, A, E and F.
Catchwords:	APPEAL – development application – golf club redevelopment and seniors living – serviced self-care housing – site compatibility certificate required - whether the existing site compatibility certificate certified that development of the kind in the development application was compatible – whether the Court has the power to amend the site compatibility certificate
Legislation Cited:	Administrative Arrangements (Administrative Changes – Ministers and Public Service Agencies) Order 2014 Biodiversity Conservation Act 2016 Biodiversity Conservation (Savings and Transitional) Regulation 2017 Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Amendment Act 2017

	Interpretation Act 1987 Land and Environment Court Act 1979 Local Government Act 1919 Pittwater Local Environmental Plan 2014 Retirement Villages Act 1999 Roads Act 1993 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 State Environmental Planning Policy (State and Regional Development) 2011
Cases Cited:	Australian Leisure and Hospitality Group Pty Ltd v Manly Council (No 5) [2012] NSWLEC 53 Botany Bay City Council v Saab Corp Pty Ltd [2011] NSWCA 308 Brown v Randwick City Council [2011] NSWLEC 172 Corbett v State of New South Wales [2006] NSWCA 138 Goldberg v Waverley Council [2007] NSWLEC 259; (2007) 156 LGERA 27 Leung v Minister for Immigration and Multicultural Affairs (1997) 150 ALR 76 McDougall v Warringah Shire Council (1993) 30 NSWLR 258 Michael Bald & Associates v Byron Council [1999] NSWLEC 78 Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597 Parkes Rural Distributions Pty Ltd v Glasson & Anor (1986) 7 NSWLR 332 Ryan v Port Stephens Council [2008] NSWLEC 66 Ryde Municipal Council v Royal Ryde Homes (1970) 19 LGRA 321 Shellharbour Municipal Council v Rovili Pty Ltd (1989) 15 NSWLR 104 Sloane v Minister for Immigration, Local Government and Ethnic Affairs [1992] FCA 414 Sydney City Council v Claude Neon Ltd (1989) 15 NSWLR 724 Wechsler v Auburn Council (1997) 130 LGERA 134 Whittaker v Northern Beaches Council (No 3) [2018] NSWLEC 143 Wirrabara Village Pty Limited v The Secretary of the Department of Planning and Environment [2018] NSWLEC 138
Texts Cited:	New South Wales Department of Planning and Environment, Planning Circular PS18-009 Pittwater 21 Development Control Plan 2014

Category:	Principal judgment
Parties:	Waterbrook Bayview Pty Ltd (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: I Hemmings SC with J Farrell (Applicant) A Stafford (Respondent) Solicitors: Mills Oakley (Applicant) King and Wood Mallesons (Respondent)
File Number(s):	2018/257108
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER**: Within Bayview Valley, south-east of the Warriewood escarpment and south-west of Winnererremy Bay, are the grounds of the Bayview Golf Club. The grounds cover an area of 36.8 hectares and straddle Cabbage Tree Road, with a golf course that ranges in elevation from sea level where Cahill Creek runs through the south of the course, to 40m at the north-west toward the Warriewood escarpment. Waterbrook Bayview Pty Ltd ("Waterbrook") seeks development consent to carry out a golf course upgrade, as well as to construct seniors housing on part of the northern half of the golf course. In pursuit of this, it lodged a development application with Northern Beaches Council ("the Council"), which was refused by the Sydney North Planning Panel ("the Panel") on 8 August 2018. Waterbrook appeals against that decision pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* ("EPA Act").

2 The appeal was listed before me for a conciliation conference pursuant to s 34 of the *Land and Environment Court Act 1979* ("LEC Act"), which commenced with a site view on 21 November 2018. The parties were unable to reach an agreement at or following the conciliation, but agreed to me disposing of the proceedings following a later hearing, pursuant to s 34(4)(b)(i) of the LEC Act.

The proposed development

3 The proposed integrated golf course upgrade and seniors housing project includes golf course layout reconfiguration, new pathways that allow for improved access within the course and the replacement of the current shed with a new maintenance facility. The golf course upgrade also includes:

- Flood mitigation works, including raising sections of the golf course to improve playability and reduce inundation, and the rehabilitation of creek lines through the course; and

- Revegetation of the surrounding golf course to improve the flora and fauna corridors that will connect the upper catchment of the golf course with the lower portion of the course and Bayview.

4 The proposed seniors housing is for 85 serviced self-care units and ancillary facilities, which includes the construction of 7 separate 3-storey buildings to be operated as a retirement village. The proposed retirement village includes basement parking for 161 cars, a range of ancillary facilities including offices, a restaurant, a café, a library, a hair and beauty salon, a fitness centre and an indoor heated pool therapy centre, as well as landscaping works and augmentation of services and utilities to service the development.

5 The development application also proposes to construct a road facilitating access from Cabbage Tree Road into the seniors housing development, and a roundabout on Cabbage Tree Road (and associated pedestrian crossing). This also includes the construction of an access pathway from the seniors living site through to the bus stop on the eastern side of Annam Road.

The Council's position on the appeal

6 Pursuant to s 8.15(4) of the EPA Act, the Council is the respondent on the appeal. The Council opposes the grant of development consent, and considers that there is no power for development consent to be granted. The Council's position is that if there is power to grant development consent, the application ought to be refused on its merits.

7 The Council's position is based on a number of contentions, which can be summarised as follows:

- The development is not of the kind certified in the Site Compatibility Certificate ("SCC") granted by the Deputy Secretary of the Department of Planning and Environment on 27 March 2017 ("Existing SCC") and does not satisfy the requirement in the SCC for the seniors housing to be within the identified footprint.

- There is no power for the Court to consider and make an amendment to the Existing SCC.

- If there is power for the Court to amend the Existing SCC, the Court ought not amend the Existing SCC because it ought not be satisfied that the proposed development is compatible with the surrounding land uses.

- The Court lacks power to grant consent to the development application because Waterbrook has not complied with s 7.7(2) of the *Biodiversity Conservation Act 2016*, and Waterbrook does not have the benefit of the savings and transitional provisions in the Biodiversity Conservation (Savings and Transitional) Regulation 2017 ("the BCST Regulation"), because the development application was required to be accompanied by, but does not include, a Species Impact Statement ("SIS").

- The Court is precluded from granting consent to the proposed serviced self-care housing because it ought not be satisfied that residents of the proposed development will have reasonable access to home delivered meals, personal care, home nursing, assistance with housework, and an adequate bus service.

- The proposed seniors living development is not compatible with the context of the site, does not recognise or implement the desirable elements of the location's current character, is inconsistent with the existing and desired character of the locality and is inconsistent with the Apartment Design Guide.

- The proposed development is likely to have unreasonable impacts on the natural environment, in circumstances where the survey and assessment process has identified five endangered ecological communities, two threatened species of plants, two threatened species of birds, seven threatened species of mammals, and the presence of a high priority wildlife corridor.

Determining the appeal

8 In considering the development application the subject of the appeal, the following issues therefore arise for determination:

- Whether there is power to grant development consent based on the Existing SCC,
- Whether the Court, in exercising the functions of the consent authority, has the power to amend the Existing SCC,
- If the Court has the power to amend the SCC, whether the Court ought to exercise that power to amend the Existing SCC,
- Whether a Species Impact Statement is required,
- Whether residents of the proposed development will have reasonable access to home delivered meals, personal care, home nursing, assistance with housework, and an adequate bus service,
- Whether the proposed seniors living development is compatible in the context of the site, recognises and implements the desirable elements of the location's current character, and is consistent with the existing and desired character of the locality and the Apartment Design Guide, and
- Whether the proposed development will have unreasonable impacts on the natural environment.

9 For reasons that are set out below, I have determined that there is no power to grant development consent based on the Existing SCC, and that the Court, in exercising the functions of the consent authority, does not have the power to amend the Existing SCC. As such, although significant expert evidence was given with respect to the remaining issues in contention, any

consideration of those contentions would be of no benefit given that I have determined that there is no power to grant development consent.

The site and its locality

10 The site, comprising the grounds of the Bayview Golf Club, is located at 1825 Pittwater Road and 52 Cabbage Tree Road, Bayview. It comprises 12 separate lots of land, legally identified as Lot 300 in DP 1139238, Lots 1-3 in DP 986894, Lot 191 in DP 1039481, Lot 150 in DP 1003518, Lot A in DP 339874, Lot 1 in DP 19161, Lot 1 in DP 662920, and Lots 5-7 in DP 45114.

11 The site is irregular in shape, and is predominantly used for the purposes of fairways and greens associated with the golf club. The clubhouse is located directly adjoining and accessed from Pittwater Road. An aerial photograph of the site is at Figure 1.

Figure 1: Aerial view of the golf course (Source: SIXmaps.com)

12 The locality is characterised by predominantly single and two storey dwelling houses, as well as a number of seniors living developments that are proximate to the site.

Land zoning and planning controls

13 The site is zoned RE2 Private Recreation pursuant to the Pittwater Local Environmental Plan 2014 ("PLEP 2014"). Part of the site is flood affected, and the site is therefore subject to the provisions of cll 7.3 and 7.4 of the PLEP 2014. Those clauses provide, relevantly:

> **7.3 Flood planning**
> ...
>
> (3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development:
>
> (a) is compatible with the flood hazard of the land, and
>
> (b) will not significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and
>
> (c) incorporates appropriate measures to manage risk to life from flood, and
>
> (d) will not significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and
>
> (e) is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding.
>
> ...
>
> **7.4 Floodplain risk management**
> ...
>
> (3) Development consent must not be granted to development for the following purposes on land to which this clause applies unless the consent authority is satisfied that the development will not, in flood events exceeding the flood planning level, affect the safe occupation of, and evacuation from, the land:
>
> ...
>
> (j) seniors housing ...

