

23 November 2018

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**Attention:** Kevin Ryan

Dear Kevin

**Application for an amended site compatibility certificate, Lot 1 DP 662920, Lot 6 DP 451114 and Lot 1 DP 19161**

You have asked us to address:

- the permissibility of a development for the purposes of seniors housing on the site;
- whether the site compatibility certificate issued on 27 March 2017 (**the certificate**) certifies that the kind of development for the purposes of seniors proposed in the DA2017/1274 (**the development application**) is compatible with the surrounding environment;
- whether the certificate certifies that the kind of development proposed in the development application is compatible with the surrounding environment; and
- whether there is any benefit in obtaining an amended site compatibility certificate (**an amended certificate**).

**Summary**

- It is plain that the Bayview Golf Club site (excluding the land mapped as 'Geotechnical Hazard' on the LEP's 'Geotechnical Hazard Map') is land that adjoins land zoned primarily for urban purposes.
- The site, as defined by the certificate, is land that adjoins land which is zoned primarily for urban purposes.
- The certificate **did not** anticipate that the 'site' (suitable for more intensive housing development) was merely the development footprint area. The development footprint area is **within** the site to which the certificate relates.
- The site is not excluded from the operation of the Seniors Housing SEPP as 'environmentally sensitive land'.
- The proposed development is plainly 'serviced self-care housing'. It satisfies clause 17 of the Seniors Housing SEPP.
- The reference to 'in-fill self-care units and ancillary facilities' in the certificate should be given its ordinary meaning. The certificate is saying that the kind of development, for the purposes of seniors housing, that is compatible with the surrounding environment comprises two elements:
  - **Housing on the site, being an infill site.** The site is an 'infill' site in the ordinary sense of the word — as it is largely surrounded by residential development.

- **Housing with ancillary facilities.** The proposed development includes such facilities.
- The project description in the certificate includes any development (use of land, works) that would be for the **purpose** of seniors living. However, schedule 2 only confines that part of the development to the footprint area if it is, by **nature**, seniors housing. Ancillary works or uses of land that are not in themselves seniors housing are not captured by this restriction in schedule 2 of the certificate.
- The asset protection zone is for the **purpose** of seniors housing, but is not in the **nature** of seniors housing. Therefore the fact that this zone is outside of the development footprint area is not problematic.
- The certificate certifies that the kind of development proposed in the development application is compatible with surrounding environment (subject to ensuring that all development that is in the **nature** of seniors housing is within the development footprint area).
- Despite the above, there remains a risk that the Council will continue to oppose the development application on the grounds that:
  - uncertainty is created by the reference to 'in-fill self-care units' in the certificate; and
  - the absence of an express statement confirming that land that is within the site, but outside the development footprint area, may be the subject of development for the purposes of seniors housing (eg for asset protection zones and access), so long as the built form of the actual seniors housing is confined to the development footprint area.
- This may ultimately take up a disproportionate amount of time at the hearing of the matter in January 2019. Accordingly, it is a sensible course of action to seek to eliminate the need for unnecessary legal arguments. This can be done by seeking to amend the certificate so that deals with the above issues in a conclusive way. This will enable the Land and Environment Court to focus on any merit issues and avoid unnecessary legal debate.

## Background

We understand and assume the relevant facts to be as follows:

- You have lodged the development application with Northern Beaches Council (**the Council**).
- The development application relates to land at 52 Cabbage Tree Road and 1825 Pittwater Road, Bayview.
- The Council issued a notice determination of the development application on 17 August 2018. The notice was for a refusal of the development application.
- The decision to refuse the development application has been appealed in the Land and Environment Court. The matter is known as *Waterbrook Bayview Pty Ltd v Northern Beaches Council* (proceedings number 2018/257108).
- The certificate has been issued by a delegate of the Secretary of the Department of Planning and Environment. The certificate has been issued under the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**the Seniors Housing SEPP**). The certificate is dated 27 March 2017.
- On 19 September 2018 the Court gave you, as the applicant, leave to rely on an amended application.
- The site is zoned 'RE2 — Private Recreation' (**RE2**) by the LEP.
- The site, as part of the Bayview Golf Course, is being used for the purposes of an existing registered club, namely Bayview Golf Club Ltd (**the club**).
- The club holds a club licence under the *Liquor Act 2007* as a consequence of previously holding of a certificate of registration under the *Registered Clubs Act 1976* (as per clause 93 of Schedule 2 of the *Registered Clubs Act 1976*).