14 The entire site is shown as area of biodiversity on the Biodiversity Map of the PLEP 2014, and is therefore subject to the provisions of cl 7.6, which provide:

> **7.6 Biodiversity**
> ...

(3) Before determining a development application for development on land to which this clause applies, the consent authority must consider:

(a) whether the development is likely to have:

(i) any adverse impact on the condition, ecological value and significance of the fauna and flora on the land, and

(ii) any adverse impact on the importance of the vegetation on the land to the habitat and survival of native fauna, and

(iii) any potential to fragment, disturb or diminish the biodiversity structure, function and composition of the land, and

(iv) any adverse impact on the habitat elements providing connectivity on the land, and

(b) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

(4) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:

(a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or

(b) if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or

(c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

15 Part of the site, including part of the site proposed to be used for seniors housing, contains land identified as "Geotechnical Hazard H1" pursuant to the provisions of the PLEP 2014. As a result, cl 7.7 applies and provides:

7.7 Geotechnical hazards

...

(3) Before determining a development application for development on land to which this clause applies, the consent authority must consider the following matters to decide whether or not the development takes into account all geotechnical risks:

(a) site layout, including access,

(b) the development's design and construction methods,

(c) the amount of cut and fill that will be required for the development,

(d) waste water management, stormwater and drainage across the land,

(e) the geotechnical constraints of the site,

(f) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

(4) Development consent must not be granted to development on land to which this clause applies unless:

(a) the consent authority is satisfied that the development will appropriately manage waste water, stormwater and drainage across the land so as not to affect the rate, volume and quality of water leaving the land, and

(b) the consent authority is satisfied that:

(i) the development is designed, sited and will be managed to avoid any geotechnical risk or significant adverse impact on the development and the land surrounding the development, or

(ii) if that risk or impact cannot be reasonably avoided—the development is designed, sited and will be managed to minimise that risk or impact, or

(iii) if that risk or impact cannot be minimised—the development will be managed to mitigate that risk or impact.

16 Part of the site, including part of the area proposed to be used for seniors housing, is identified as being bush prone in the NSW RFS Bush Fire Prone Land Map established pursuant to s 10.3 of the EPA Act.

Desired character statement for Mona Vale Locality

17 The site is located within the Mona Vale Locality, as identified by the Pittwater 21 Development Control Plan 2014 ("PDCP 2014"). Clause A4.9 of the PDCP 2014 describes the desired character of the Mona Vale Locality as follows:

"The Mona Vale locality will contain a mix of residential, retail, commercial, industrial, recreational, community, and educational land uses.

Existing residential areas will remain primarily low-density with dwelling houses a maximum of two storeys in any one place in a landscaped setting, integrated with the landform and landscape. Secondary dwellings can be established in conjunction with another dwelling to encourage additional opportunities for more compact and affordable housing with minimal environmental impact in appropriate locations. Any dual occupancies will be

located on the valley floor and lower slopes that has less tree canopy coverage, species and habitat diversity and fewer other constraints to development. Any medium density housing will be located within and around commercial centres, public transport and community facilities.

Retail, commercial and light industrial land uses will be employment-generating. The Mona Vale commercial centre status will be enhanced to provide a one-stop convenient centre for medical services, retail and commerce, exploiting the crossroads to its fullest advantage and ensuring its growth and prosperity as an economic hub of sub-regional status. The permissible building height limit is increased to promote economic growth within the centre. The Mona Vale Hospital, as a regional facility servicing the Peninsula, is an essential part of the future local economy.

Future development is to be located so as to be supported by adequate infrastructure, including roads, water and sewerage facilities, and public transport.

Future development will maintain a building height limit below the tree canopy and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Contemporary buildings will utilise facade modulation and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape, and minimise site disturbance. Development will be designed to be safe from hazards.

The design, scale and treatment of future development within the Mona Vale commercial centre will reflect principles of good urban design. Landscaping will be incorporated into building design. Outdoor cafe seating will be encouraged.

Light industrial land uses in Darley and Bassett Streets will be enhanced as pleasant, orderly, and economically viable areas.

A balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment, and the development of land. As far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment, and to enhance wildlife corridors.

Heritage items and conservation areas indicative of the Guringai Aboriginal people and of early settlement in the locality will be conserved.

Vehicular, pedestrian and cycle access within and through the locality will be maintained and upgraded. Improved public transport, pedestrian accessibility and amenity, carparking and an efficient surrounding local network will support the commercial centre, moving people in and out of the locality in the most efficient manner. The design and construction of roads will manage local traffic needs, minimise harm to people and fauna, and facilitate co-location of services and utilities."

Serviced self-care housing is permissible on the site

18 Pursuant to the land use table in the PLEP 2014, seniors housing is an innominate prohibited use in the RE2 Private Recreation zone. However, serviced self-care housing is permissible on the site as a result of provisions of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 ("SEPP HSPD").

19 The SEPP HSPD applies to the site by virtue of cl 4, which provides:

> **4 Land to which Policy applies**
>
> (1) **General**
> This Policy applies to land within New South Wales that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes, but only if:
>
> (a) development for the purpose of any of the following is permitted on the land:
>
> (i) dwelling-houses,
>
> (ii) residential flat buildings,
>
> (iii) hospitals,
>
> (iv) development of a kind identified in respect of land zoned as special uses, including (but not limited to) churches, convents, educational establishments, schools and seminaries, or
>
> (b) the land is being used for the purposes of an existing registered club.

20 The land on which the seniors housing is proposed falls within the description of "land that adjoins land zoned primarily for urban purposes", as it adjoins land to the east that is zoned R2 Low Density Residential. As the golf course and club fits within a use for the purposes of an existing registered club, the SEPP HSPD applies pursuant to cl 4(1)(b).

21 Clause 15 of the SEPP HSPD provides as follows:

15 What Chapter does

This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy:

(a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing, and

(b) development on land that adjoins land zoned primarily for urban purposes for the purpose of any form of seniors housing consisting of a hostel, a residential care facility or serviced self-care housing.

22 Clause 15(b) therefore makes it clear that the chapter allows "seniors housing consisting of a hostel, a residential care facility or serviced self-care housing" on land that adjoins land zoned for urban purposes. Consistent with this, cl 17 restricts the type of seniors housing that can be approved on the site to either a hostel, a residential care facility, or serviced self-care housing. Further, for serviced self-care housing, the housing must be either for people with a disability, in combination with a residential care facility, or as a retirement village within the meaning of the *Retirement Villages Act 1999*. Clause 17 provides:

17 Development on land adjoining land zoned primarily for urban purposes

(1) Subject to subclause (2), a consent authority must not consent to a development application made pursuant to this Chapter to carry out development on land that adjoins land zoned primarily for urban purposes unless the proposed development is for the purpose of any of the following:

(a) a hostel,

(b) a residential care facility,

(c) serviced self-care housing.

(2) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development for the purposes of serviced self-care housing on land that adjoins land zoned primarily for urban purposes unless the consent authority is satisfied that the housing will be provided:

(a) for people with a disability, or

(b) in combination with a residential care facility, or

(c) as a retirement village (within the meaning of the *Retirement Villages Act 1999*).

23 Serviced self-care housing is defined in cl 13 as falling within the general term "self-contained dwelling" and meaning "seniors housing that consists of self-contained dwellings where the following services are available on the site: meals, cleaning services, personal care, nursing care".

24 "Self-contained dwelling" is defined in the same clause, to mean:

> a dwelling or part of a building (other than a hostel), whether attached to another dwelling or not, housing seniors or people with a disability, where private facilities for significant cooking, sleeping and washing are included in the dwelling or part of the building, but where clothes washing facilities or other facilities for use in connection with the dwelling or part of the building may be provided on a shared basis.

25 The proposed seniors living development is for serviced self-care housing, as serviced self-contained dwellings in a retirement village within the meaning of the *Retirement Villages Act 1999*, and is therefore a permissible use.

Pre-conditions to the grant of development consent under SEPP HSPD

26 However, there are a number of pre-conditions to the grant of development consent for the proposed serviced self-care housing, some of which are contained in cll 23, 42 and 43. These clauses preclude the grant of development consent unless the consent authority is satisfied of certain matters, including the separation from the club facilities and the provision of certain services. Those clauses provide as follows:

> **23 Development on land used for the purposes of an existing registered club**
>
> (1) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development on land that is used for the purposes of an existing registered club unless the consent authority is satisfied that:
>
> (a) the proposed development provides for appropriate measures to separate the club from the residential areas of the proposed development in order to avoid land use conflicts, and

(b) an appropriate protocol will be in place for managing the relationship between the proposed development and the gambling facilities on the site of the club in order to minimise harm associated with the misuse and abuse of gambling activities by residents of the proposed development.

(2) For the purposes of subclause (1) (a), some of the measures to which a consent authority may have regard include (but are not limited to) the following:

(a) any separate pedestrian access points for the club and the residential areas of the proposed development,

(b) any design principles underlying the proposed development aimed at ensuring acceptable noise levels in bedrooms and living areas in the residential areas of the proposed development.

...

42 Serviced self-care housing

(1) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development for the purpose of serviced self-care housing on land that adjoins land zoned primarily for urban purposes unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have reasonable access to:

(a) home delivered meals, and

(b) personal care and home nursing, and

(c) assistance with housework.

(2) For the purposes of subclause (1), residents of a proposed development do not have reasonable access to the services referred to in subclause (1) if those services will be limited to services provided to residents under Government provided or funded community based care programs (such as the Home and Community Care Program administered by the Commonwealth and the State and the Community Aged Care and Extended Aged Care at Home programs administered by the Commonwealth).

43 Transport services to local centres

(1) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development for the purpose of serviced self-care housing on land that adjoins land zoned primarily for urban purposes unless the consent authority is satisfied that a bus capable of carrying at least 10 passengers will be provided to the residents of the proposed development:

(a) that will drop off and pick up passengers at a local centre that provides residents with access to the following:

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

(ii) community services and recreation facilities,

(iii) the practice of a general medical practitioner, and

(b) that is available both to and from the proposed development to any such local centre at least once between 8am and 12pm each day and at least once between 12pm and 6pm each day.

(2) Subclause (1) does not apply to a development application to carry out development for the purposes of the accommodation of people with dementia.

(3) In this clause, bank service provider has the same meaning as in clause 26.

The requirement for a site compatibility certificate

27 An additional pre-condition to the grant of development consent is imposed by cl 24, which requires that for development on land that is used for the purposes of a registered club, a site compatibility certificate ("SCC") is required. Specifically, cl 24(2) provides:

> (2) A consent authority must not consent to a development application to which this clause applies unless the consent authority is satisfied that the relevant panel has certified in a current site compatibility certificate that, in the relevant panel's opinion:
>
> (a) the site of the proposed development is suitable for more intensive development, and
>
> (b) development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding environment having regard to (at least) the criteria specified in clause 25 (5) (b).

28 SEPP HSPD was amended on 1 October 2018. Prior to its amendment, cl 24(2) referred to the certification of the "Director-General" in lieu of the relevant panel.

29 In cl 54A of the SEPP HSPD a savings provision applies, such that the reference in cl 24 to the relevant panel extends to the Planning Secretary for a current SCC issued before 1 October 2018. It provides:

> (3) A reference in clause 24 (as amended by the Policy referred to in subclause (1)) to the relevant panel extends to the Planning Secretary in respect of a current site compatibility certificate issued before 1 October 2018.

30 As such, the pre-condition to the grant of consent referred to in cl 24(2) can be satisfied by a SCC that was issued by the Planning Secretary before 1 October 2018 and that remains current.

The procedure for the issue of a site compatibility certificate

31 Clause 25 particularises the process for applying for a SCC, and the relevant factors for consideration. Clause 25, in its current form, also sets out additional requirements with respect to applications for a SCC where there is already a current SCC with respect to the land or proximate land. It provides as follows:

> **25 Application for site compatibility certificate**
>
> (1) An application for a site compatibility certificate for the purposes of clause 24 may be lodged with the Department:
>
> (a) by the owner of the land on which the development is proposed to be carried out, or
>
> (b) by any other person, with the consent of the owner of that land.
>
> (2) An application:
>
> (a) must be:
>
> (i) in writing, and
>
> (ii) in the form (if any) approved by the Planning Secretary from time to time, and
>
> (iii) accompanied by such documents and information as the Planning Secretary may require, and
>
> (b) specify, in the manner required by the Planning Secretary, whether any site compatibility certificates have previously been issued in respect of the land (or any part of the land) to which the application relates, and
>
> (c) for land that is next to proximate site land—must be accompanied by a cumulative impact study that has been prepared in accordance with any guidelines issued by the Planning Secretary from time to time.
>
> ...
>
> (2A) Land is ***next to proximate site land*** for the purposes of this clause if the land (or any part of the land) is located within a one kilometre radius of 2 or more other parcels of land (the ***proximate site land***) in respect of each of which either:

(a) there is a current site compatibility certificate, or

(b) an application for a site compatibility certificate has been made but not yet determined.

(2B) However, any other parcel of land for which development consent for the purposes of seniors housing has been granted is to be disregarded when determining whether land is next to proximate site land even if a site compatibility certificate has been granted in respect of that parcel.

(2C) A ***cumulative impact study*** for the purposes of this clause is a study that considers whether the impacts associated with the proposed development on the land to which an application relates (when considered together with the impacts of proposed developments on the proximate site land concerned):

(a) take into account the capacity of existing or future services and infrastructure (including water, reticulated sewers and public transport) to meet the demands arising from the proposal and any proposed financial arrangements for infrastructure provision, and

(b) take into account the capacity of existing or future road infrastructure to meet any increase in traffic as a result of proposed development.

(2D) Without limiting subclause (2), the relevant panel may require an applicant to provide a cumulative impact study even if it has not been provided with the application if the relevant panel considers that it is necessary for it to be provided to determine whether the land concerned is suitable for more intensive development.

(3) The Planning Secretary must:

(a) forward the application to the relevant panel within 35 days after it is lodged if it is reasonably practicable to do so, and

(b) provide a copy of the application to the General Manager of the council for the area in which the development concerned is proposed to be carried out (the ***relevant General Manager***) within the period of 7 days after the application is lodged.

(4) Subject to subclause (5), the relevant panel may determine the application by issuing a certificate or refusing to do so.

(5) The relevant panel must not issue a site compatibility certificate unless the relevant panel:

(a) has taken into account the written comments (if any) concerning the consistency of the proposed development with the criteria referred to in paragraph (b) that are received from the relevant General Manager within 21 days after the application for the certificate was made, and

(b) is of the opinion that the proposed development is compatible with the surrounding land uses having regard to (at least) the following criteria:

(i) the natural environment (including known significant environmental values, resources or hazards) and the existing uses and approved uses of land in the vicinity of the proposed development,

(ii) the impact that the proposed development is likely to have on the uses that, in the opinion of the relevant panel, are likely to be the future uses of that land,

(iii) the services and infrastructure that are or will be available to meet the demands arising from the proposed development (particularly, retail, community, medical and transport services having regard to the location and access requirements set out in clause 26) and any proposed financial arrangements for infrastructure provision,

(iv) in the case of applications in relation to land that is zoned open space or special uses—the impact that the proposed development is likely to have on the provision of land for open space and special uses in the vicinity of the development,

(v) without limiting any other criteria, the impact that the bulk, scale, built form and character of the proposed development is likely to have on the existing uses, approved uses and future uses of land in the vicinity of the development,

(vi) if the development may involve the clearing of native vegetation that is subject to the requirements of section 12 of the *Native Vegetation Act 2003*—the impact that the proposed development is likely to have on the conservation and management of native vegetation,

(vii) the impacts identified in any cumulative impact study provided in connection with the application for the certificate, and

(c) in relation to an application that applies to land in respect of which a site compatibility certificate has previously been issued (the ***previously certified land***) and other land (the ***additional land***)—is of the opinion that:

(i) the additional land (independently of the previously certified land) adjoins land zoned primarily for urban purposes or subclause (5A) applies, and

(ii) if a site compatibility certificate was issued in respect of the previously certified land on the basis that the land adjoined land zoned primarily for urban purposes—the previously certified land continues to adjoin land zoned primarily for urban purposes.

(5A) This subclause applies for the purposes of subclause (5) (c) if:

(a) the proposed development on the additional land does not include any new or additional structures for use as accommodation, and

(b) where the previous site compatibility certificate specified a maximum number of dwellings for the previously certified land—the total number of dwellings on the additional land and previously certified land combined will not exceed that maximum number.

(6) Without limiting subclause (4) (a), the relevant panel may refuse to issue a certificate if the relevant panel considers that the development is likely to have an adverse effect on the environment.

(7) A certificate may certify that the development to which it relates is compatible with the surrounding land uses only if it satisfies certain requirements specified in the certificate.

(8) (Repealed)

(9) A certificate remains current for a period of 24 months after the date on which it is issued by the relevant panel.

(10) To avoid doubt, a site compatibility certificate:

(a) cannot be varied during its currency to cover additional land, and

(b) does not affect the zoning of the land to which it relates under another environmental planning instrument.

32 Prior to its amendment on 1 October 2018 and at the time that the development application was determined by the Panel, the terms of cl 25 were as follows:

25 Application for site compatibility certificate

(1) An application for a site compatibility certificate for the purposes of clause 24 may be made to the Director-General:

(a) by the owner of the land on which the development is proposed to be carried out, or

(b) by any other person, with the consent of the owner of that land.

(2) An application must be:

(a) in writing, and

(b) in the form (if any) approved by the Director-General from time to time, and

(c) accompanied by such documents and information as the Director-General may require.

...

(3) Subject to subclause (4) (b), the Director-General must provide a copy of the application to the General Manager of the council for the area in which the development concerned is proposed to be carried out (the ***relevant General Manager***) within the period of 7 days after the application is made.

(4) Subject to subclause (5), the Director-General:

(a) may determine the application by issuing a certificate or refusing to do so, and

(b) if the Director-General refuses to issue a certificate at any time within the period of 7 days after the application is made—is not required to comply with subclause (3).