## Detail

### 1. The permissibility of a development for the purposes of seniors housing on the site

1.1 The Council's notice of determination includes the following reason for refusal.

The permissibility of the proposal under the Site Compatibility Certificate (SCC) and SEPP (HSPD) 2004 [*State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*] is not fully resolved. ...

1.2 The development application is, in part, for seniors housing.

#### **Permissibility under the LEP**

1.3 To establish permissibility of any development under the *Pittwater Local Environmental Plan 2014 (the LEP)*, the characterisation of the proposed development must be made by reference to the particular terms of the LEP. The question is whether the development can be characterised:

- (a) as being for a purpose that the instrument identifies as being permissible with consent; and
- (b) not for a purpose that the instrument identifies as being permissible without consent or as being prohibited,

(*Botany Bay City Council v Pet Carriers International Pty Ltd* [2013] NSWLEC 147 at [32]).

1.4 The site is zoned 'RE2 Private Recreation' (**RE2**) under the LEP.

1.5 Clause 2.3 of the LEP is the primary mechanism by which types of development are made either permissible or prohibited in a zone. This clause (relevantly) says:

- (1) The Land Use Table at the end of this Part [ie Part 2] specifies for each zone: ...
  - (b) development that may be carried out without development consent, and
  - (c) development that may be carried out only with development consent, and
  - (d) development that is prohibited. ...

(3) In the Land Use Table at the end of this Part:

- (a) a reference to a type of building or other thing is a reference to **development for the purposes** of that type of building or other thing (bold added)...

1.6 Clause 2.3(3) makes it clear that, when considering characterisation for permissibility, it is the **purpose** of the use of the land that is important, rather than its **nature** (cf *Chamwell v Strathfield Council* [2007] NSWLEC 114 at [34]).

1.7 Uses of different natures can still be seen to serve the same purpose: *Shire of Perth v O'Keefe* (1964) 110 CLR 529,534–535; *Warringah Shire Council v Raffles* [1979] 2 NSWLR 299, 301.

1.8 For example, the nature of a given development may be 'earthworks', but the purpose of the development may be a 'residential flat building' (if the earthworks are only required so as to make the construction of a residential flat building possible).

1.9 Likewise, uses of the same nature may serve different purposes (*Hawkesbury City Council v Sammut* [2002] NSWCA 18 at [21] and [24]; *Abret v Wingecarribee Shire Council* [2011] NSWCA 107 at [61]-[62], [67]).

1.10 To continue the earlier example, the same program of 'earthworks' may be regarded as development for 'commercial premises' if that is the end purpose or a 'residential flat building' if that is the end purpose.

- 1.11 Furthermore, a single use of land can be for **two** or more purposes: *Botany Bay City Council v Pet Carriers International* [2013] NSWLEC 147 at [28].
- 1.12 Again, to continue an earlier example, earthworks for a mixed use development may be characterised as being for both commercial premises and a residential flat building.
- 1.13 The Land Use Table at the end of Part 2 includes text organised under the heading 'Zone RE2 Private Recreation'. Item 2 under that heading is titled 'Permitted without consent'. No development types are listed under this heading.
- 1.14 Item 3 under that heading is titled 'Permitted with consent'. Listed under that heading (among other things) is (relevantly):
- Community facilities; Environmental facilities; **Environmental protection works**; Kiosks; Marinas; Recreation areas; Recreation facilities (indoor); **Recreation facilities (outdoor)**; **Registered clubs**; **Roads**; Signage (bold added).
- 1.15 Development for the purposes of seniors housing is not included in this list.
- 1.16 A 'recreation facility (outdoor)' is defined by the LEP to include a golf course.
- 1.17 Development that is prohibited in the RE2 zone (by reason of the Land Use Table) is development for the purposes listed under the heading for item 4: 'Prohibited'. The only text that appears under this heading is:
- Any development not specified in item 2 or 3.
- 1.18 The chief judge of the Land and Environment Court, Preston J, explained how such a provision works in *Pet Carriers* at [50]:
- Because the category of prohibited development is formulated as being "any development other than development included in item 2 or 3", it necessarily does not and cannot include any purpose of development that is specifically nominated in item 2 or 3 ...
- 1.19 The chief judge went on to say (at [55]):
- if the genus is a nominate [ie expressly nominated] permissible purpose, development for that purpose will be permissible **even if** it could also come within one or more species of purposes that are innominate [not expressly nominated] prohibited purposes (bold added).
- 1.20 This means that a proposed development is only prohibited under item 4 of the Land Use Table if it is **not** a development for the purpose of a development type listed in item 3 of the table.
- 1.21 For example, it will not matter if a proposed development may be characterised as being for the dual purposes of a 'recreation facility (outdoor)' **and** 'food and drink premises'. This is because 'recreation facility (outdoor)' is an expressly permitted development purpose and 'food and drink premises' is not expressly identified as a prohibited development purpose. The only prohibited development is a development that is not captured by item 3. Hence such a development would be permissible.
- 1.22 Accordingly, no issue of permissibility can arise to the extent that any of the works serves the dual purposes of seniors housing (which is **not** expressly nominated under the LEP as being permissible) and a nominated permissible purpose, such as environmental protection works, recreation facilities (outdoor), registered club and/or roads. We can also add stormwater management system as a nominated permissible purpose, courtesy of clause 111A of the *State Environmental Planning Policy (Infrastructure) 2007 (the Infrastructure SEPP)*.
- 1.23 The only potential issue of permissibility that arises relates to any aspect of the development that is both:
- (a) for the purposes of a seniors housing; and

- (b) is **incapable** of **also** being characterised as being for a permissible purpose.

### **Permissibility under the Seniors Housing SEPP**

1.24 In the present case, the prohibition under item 4 of the Land Use Table is partially overridden by the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (the Seniors Housing SEPP)*. The relevant effect of the Seniors Housing SEPP is (under clause 15) that development 'for the purpose of' serviced self-care housing (a type of seniors housing) is permitted with development consent (clauses 15-16).

1.25 Clause 15 says:

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 (bold added).

1.26 However, in order for this provision to apply to the site, various preconditions in the Seniors Housing SEPP must be satisfied. These are set out below.

### **Land must be zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes**

1.27 Clause 4(1) of the Seniors Housing SEPP says that it only applies:

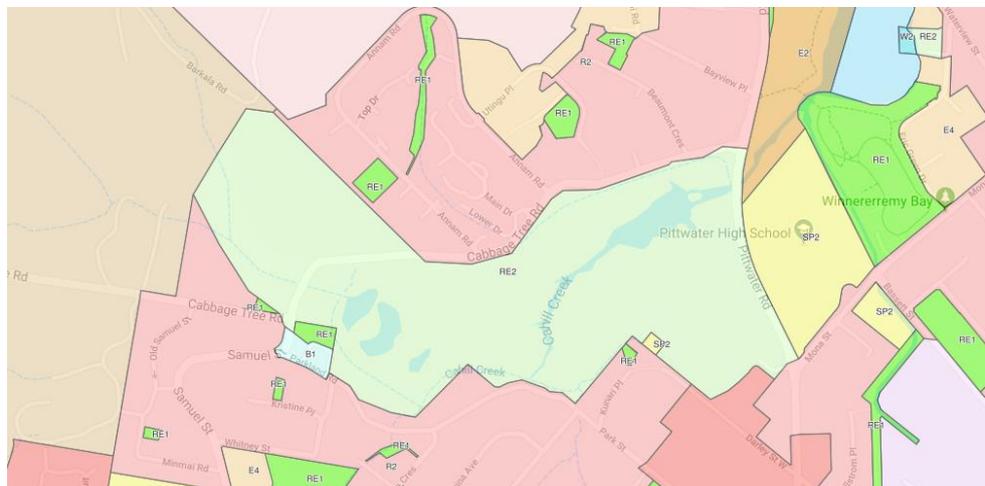
to **land** within New South Wales that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes ...

1.28 The land that is the subject of the development application (as per page 17 of the statement of environmental effects) is:

**the entire Bayview Golf Club site**, excluding the land mapped as 'Geotechnical Hazard' on the LEP's 'Geotechnical Hazard Map' (bold added).

1.29 Twelve allotments are identified as comprising this site. The development application does not propose any subdivision.