(5) The Director-General must not issue a site compatibility certificate unless the Director-General:

(a) has taken into account the written comments (if any) concerning the consistency of the proposed development with the criteria referred to in paragraph (b) that are received from the relevant General Manager within 21 days after the application for the certificate was made, and

(b) is of the opinion that the proposed development is compatible with the surrounding land uses having regard to (at least) the following criteria:

(i) the natural environment (including known significant environmental values, resources or hazards) and the existing uses and approved uses of land in the vicinity of the proposed development,

(ii) the impact that the proposed development is likely to have on the uses that, in the opinion of the Director-General, are likely to be the future uses of that land,

(iii) the services and infrastructure that are or will be available to meet the demands arising from the proposed development (particularly, retail, community, medical and transport services having regard to the location and access requirements set out in clause 26) and any proposed financial arrangements for infrastructure provision,

(iv) in the case of applications in relation to land that is zoned open space or special uses—the impact that the proposed development is likely to have on the provision of land for open space and special uses in the vicinity of the development,

(v) without limiting any other criteria, the impact that the bulk, scale, built form and character of the proposed development is

likely to have on the existing uses, approved uses and future uses of land in the vicinity of the development,

(vi) if the development may involve the clearing of native vegetation that is subject to the requirements of section 12 of the *Native Vegetation Act 2003*—the impact that the proposed development is likely to have on the conservation and management of native vegetation.

(6) Without limiting subclause (4) (a), the Director-General may refuse to issue a certificate if the Director-General considers that the development is likely to have an adverse effect on the environment.

(7) A certificate may certify that the development to which it relates is compatible with the surrounding land uses only if it satisfies certain requirements specified in the certificate.

(8) The Director-General must, if it is reasonably practicable to do so, determine an application within 35 days after it is lodged.

(9) A certificate remains current for a period of 24 months after the date on which it is issued by the Director-General.

(10) The provisions of subclauses (3) and (5) (a) do not apply in relation to the determination of an application for a site compatibility certificate if the Director-General has delegated the function of determining the application to the council for the area in which the development concerned is proposed to be carried out.

33 Pursuant to cl 7(2)(b) of the Administrative Arrangements (Administrative Changes – Ministers and Public Service Agencies) Order 2014, the reference to 'Director-General' is taken to be a reference to the Secretary of the Department.

34 Therefore, whereas the current cl 25 provides for a process for application to the Secretary for determination by the relevant panel, the previous cl 25 provided for a process for application to the Secretary for determination by the Secretary. Further, the current cl 25 sets out a number of additional requirements for, and factors for consideration on, an application where there is already a SCC for the land or for proximate land. These requirements were absent from the previous cl 25.

The Deputy Secretary issued a Site Compatibility Certificate

35 The Deputy Secretary of the Department of Planning and Environment, a delegate of the Secretary, issued the Existing SCC on 27 March 2017. The Existing SCC remains current for a period of 24 months after the date of issue, that is, until 27 March 2019. It certifies, *inter alia*, that the development "described in Schedule 1 is compatible with the surrounding land uses". The development in Schedule 1 gives the project description as "To permit 95 in-fill self-care units and ancillary facilities for the purpose of seniors living."

36 At Schedule 2, there are a number of requirements imposed on the determination. Although I note that Schedule 2 does not appear to be expressly referenced as a condition of the substantive certification, cl 25(7) of the SEPP HSPD states that "[a] certificate may certify that the development to which it relates is compatible with the surrounding land uses only if it satisfies certain requirements specified in the certificate." The requirements imposed by Schedule 2 are:

> "1. Seniors housing is to be limited to the development footprint area within the site, as nominated under map Figure 4: New Study Boundary prepared by Cardno and dated February 2017.
>
> 2. The final layout, number of in-fill self-care living units and onsite facilities in the proposed seniors housing development will be subject to the resolution of issues relating to:
> • form, height, bulk, scale, setbacks and landscaping;
> • flood risk management and evacuation design responses;
> • car parking and access requirements for all existing and proposed land uses on the site; and
> • potential ecological impacts"

The Council's position on the Existing SCC

37 The Council's position is that the Existing SCC does not certify that the proposed development is compatible with the surrounding land uses, for two reasons.

38 The first reason is that the proposed development is not for the purposes of "in-fill self-care units", which is the type of development the subject of the Existing SCC. That is, the Existing SCC provides that development of "95 in-

fill self-care units and ancillary facilities for the purpose of seniors living" is compatible with the surrounding environment. The Council submits that the proposed development is instead for 85 units in serviced self-care housing, which is distinct from "in-fill self-care" units. This distinction is borne out by the separate definitions of in-fill self-care housing and serviced self-care housing, which are described in cl 13 of SEPP HSPD as two different types of self-contained dwellings. Clause 13 provides:

> **13 Self-contained dwellings**
>
> (1) **General term: "self-contained dwelling"**
> In this Policy, a *self-contained dwelling* is a dwelling or part of a building (other than a hostel), whether attached to another dwelling or not, housing seniors or people with a disability, where private facilities for significant cooking, sleeping and washing are included in the dwelling or part of the building, but where clothes washing facilities or other facilities for use in connection with the dwelling or part of the building may be provided on a shared basis.
>
> (2) **Example: "in-fill self-care housing"**
> In this Policy, *in-fill self-care housing* is seniors housing on land zoned primarily for urban purposes that consists of 2 or more self-contained dwellings where none of the following services are provided on site as part of the development: meals, cleaning services, personal care, nursing care.
>
> (3) **Example: "serviced self-care housing"**
> In this Policy, *serviced self-care housing* is seniors housing that consists of self-contained dwellings where the following services are available on the site: meals, cleaning services, personal care, nursing care.

39 The Council submits that the Existing SCC expressly adopts a defined term from the instrument under which the certification was made, and, consistent with the definitions in cl 13, the reference to "in-fill self-care units" is mutually exclusive from "serviced self-care housing" for which consent is now sought. The Council says that the use of the words "units" in Schedule 1 of the SCC can be explained on grammatical grounds, given that it would have been wrong to say either "95 in-fill self-care housing" or "95 in-fill self-care houses". Further, the Council says that the reference in the Existing SCC to "ancillary facilities" were simply additional facilities and not intended to be nursing, personal care, cleaning or meal services.

40 In support of its position, the Council relies on the application for the SCC, which is dated February 2016. The detailed description of the project in that application includes the words "for the purposes of in-fill self-care housing", and then describes ancillary facilities that do not include nursing care, personal care, cleaning services or meal delivery services.

41 The Council points out that cl 24(2)(b) of SEPP HSPD precludes the Court from granting consent unless it is satisfied that the issuer of the SCC has certified that, in its opinion, development for the purpose of seniors housing *of the kind proposed in the development application* is compatible with the surrounding environment. The Council submits that the words "of the kind" refer to a class of development of the same nature or character which has comparable impacts, and are not sufficiently broad to extend beyond this. As a result of the reference to "in-fill self-care" in the Existing SCC, the Council submits that this is not development "of the kind" proposed in the development application. The Council submits that the proposal no longer has the character of self-care units with ancillary facilities, but of serviced self-care units, which are a different kind of development. It submits also that the proposed development does not have comparable impacts to that of in-fill self-care units, as the services that are now to be provided require more staff, dedicated facilities for those staff, and change the nature of the deliveries or waste collection. The Council also submits that as a result, the total floor space and bulk of the development is greater than that which was certified in the Existing SCC.

42 The second reason for which the Council says that the Existing SCC does not certify that the proposed development is compatible with the surrounding land uses is that the proposed building footprint does not comply with condition 1 of Schedule 2. The Council points out, and Waterbrook concedes, that some of the seniors housing footprint (Blocks E and F) are placed outside of the boundary identified in the Schedule. Clause 25(7) of the SEPP HSPD makes it clear that the SCC can certify that the development to which it relates is compatible only if the requirements specified in the certificate are met. As such, the Council submits that given that the proposed development does not

comply with the requirement in Schedule 2 of the Existing SCC, the Existing SCC does not certify that the development proposed is compatible with surrounding land uses.

Waterbrook seeks to amend the Existing SCC

43 Waterbrook contests the Council's position that the proposed development is of a kind that is distinct from the "in-fill self-care units and ancillary facilities" certified in the Existing SCC. Waterbrook observes that the definition of "in-fill self-care housing" clearly states "none of the following services are provided on site as part of the development: meals, cleaning services, personal care, nursing care".

44 Waterbrook submits firstly that the application for the SCC clearly includes the provision of meals and personal services, which is inconsistent with the definition of "in-fill self-care units". Waterbrook says that the meal services are provided through a commercial kitchen, restaurant, dining area, a café, and a bar, and personal services are provided through a hair and beauty salon, a fitness centre and an indoor heated pool therapy centre.

45 Waterbrook submits secondly that this is reflected in the reference to "ancillary facilities" in the Existing SCC, which it says is an acknowledgement of the facilities that are to be provided on site.

46 Thirdly, Waterbrook submits that the reference to "in-fill self-care units" in the Existing SCC is ambiguous, and the use of the word "in-fill" can be construed by its ordinary meaning, which in this context would be new development surrounded by existing residential development, in contrast to "greenfields" development (see *Ryan v Port Stephens Council* [2008] NSWLEC 66 at [33]). Further, Waterbrook relies on the decision of the Court of Appeal in *Botany Bay City Council v Saab Corp Pty Ltd* [2011] NSWCA 308 that there is authority that establishes that where there could be multiple interpretations, the interpretation that means the certificate is functional should be preferred. In light of the fact that "in-fill self-care housing" is not a permissible use on the

site, the interpretation of the certificate as certifying "serviced self-care housing" is one that enables it to be functional and should be preferred.