1.30 These twelve allotments generally account for the land shown as RE2 (light green) in figure 1 below:



**Figure 1:** Image taken from NSW Planning Portal, 26 October 2018

- 1.31 It is plain that the Bayview Golf Club site immediately adjoins large tracts of land zoned as 'R2 Low Density Residential' (R2) land. This land is shaded light pink in figure 1. It also adjoins some land that is zoned 'B1 Neighbourhood Centre' (B1). This land is shown as light blue in figure 1. Also adjoining, at the south western corner of the site, is land zoned 'R3 Medium Density Residential' (R3). This land is shown as a dark pink in figure 1.
- 1.32 It is obvious that the R2, R3 and B1 land is zoned primarily for urban purposes. Accordingly, it is plain that the Bayview Golf Club site (excluding the land mapped as 'Geotechnical Hazard' on the LEP's 'Geotechnical Hazard Map') is land that adjoins land zoned primarily for urban purposes.
- 1.33 For completeness, the schedule 1 of the certificate defines a 'site' that does not include the entire Bayview Golf Club site. This definition is given in schedule 1 of the certificate as follows:
- Site description:** Bayview Golf Course, Bayview (Lot 1 DP 662920, Lot 6 DP 45114 and Lot 1 DP 19161).
- 1.34 This site is shown in figure 2 (marked with red outline) below. It accounts for the western portion of the Bayview Golf Club site shown in figure 1 above.



**Figure 2:** Lot 1 DP 662920, Lot 6 DP 45114 and Lot 1 DP 19161, as per the 'site description' in the certificate. The outer boundaries of the three lots are identified with a thick red line. Image taken from NSW Planning Portal, 26 October 2018. The red line has been added.

- 1.35 It is plain that the site, as defined by the certificate, directly adjoins large tracts of R2 land. Accordingly, the site, as defined by the certificate, is land that adjoins land zoned primarily for urban purposes.
- 1.36 For clarity's sake, it should be noted that the certificate also refers to a 'development footprint area'. **This is not the site that is the subject of the certificate.** It is merely part of that site. This is obvious from the definition of 'site' in schedule 1 of the certificate (quoted in paragraph 1.33 above). It is also apparent because the statutory opinion that was formed by the Secretary's delegate was directed to the **site as defined in schedule 1** of the certificate, and **not** by the 'development footprint area' set out in schedule 2. To directly quote from the certificate:

I certify that in my opinion:

- the **site described in Schedule 1** is suitable for more intensive housing development; and
- the development described in Schedule 1 is compatible with the surrounding environment and surrounding land uses, having regard to the criteria specified in clause 25(5)(b) (bold added).

- 1.37 It is not necessary to go further than the terms of the certificate itself. However, for completeness, we have reviewed the 'Report to the Secretary' dated 3 March 2017 that was presented to the Secretary's delegate by officers of the Department when the delegate issued the certificate. This report says (on its third page) that:

The Bayview Golf Club site includes land mapped as 'geotechnical hazard land' under Pittwater LEP 2014 ... The applicant's nominated development footprint however, does not include land mapped as geotechnical hazard land ... Despite this nominated footprint, **this assessment refers to the site being the whole golf course site** (bold added).

- 1.38 The reason for this is apparent from other provisions of the Report to the Secretary. The report says (on its fifth page) that:

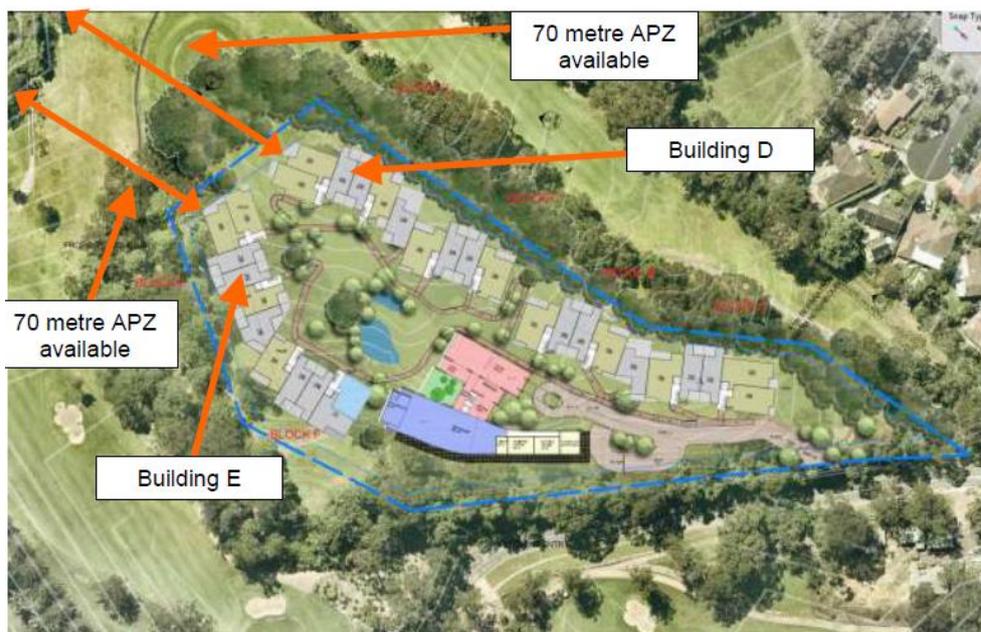
[B]ushfire hazard: the proposed Asset Protection Zones sit outside the development footprint **and therefore will result in further existing vegetation removal on the golf course site** (bold added).

- 1.39 The report also says (on the seventh page):

A bushfire impact assessment has been submitted with the SCC application, which concludes that appropriate setbacks and Asset Protection Zones can be accommodated **within the site** to address bushfire risk.

This assessment provides a level of satisfaction that bushfire is not a constraint on the land that should preclude consideration of the site for seniors housing development (bold added).

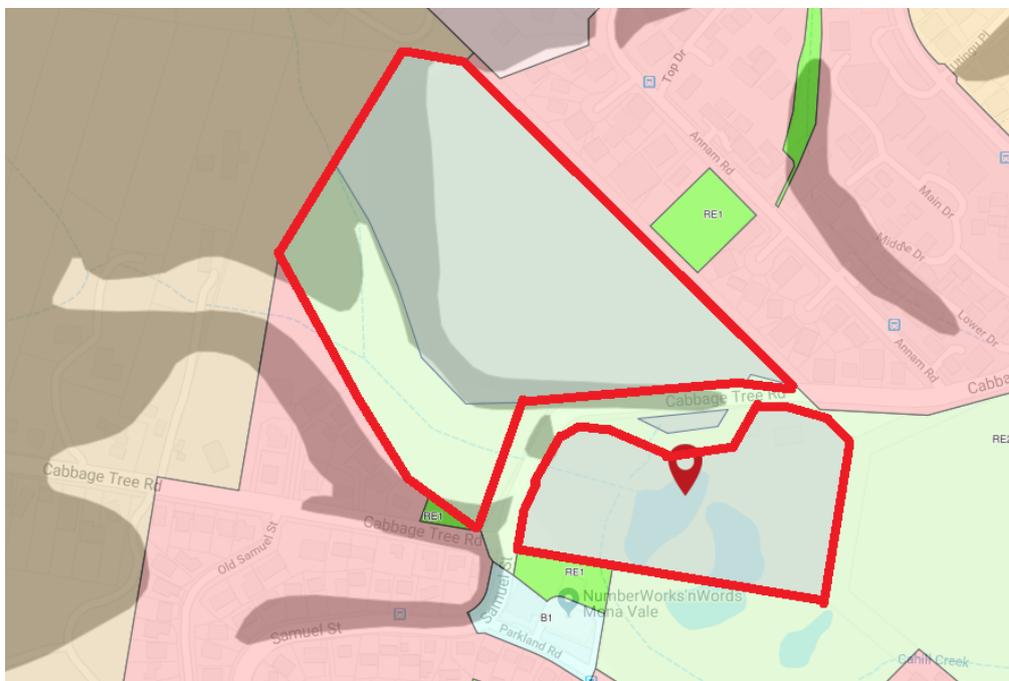
- 1.40 The bushfire impact assessment cited was a report prepared by Building Code & Bushfire Hazard Solutions dated 23 December 2015. As the Report to Secretary indicates, it showed asset protection zones within the site, but outside of the development footprint area (in image 5, on page 6). See figure 3 below.



**Figure 3:** Image 05 'Indicative APZ overlay' on page 6 of the Report to the Secretary.

- 1.41 In short, the certificate **did not** anticipate that the 'site' (suitable for more intensive housing development) was merely the development footprint area.