47 Nevertheless, Waterbrook seeks an amendment to the Existing SCC to amend the building footprint referred to in Condition 1 of Schedule 2. In order to avoid an unnecessary resolution of the dispute between the parties concerning whether or not the Existing SCC certifies the compatibility of serviced self-care housing, Waterbrook points out that an amendment to the description of the proposal in the Existing SCC would resolve this issue entirely.

48 On 23 November 2018, Waterbrook lodged an application to amend the Existing SCC with the Department of Planning and Environment ("the Amendment Application"). This application seeks to have the certificate amended to:

- Replace the description of the type of self-contained dwellings from 'in-fill self-care units with ancillary services' to 'serviced self-care housing' to remove the need for unnecessary legal argument in the Court proceedings,

- Note that the asset protection zone extends beyond the boundaries of the footprint area, and

- Correct the mapping error in the current site compatibility certificate as to the location of the 'development footprint area'.

49 As a result of the amendments to cl 25 on 1 October 2018 that vest the power to issue a SCC in the relevant Panel, it is common ground that there is no power for the Secretary or its delegate to amend the Existing SCC.

50 The Amendment Application has been provided by the Department to the Panel, but has not yet been determined. Waterbrook asks that the Court deal with the Amendment Application in the course of considering the subject

development application. The Council instead says that there is power neither for the Panel, nor for the Court, to determine the Amendment Application.

Waterbrook's position that the Court has the power to amend the Existing SCC

Waterbrook submits that the Panel has the power to amend a SCC

51 Waterbrook submits that as the Panel has the power to issue a SCC, pursuant to s 1.4(8) of the EPA Act it has the power to amend a SCC. Section 1.4(8) provides:

> (8) A power, express or implied, to make or give an order, direction, declaration, determination or other instrument under this Act or under an instrument made under this Act includes a power to revoke or amend the order, direction, declaration, determination or other instrument.

52 The definition of "amend", also contained in s 1.4, includes "alter, vary or substitute (and amend provisions or a document includes amend a map or spatial dataset adopted by or under the provisions or document)".

53 Waterbrook submits that the decision to issue the Existing SCC is a "determination" as, at the date the Existing SCC was issued, cl 25(4) of the SEPP HSPD provided that the Director-General may "determine the application by issuing a certificate." Waterbrook submits also that the Existing SCC is an instrument, as it falls within the definition of "instrument" contained in s 3 of the *Interpretation Act 1987* ("Interpretation Act"). Section 3 provides:

> **3 Definitions**
>
> (1) In this Act:
>
> ***instrument*** means an instrument (including a statutory rule or an environmental planning instrument) made under an Act, and includes an instrument made under any such instrument.

54 Waterbrook also relies on the plain meaning of "instrument", which is defined in the Macquarie Dictionary as a "formal legal document, as a contract, promissory note, deed, grant".

55 Waterbrook therefore considers that the Existing SCC can be amended by the express power provided by s 1.4(8), as it is a "determination" or "instrument" made or given under an environmental planning instrument (the SEPP HSPD), which itself is made pursuant to the EPA Act, and as the amendment to rely on a new plan to replace the Cardno plan clearly falls within the scope of the expression "amend".

56 In addition, Waterbrook submits that the terms of the SEPP HSPD provide textual support for the interpretation that a variation of the Existing SCC is permitted. Clause 25(10) provides that a site compatibility certificate "(a) cannot be varied during its currency to cover additional land". Waterbrook submits that this provision implies that there is a power to vary a SCC, but that this power is confined by cl 25(10)(a) such that it cannot be varied to cover additional land.

57 Further, Waterbrook relies on ss 5 and 48 of the Interpretation Act, which provide:

> **5. Application of Act**
> ...
>
> (2) This Act applies to an Act or instrument except in so far as the contrary intention appears in this Act or in the Act or instrument concerned.
> ...
>
> **48. Exercise of statutory functions**
>
> If an Act or instrument confers or imposes a function on any person or body, the function may be exercised (or, in the case of a duty, shall be performed) from time to time as occasion requires.
>
> If an Act or instrument confers or imposes a function on a particular officer or the holder of a particular office, the function may be exercised (or, in the case of a duty, shall be performed) by the person for the time being occupying or acting in the office concerned.

58 Waterbrook relies on the authority of the Court of Appeal in *Parkes Rural Distributions Pty Ltd v Glasson & Anor* (1986) 7 NSWLR 332 ("*Parkes Rural Distributions v Glasson*"), in which there was a legislative scheme which provided for financial assistance to distributors to enable petroleum products to be sold in outlying areas at prices comparable to those charged in capital

cities. Under that scheme, an authorised officer could investigate and certify the place and date of all sales as a basis for calculating the amount payable. The basis of each certificate was the satisfaction of the authorised officer of certain matters. The Court of Appeal applied s 48 of the Interpretation Act to the power to issue certificates and found it to be a power exercisable "from time to time", which meant that it may be exercised so as to add to, subtract from, or reverse, the result of the previous exercise of the power.

59 Waterbrook therefore submits that in the absence of a contrary intention in the SEPP HSPD, it is clear that a SCC can be varied. As the power to determine an application for a SCC is now with the Panel, Waterbrook submits that the Panel is the determining authority in respect of the application to amend the Existing SCC.

Waterbrook submits that the Court can exercise the function of the Panel to amend the SCC

60 The Panel was the consent authority for the development application, pursuant to ss 2.15 and 4.5(b) of the EPA Act and cl 20(1) and Sch 7 cl 2 of the State Environmental Planning Policy (State and Regional Development) 2011.

61 Pursuant to s 8.14 of the EPA Act and s 39(2) of the LEC Act, the Court has "all the functions and discretions" of the Panel, "in respect of the matter the subject of the appeal". Specifically, s 39(2) of the LEC Act is worded as follows:

> (2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

62 Waterbrook therefore submits that the Court can exercise the function of the Panel to amend the Existing SCC. In support of this submission, Waterbrook relies on the decisions of the Court in *Australian Leisure and Hospitality Group Pty Ltd v Manly Council* (No 5) [2012] NSWLEC 53 and *Goldberg v*

Waverley Council [2007] NSWLEC 259; (2007) 156 LGERA 27 ("*Goldberg v Waverley Council*"), in which Preston CJ and Biscoe J, respectively, considered that the power pursuant to s 39(2) should be construed broadly to facilitate the Court's power to determine the appeal. In *Goldberg v Waverley Council*, Biscoe J determined that the power available to the Court under s 39(2) on a development application on appeal from the Council extended to the functions and discretions of the Council to consent to the construction of the unformed section of public road under s 138 of the *Roads Act 1993*. His Honour stated at [43]:

> "Of course, the functions and discretions (as Cripps JA indicated in McDougall) must have a relevant nexus to the matter the subject of the appeal in order to be 'in respect of" that matter. I take this to mean that if a development application is refused and something has a relevant nexus to it, s 39(2) throws a blanket over both, that is, empowers the Court to deal with both."

63 This broad approach is also endorsed by the Court of Appeal in *Sydney City Council v Claude Neon Ltd* (1989) 15 NSWLR 724, in which the Court considered that the power available on determining a development application on appeal from the Council extended, pursuant to s 39(2), to the functions and discretions of the Council to grant owners consent for work to be carried out on land owned by the Council.

64 Waterbrook also relies on similar reasoning by the Court of Appeal in *Shellharbour Municipal Council v Rovili Pty Ltd* (1989) 15 NSWLR 104. Clarke JA (Samuels and Meagher JJA agreeing) said (at 112) that whether s 39(2) of the LEC Act was engaged "depends upon whether the giving of consent is a necessary incident to the power of the council to grant development approval."

65 Waterbrook submits that the issue by the Court of an amended SCC is an exercise of power that is legally indispensable from the power to determine the subject matter of the appeal. This is because the Court, in exercising the functions of the consent authority, must not consent to the development

application unless there is a current site compatibility certificate that certifies, in the determining authority's opinion (at cl 24), that:

> (b) development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding environment having regard to (at least) the criteria specified in clause 25 (5) (b).

66 The issue of an amended SCC is therefore a jurisdictional pre-requisite to the grant of consent, and Waterbrook submits that the power pursuant to s 39(2) consequently extends to the power of the Panel to determine the amendment application by amending the Existing SCC.

Waterbrook submits that the Court ought to exercise that power in the circumstances

67 In the course of these appeal proceedings, Waterbrook became aware that the Cardno Map referred to in Schedule 2 contained an error in its identification of the development footprint area. The error arose for reasons that are summarised by Waterbrook in their written submissions as follows:

> "a) a letter from Cardno was submitted to the DPE in response to a submission from the Respondent in November 2016. The letter proposed an amendment to the development footprint boundary to avoid an overland flow path to the north east, as well as land mapped as 'geotechnical hazard' under the Pittwater Local Environmental Plan 2014;
> b) there was a slight error in the development footprint area boundary in the Cardno Map as drawn by Cardno. The development footprint area boundary was incorrectly rotated, and so did not properly match up with the SCC drawings prepared by Marchese at the time;
> c) it is now no longer necessary to avoid the land mapped 'geotechnical hazard' following the decision of Pepper J in *Whittaker v Northern Beaches Council* (No 3) [2018] NSWLEC 143;
> d) the Cardno plan does not align to any boundaries, contains no co-ordinates, dimensions or survey locations, and the development footprint was rotated without notice to the Applicant;
> e) the DPE utilised the Cardno figure following a specific request that it be issued a figure from one of Cardno's reports, prior to the SCC being determined. It was not made clear to the Applicant how this figure was to be utilised. The Applicant provided that figure to the DPE, and the figure was then referenced in Condition 1 of Schedule 2 of the SCC; and
> f) ultimately, part of the proposed development in the Development Application is slightly outside the development footprint area identified in condition 1 of the Existing SCC."

68 Figure 2 illustrates the misaligned Cardno boundary (yellow), which is referenced in the Condition 1 of Schedule 2 of the SCC, with the red outline demonstrating the proposed building footprint for the seniors housing.

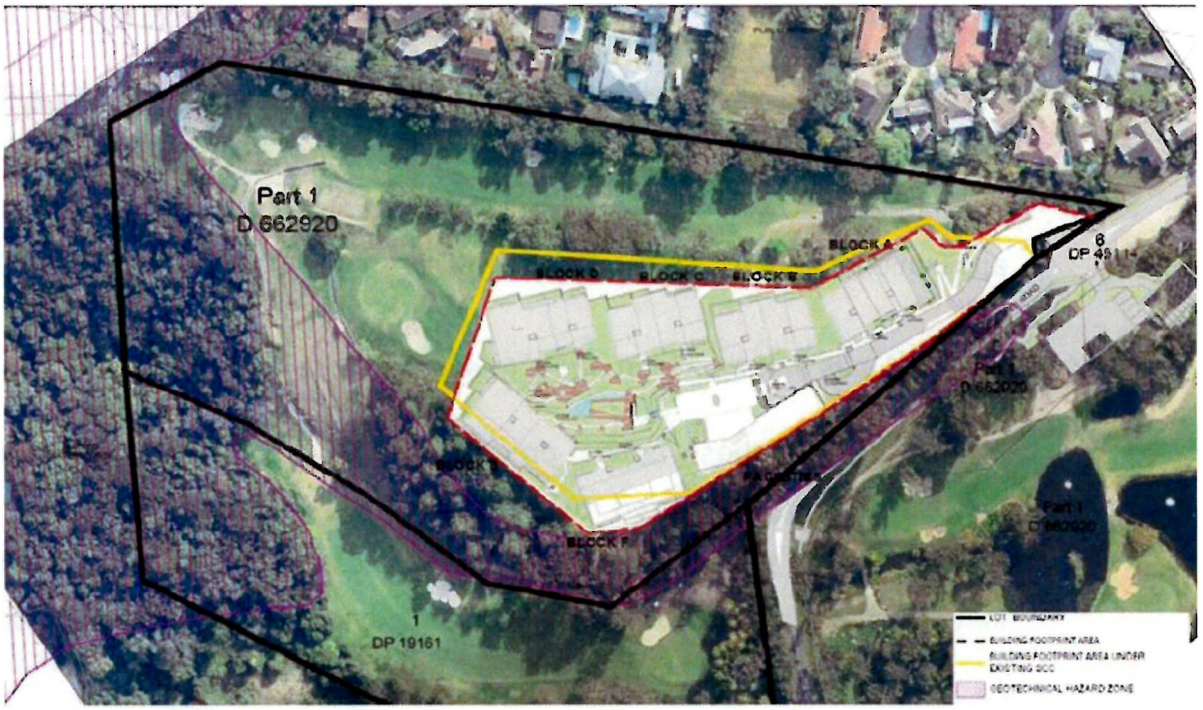

Figure 2 – Plan illustrating the misaligned Cardno boundary (yellow), which is referenced in the Condition 1 of Schedule 2 of the SCC
Source: Marchese Partners

69 To rectify this issue, the Amendment Application was lodged on 23 November 2018, seeking to replace the existing development footprint boundary referenced in Condition 1 of Schedule 2 of the Existing SCC with an updated building footprint boundary. Waterbrook submits that the change to the development footprint boundary is minor and the area of land within the new development footprint boundary is smaller than the footprint in the Cardno Map. Waterbrook submits that it follows that there is no reason that the Existing SCC should not be amended.

The Council submits that the Court does not have the power to amend the Existing SCC

70 The Council submits that there are four reasons why neither the Panel, nor the Court, has the power to amend the Existing SCC. Firstly, the Council

submits that in circumstances where there is no longer any power in the SEPP HSPD for the Secretary to issue a SCC, there can be no power to amend a certification issued by the Secretary. The Council submits that even if s 1.4(8) of the EPA Act applies to the decision to issue a SCC (which it disputes), the power does not extend to allow the Panel to amend a SCC issued by the Secretary. That is, a power to make a determination includes a power to amend "**the**... determination" and the Council submits that the power of a decision maker to "revoke or amend" in s 1.4(8) is therefore confined to the revocation or amendment of instruments issued by that same decision maker. Given that there is no longer any power for the Secretary of the Department to issue a SCC, the Council submits that there can be no power to amend a certification given by the Secretary.

71 The Council points out that this is consistent with the nature of a SCC, which is an opinion certifying that the proposed development is compatible with the surrounding land uses. The Council submits that it is not open to the Panel to amend a certified opinion of the Secretary, and neither the Panel nor the Court can vary the opinion of the Secretary. The Council also points out that there is no transitional provision in respect of cl 25, and nor is there anything in the Interpretation Act that enables the Panel to stand in the shoes of the Director General (now Secretary) to amend the opinion given in the Existing SCC. The Council submits that the authority of *Parkes Rural Distributions v Glasson* does not extend to circumstances where the power was taken away from those in office, and given to another authority.

72 Secondly, the Council submits that there is no power under the legislative scheme to amend a SCC issued under clause 25(4) of the SEPP HSPD. Specifically, the Council submits that neither s 1.4(8) of the EPA Act, nor cl 25 of the SEPP HSPD is a source of such power. The Council relies on the decision of the High Court in *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, in which Gleeson CJ stated (at [8]):

> "The question is whether the statute pursuant to which the decision maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen."

73 The Council submits that in the absence of such legislative power, the decision-maker is *functus officio*, relying on *Leung v Minister for Immigration and Multicultural Affairs* (1997) 150 ALR 76, in which Finkelstein J said (at 84):

> "...If a statute confers a power or a function, once that power has been exercised or the function performed the purpose for its creation has been fulfilled with the consequence that the power or function is exhausted. In Blacks Law Dictionary (5th ed, 1979) 'functus officio' is defined as 'a task performed' and it is applied to 'an instrument, power agency etc which has fulfilled the purpose of its creation and is therefore of no further effect or virtue'. It is for this reason that where it is sought to reconsider the exercise of a statutory power or the performance of a statutory function it is necessary to find the power to do so in the statute...
>
> When one turns to consider the circumstances in which a power of reconsideration will be implied, an examination of the cases shows that no coherent set of principles has as yet been developed. The courts have been required to choose between two competing interests. On the one hand there is the desirability for the administration to be able to correct decisions arrived at as a result of an error of law or an error of fact. In some cases it may also be desirable that an administrative decision be altered when there has been a change in policy. On the other hand, if a decision is favourable to an individual its reconsideration may cause a real sense of grievance".

74 These competing considerations have been discussed by French J in *Sloane v Minister for Immigration, Local Government and Ethnic Affairs* [1992] FCA 414 at [30]:

> "... The question is one of statutory construction. It is not without difficulty and is attended by policy considerations which are in some degree in conflict. The implication into an express grant of statutory power of a power to reconsider its exercise would be capable, if not subject to limitation, of generating endless requests for reconsideration on new material or changed circumstances."

75 The Council submits that there is no legislative power to permit an amendment, as s 1.4(8) of the EPA Act does not apply to a certification under cl 25(4), as it is not a "determination... or other instrument" of the type to which s 1.4(8) of the EPA Act applies. To support this submission, the Council refers to the predecessor to s 1.4(8), which comprised a series of subsections in s 4 as follows:

> "(7A) A power, express or implied, of the Minister to make a declaration under this Act includes a power to revoke or amend the declaration.
> (8) A power, express or implied, to give a direction under this Act includes a power to revoke or amend the direction.
> (8A) If an environmental planning instrument confers a power on any person or body to make an order (whether or not the order must be in writing), the power includes a power to amend or repeal an order made in the exercise of the power."

76 The *Environmental Planning and Assessment Amendment Act 2017* replaced these provisions on 1 March 2018 with s 1.4(8) and introduced for the first time the words "determination...or other instrument". The Council submits that the use of the words "or other instrument" suggests that the types of "order, direction, declaration, determination" to which it refers are all intended to be species of "instrument".

77 The Council refers to various authorities on what constitutes an "instrument". In particular, this was discussed by the Court of Appeal in *Corbett v State of New South Wales* [2006] NSWCA 138, which stated at [53] per Giles JA that:

> " "Instrument" in some contexts can have wide scope, for example for the offence of making or using a false instrument (Crimes Act 1900, s 300) extending to any document, a credit card or a computer disc (Crimes Act, s 299). In the context of review of an instrument made under an act or an ordinance, it may be confined to an instrument of a legislative or administrative character (*Chittick v Ackland* [1984] FCA 29; (1984) 1 FCR 254), not extending to a contract (*Chapmans Ltd v Australian Stock Exchange Ltd* [1994] FCA 1192, (1994) 51 FCR 501). In the context of the interpretation of legislation it may be confined to an instrument of a legislative character (see *Australian Capital Equity Ltd v Beale* (1993) 114 ALR 50 at 63)."

78 The Council submits that s 1.4(8) of the EPA Act is not intended to extend the operation of the "revoke or amend" provisions to administrative decisions involving individual planning matters and that affect the rights or obligations of individual proponents of planning applications. The Council submits that it is instead intended to apply to the revocation or amendment of orders, directions, declarations, determinations "or other instruments" of a delegated legislative character. In support of this submission, the Council notes that the word "instrument" is only ever used in the EPA Act to refer to types of delegated legislation. In particular, the Council points out that Pt 3 is headed "Planning Instruments" and one provision of that part is s 3.34 "gateway

determination". The Council therefore submits that the type of "determination" to which the power to amend in s 1.4(8) applies is intended to be determinations of this type and not determinations that involve decisions on individual planning proposals.

79 The Council submits that this construction is consistent with the scope and purpose of the EPA Act and its terms when considered as a whole, to provide certainty where individual planning decisions have been made and to enable individual planning decisions to be revoked or amended only in the circumstances enabled by the EPA Act or its subordinate instruments.

80 The Council points out that if the words "determination... or other instrument" were intended to include decisions concerning individual planning proposals like a site compatibility certificate, then it is not apparent why it would not extend to development applications or modification applications. The Council says that this would be contrary to established case law, as discussed in *Brown v Randwick City Council* [2011] NSWLEC 172.

81 As such, the Council submits that s 1.4(8) is intended to give flexibility to delegated lawmakers to facilitate changes to the planning law, rather than to enable changes to be made to decisions that constitute planning permission, or a step towards planning permission, at will.

82 Further, the Council submits that a power to amend a SCC is inconsistent with the scheme established by cll 24 and 25 of the SEPP HSPD. The Council submits that whilst cll 24 and 25 allow a proponent to seek a further SCC during the currency of an earlier SCC, mere amendment of an existing certificate is not contemplated, and no amendment or alteration process is set out.

83 In particular, the Council points out that cl 25(2)(b) makes a distinction between the application for a SCC, and SCCs that have "previously been issued in respect of the land". Clause 25(5) contemplates the issuing of a SCC where there is a previous SCC, and contemplates the issue of a SCC

and not an amendment to a previously issued SCC. Further, the certification in subcll 24(2)(a) and (b) is required for the certificate to be effective, and a certificate would not be effective if anything short of that certification is undertaken. The Council therefore submits that the wording of cll 24 and 25 suggests that the whole procedure is intended to be undertaken in lieu of a 'short-cut' manner in which an amendment could be made. The Council says that cl 25(10)(a), added as part of the 1 October 2018 amendments, which provides that "a site compatibility certificate ... cannot be varied during its currency to cover additional land" is intended to clarify cl 25(5)(c) concerning the circumstances in which a new SCC may be issued for previously certified land. The Council says that cl 25(10)(a) clarifies that cl 25(5)(c), which allows additional land to be included in a SCC, applies to land the subject of a previous SCC after that SCC has expired and not during its currency. That is, the Council submits that cl 25(10) is not intended to suggest that certificates can be altered during their currency, but rather that cl 25(5)(c) cannot be utilised to issue a new SCC that covers additional land during the currency of a SCC, and the word "varied" means no more than the issue of a new SCC.

84 In support of its position, the Council refers to Planning Circular PS18-009, issued 2 October 2018 to coincide with the commencement of amendments to the SEPP HSPD, which provides guidance that "A SCC is valid for 24 months. A valid SCC cannot be altered once it has been issued."

85 Thirdly, the Council submits that any power to alter the certificate is not intended to be exercised to change the kind of seniors housing development and remove or vary the requirements of the Director-General that must be met for compatibility. The Council submits that even if there is power to alter an existing certificate under s 1.4(8), that power may only be exercised in a manner that is consistent with its nature, terms and purpose, when read in the context of cl 25 of SEPP HSPD, and therefore a reassessment of the matters in cl 25 is required. The Council submits that changes to the type of seniors housing development and to the footprint go beyond "fixing" an error, and change the substance of the certificate, which requires a re-assessment and a fresh opinion under cl 25.

86 Fourthly, the Council submits that, even if there is power for the Panel to amend the Existing SCC, s 8.14(1) of the EPA Act and s 39(2) of the LEC Act do not empower the Court to exercise that function. Specifically, the Council submits that the Court's powers do not extend to the functions of any person other than the consent authority and the body whose decision is under appeal, in respect of the matter the subject of the appeal. In circumstances where cl 25 of the SEPP HSPD contemplates a distinct SCC application process, the Council submits that it is not a decision that falls within the scope of the words "in respect of the matter the subject of the appeal". Further, the Council says that cl 25 contemplates comments made by the General Manager, and that the application must be "accompanied by such documents and information as the Planning Secretary may require". The Council submits that the role of determining what documents are required, and of providing documents to the General Manager for comment, are roles that cannot be undertaken by the Court.

87 The Council also submits that cl 24(2) did not intend that the consent authority considering a development application would concurrently make a decision that would give it jurisdiction. Consistent with this, it relies on the decision of Lloyd J in *Michael Bald & Associates v Byron Council* [1999] NSWLEC 78, in which His Honour considered that the Court exercising the power of the consent authority did not extend to approve a sewage treatment process under the *Local Government Act 1919* so as to satisfy a pre-requisite under an environmental planning instrument that development consent could not be given unless prior adequate arrangements were made for the provision of sewerage, drainage and water services. Similarly, the Council submits that the Court's exercise of the functions of the Panel do not extend to the grant of a certificate that forms a pre-requisite to the grant of development consent.

The Council's submissions on how the power should be exercised

88 The Council's position is that even if there is power to amend the Existing SCC, the application to amend the Existing SCC ought not be approved on its merits. The Council submits that the Court ought not be satisfied that the

proposed development is compatible with the surrounding land uses, including by having regard to the criteria in cl 25(5) and (6). The Council considers that the proposal, having a large footprint and a closely clustered configuration without space for canopy planting between buildings, is not compatible with the existing and approved uses in the vicinity. The Council also says that the proposal is not compatible with the surrounding land uses because of the excessive excavation, the significant clearing of vegetation, the placement of the building in the middle of a wildlife corridor, the lack of setbacks to the development boundary and the inadequate landscaping between the built form. The Council points out also that the proposal that is now before the Court is more intensive than the proposal that was the subject of the Existing SCC, as there are additional services provided and there is greater floor space.

The existing SCC is not adequate for the present development application

89 The words of subcl 24(2) of SEPP HSPD require that the Court, in exercising the functions of the consent authority, be satisfied that the certification "in a current site compatibility certificate" meets subcll (2)(a) and (b). That is, the certification must be drawn from the terms of the SCC itself.

90 There is no dispute that subcl (2)(a) is satisfied by the terms of the Existing SCC. The Existing SCC clearly states that the Deputy Secretary is satisfied that the site "is suitable for more intensive development."

91 However, consistent with the submissions made on behalf of the Council, the terms of the certificate do not satisfy the requirements of subcl (2)(b). To satisfy subcl (2)(b), the terms of the SCC either need to explicitly refer to "development for the purposes of seniors housing of the kind proposed in the development application", or implicitly refer to such development, by reference to the definitional elements or requirements of the seniors housing "of the kind proposed". The existing SCC does neither. It neither refers to "serviced self-care housing", which is the development "of the kind proposed" in the development application, nor does it refer to the elements of "serviced self-

care housing" contained in the definition of "serviced self-care housing" or "self-contained dwelling".

92 Whilst I do not accept the Council's submission that the terms of the certificate points to it certifying "in-fill self-care housing", I consider that the certificate is instead ambiguous as to what "kind" of development it certifies as being compatible. It is ambiguous in three respects. Firstly, the use of the word "in-fill" is ambiguous as to whether it refers to "in-fill" development or points to the defined term "in-fill self-care housing" in the SEPP HSPD, the latter which is not permissible on the site. Secondly, it is unclear if the word "units" is a reference to self-contained dwellings or to some other form of residential care units (such as units in a hostel). Contrary to the submission of both parties, the word "units" does not pick up, explicitly or by inference, any of the elements that form part of the defined term "self-contained dwellings". Thirdly, the words "ancillary facilities" could mean any type of facility that is ancillary to the purpose of seniors living. There is no indication as to what those facilities are, and whether they refer to the shared services that form part of the definition of "self-contained dwellings", whether they comprise the more detailed services required within the definition of "serviced self-care housing", or whether they refer to something separate altogether.

93 Further, there is no basis upon which the Court, in exercising the functions of the consent authority, can utilise the application for the SCC or other extrinsic material to resolve these ambiguities and to ascertain whether the proposal described in Schedule 1 of the Existing SCC is "of the kind" proposed in the development application. Other than the map referred to in Schedule 2 (discussed further below), none of those application documents are incorporated into the Existing SCC explicitly or by implication. A SCC is a creature of cl 25 of the SEPP HSPD, and, analogous to a development consent granted pursuant to the EPA Act, it ought operate in accordance with its own terms. Consistent with the oft-cited authority of Else-Mitchell J in *Ryde Municipal Council v Royal Ryde Homes* (1970) 19 LGRA 321, at 323, "the mere approval of an application does not, I think, necessarily have the effect of incorporating all the matters stated in the application."

94 As such, I am not persuaded that the description of the proposal in Schedule 1 of the Existing SCC is sufficient to certify that the development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding environment.

95 Further, as conceded by Waterbrook, the proposed development does not satisfy the requirement in Schedule 2 of the Existing SCC for the seniors housing to be within the identified footprint. As noted above, the content of Schedule 2 is not expressly imposed as a condition on the certification provided in the certificate. Nevertheless, this was not raised by Waterbrook, who proceeded on the basis that the certificate of compatibility is dependant on compliance with Schedule 2, and that this could be resolved by an amendment to the Existing SCC.

The general power pursuant to s 1.4(8) extends to the amendment of a SCC

96 I accept that, *prima facie*, the general power to revoke or amend, pursuant to s 1.4(8) of the EPA Act, extends to the amendment of a SCC.

97 I consider that a SCC falls within the meaning of an "instrument" within s 1.4(8). It is distinct from a determination, which is limited in cl 25 to determining "the application by issuing a certificate or refusing to do so". The determination is distinct from the certificate that is created as a result of a determination. The certificate is therefore an instrument created pursuant to the SEPP HSPD, which itself is an instrument under the EPA Act. There is nothing in s 1.4(8) that limits the type of "instrument" to one of a legislative character as contended by the Council. Instead, I consider that the SCC falls squarely within the definition of "instrument" contained in the Interpretation Act, just as in *Wechsler v Auburn Council* (1997) 130 LGERA 134 Talbot J held that a development consent was an instrument within the meaning of s 3 of the Interpretation Act.

98 Further, I do not accept that the perceived adverse consequences feared by the Council can inform the interpretation of the text of s 1.4(8). The sub-section must be interpreted by understanding the text of the sub-section in the

context of the EPA Act. It is only if the provision is "ambiguous or obscure" or leads to "a result that is manifestly absurd or is unreasonable" that certain extrinsic material can be taken into account to assist in its interpretation (see s 34 of the Interpretation Act), and it is only if more than one construction is available, that "a construction that would promote the purpose or object underlying the Act" shall be preferred (s 33 of the Interpretation Act). In my view, the text of s 1.4(8) is quite clear in giving a general power for the revocation or amendment of instruments.

99 However, the general power is constrained by specific provisions within the EPA Act that establish a process for administering that power, and the manner in which that power is to be exercised. For example, the power to amend a development consent is constrained by the specific provisions requiring an application to modify a development consent (s 4.55).

100 Similarly, the general power pursuant to s 1.4(8) of the EPA Act with respect to the amendment of a SCC must be exercised consistently with the framework established by cl 25. This limitation was acknowledged by the parties, and ultimately accepted by Pepper J, in *Wirrabara Village Pty Limited v The Secretary of the Department of Planning and Environment* [2018] NSWLEC 138 at [25]:

> "Assuming that s 1.4(8) of the EPAA confers a power to revoke a site compatibility certificate issued under cl 25 of the SEPP (it is presently unnecessary to decide this issue in these proceedings), **such power may only be exercised in a manner that is consistent with its nature, terms and purpose, when read in the context of cl 25 of the SEPP** (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) [1986] HCA 40; 162 CLR 24 at 38)" (emphasis added)

101 I accept the submission of the Council that whilst the statutory scheme established by cl 25 allows a proponent to seek a further SCC during the currency of an earlier SCC, which would be in terms an amended or varied SCC, no separate amendment or alteration process is set out that allows consideration of the proposed amendment absent the requirements in cl 25. As such, there is no statutory basis that allows an amendment application to be made other than by the seeking of a further SCC. Indeed, this is

exemplified by the manner in which the Amendment Application was made, which was by the completion of a 'Site Compatibility Certificate Application' with accompanying documents that set out the requisite considerations arising pursuant to cl 25(5)(b) of the SEPP HSPD.

102 Nevertheless, I need not determine how the interaction of the general power pursuant to s 1.4(8) of the EPA Act with the framework of cl 25 of the SEPP HSPD operates in practice, as I have concluded below that there is no power for the Court to exercise the function of the Panel to determine the Amendment Application.

There is no power for the Court to amend the Existing SCC in the circumstances

103 Notwithstanding that I accept that there is power to amend a SCC through the grant of a further SCC, I find that, in the circumstances of the present appeal, the Court's power pursuant to s 39(2) of the LEC Act and s 8.14(1) of the EPA Act does not extend to amending the Existing SCC or issuing an amended SCC.

104 Firstly, s 39(2) of the LEC Act and s 8.14(1) of the EPA Act do not extend to giving the Court a function that the consent authority did not have at the time that the consent authority determined the development application. Pursuant to s 39(2) of the LEC Act and s 8.14(1) of the EPA Act, the Court has "all the functions and discretions which the consent authority... ***had*** in respect of the matter the subject of the appeal" (emphasis added). This is set out clearly in Biscoe J's analysis in *Goldberg v Waverley*, in which at [43] he cites Kirby P in *McDougall v Warringah Shire Council* (1993) 30 NSWLR 258:

> "The result of that interpretation, as articulated by Kirby P in McDougall at 264 is that "*all the functions and discretions the council* ***could have exercised when considering the application*** *are open to the Land and Environment Court on appeal and not only those strictly necessary to the approval*" (emphasis added).

105 In the circumstances of the present development application, any power to amend the Existing SCC was not a function that the Panel had when it

determined the development application. The existing SCC was issued at a time when the power to issue a SCC was vested in the Secretary. The Secretary ceased to have that power on 1 October 2018, at which time the power was given to the "relevant panel". At present, the Sydney North Planning Panel is the relevant panel for the purpose of exercising the power to issue a SCC with respect to the proposed development. Yet the Panel determined the development application, by way of refusal, at a time when it did not have the power to issue a SCC and the power remained in the Secretary. The applicable transitional provision with respect to the Existing SCC is limited to the pre-condition to the exercise of power to grant consent in cl 24 of the SEPP HSPD. As such, neither s 39(2) of the LEC Act nor s 8.14(1) of the EPA Act provides the Court with the power to amend the Existing SCC or issue an amended SCC.

106 Secondly, the making of the Amendment Application after the determination by the Panel of the development application and after the commencement of the appeal does not, by its lodgement, vest a power in the Court to consider and determine such an application in the course of exercising the functions and discretions of the Panel in determining the development application the subject of the appeal.

107 Thirdly, it follows that, in moving the Court to exercise the general power pursuant to s 1.4(8) absent from the statutory scheme established by cl 25, Waterbrook relies on the power of the Court in s 39(2) of the LEC Act extending to the exercise of this general power (with or without the Amendment Application). However, I accept the submission of the Council that any power arising pursuant to s 39(2) of the LEC Act and s 1.4(8) of the EPA Act does not extend to amending a SCC issued by a body other than that whose decision is the subject of the appeal. The use of the word "the" in s 1.4(8) to identify what can be revoked or amended connotes that the repository of the power to "revoke or amend" is the repository that made or gave the instrument. As such, the power in s 1.4(8) (if it can be considered in isolation from cl 25) is confined to the revocation or amendment of instruments issued by that same decision maker. As such, even if the Court

has the general power to revoke or amend a SCC pursuant to s 1.4(8) of the EPA Act, that power does not extend to the revocation or amendment of a certificate issued by the Secretary.

The pre-condition for the grant of consent is not met

108 I therefore consider that, contrary to cl 24(2)(b) of the SEPP HSPD, the Existing SCC does not certify that "development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding environment having regard to (at least) the criteria specified in clause 25(5)(b)".

109 Further, I have determined that, in the circumstances of the present application, the Court does not have the power to rectify this by amending the Existing SCC or issuing an amended SCC.

110 Accordingly, cl 24(2) makes it clear that the Court, in exercising the functions of the consent authority "must not consent" to the development application. As such, there is no power to grant development consent on the basis of the Existing SCC and the development application must be refused on that ground alone.

Other issues on the appeal

111 As set out above, the Council raised a number of other contentions on the basis of which it says that the Court should refuse the development application. It contended that residents of the proposed development would not have reasonable access to the requisite services, and that therefore the pre-conditions to the grant of consent required by cll 42 and 43 of the SEPP HSPD were not met. The Council also raised contentions regarding the requirement for a SIS, the impact of the proposal on the natural environment, the compatibility of the proposed development with the context of the site, and whether the proposal recognises or implements the desired elements of the location's current character. A significant body of expert opinion evidence was put before the Court with respect to each of these contentions, and a large

number of specialist experts were subjected to cross-examination and re-examination at the hearing.

112 Further, a significant number of submissions were made by residents with respect to the proposal, and 12 residents gave evidence and/or made submissions at the commencement of the conciliation conference. Six of those residents spoke in favour of the proposal, and 6 gave evidence with respect to the perceived adverse impacts of the proposal.

113 However, any consideration of these contentions or of the residents' evidence would be of no benefit given that I have determined that there is no power to grant development consent.

Outcome of the appeal

114 For the reasons expressed above, the appeal should be dismissed and the development application refused.

115 The Court orders that:

(1) The appeal is dismissed.

(2) The development application (DA2017/1274) for a golf course redevelopment and the construction of a seniors housing development and associated works at 1825 Pittwater Road and 52 Cabbage Tree Road, Bayview, is refused.

(3) The exhibits are returned, except for Exhibits 1, 2, 3, 5, 6, A, E and F.

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Commissioner Gray

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