- 1.42 Accordingly, whether the site is defined as the entire Bayview Golf Club, or simply as Lot 1 DP 662920, Lot 6 DP 45114 and Lot 1 DP 19161, **it adjoins land that is zoned primarily for urban purposes.**
- 1.43 For absolute clarity, we will briefly address the fact that the development application excludes land that is part of the land mapped as 'Geotechnical Hazard' on the LEP's 'Geotechnical Hazard Map'. This land is shown in dark shading in figure 4 below.



**Figure 4:** Lot 1 DP 662920, Lot 6 DP 45114 and Lot 1 DP 19161, as per the 'site description' in the certificate. The image is as per figure 2 above, but this time the land mapped as 'Geotechnical Hazard' on the LEP's 'Geotechnical Hazard Map' is shown as grey.

- 1.44 There is no **legal** reason why geotechnical hazard land **needs** to be excluded from the development application. This is because 'geotechnical hazard land' is not 'environmentally sensitive land' under the Seniors Housing SEPP: *Whittaker v Northern Beaches Council (No 3)* [2018] NSWLEC 143 at [88].
- 1.45 Nonetheless, the development application does presently exclude this land. However, it is apparent that the site — even with the exclusion of the geotechnical hazard land — immediately adjoins large stretches of R2 land (to both the north and the south). The proposed amended certificate will include the 'geotechnical hazard land'. This is appropriate given that the Council has, in its statement of facts and contentions, sought vegetation management arrangements in the 'geotechnical hazard land'.

***The land is being used for the purposes of an existing registered club***

- 1.46 Clause 4(2) of the Seniors Housing SEPP requires that the land is being used for the purposes of an existing registered club. This fact is uncontroversial and the requirement is met.

***Whether most of the land that adjoins the site is zoned for urban purposes***

- 1.47 Clause 4(5) of the Seniors Housing SEPP says that:

For the purposes of this Policy (and for the avoidance of doubt), a consent authority must not treat:

- (a) land on which development for the purposes of special uses is permitted, or
- (b) land that is being used for the purposes of an existing registered club,

as being land zoned **primarily** for urban purposes unless it is satisfied that most of the land that it adjoins is land zoned for urban purposes (bold added).

- 1.48 In our view, the RE2 land is not land that is zoned **primarily** for urban purposes (cf *Wirrabara Village Pty Limited v The Hills Shire Council* [2018] NSWLEC 1187 at [56]-[60]). The permissibility of seniors housing development depends on the fact that the land **adjoins** land that is zoned primarily for urban purposes. Accordingly, clause 4(5) of the Seniors Housing SEPP does not apply.

***Whether the land is environmentally sensitive land***

- 1.49 Clause 4(6) of the Seniors Housing SEPP relevantly provides that:

This Policy does not apply to: ... land described in Schedule 1 (Environmentally sensitive land) ...

- 1.50 Schedule 1 of the Seniors Housing SEPP (relevantly) describes land ‘identified’ in another environmental planning instrument, such as the LEP

by any of the following **descriptions** or by **like descriptions** or by descriptions that incorporate any of the following **words or expressions**:

- (a) coastal protection,
- (b) **conservation** ...,
- (c) **critical habitat**,
- (d) environment protection,
- (e) **open space**,
- (f) escarpment,
- (g) floodway,
- (h) high flooding hazard,
- (i) natural hazard, ...
- (k) scenic ...
- (l) water catchment,
- (m) natural wetland (bold added).

***Open space***

- 1.51 The site is described as ‘environmentally sensitive land’ in Schedule 1 of Seniors Housing SEPP if the LEP identifies the site by use of certain descriptions. In working out if, and how, a LEP identifies land, the Court of Appeal favours a very ‘textual’ approach (*Warringah Shire Council v Punnett and Assoc* [2001] NSWCA 480 at [25] and [31]). This requires a fairly literal analysis of the words of planning instruments. It is not relevant to consider the current use of the land. The only relevant consideration is what description, if any, **the LEP** gives to the land.
- 1.52 One of the descriptions of ‘environmentally sensitive land’ in Schedule 1 is ‘open space’. On two occasions, Court of Appeal majority judgments have stated that ‘open space’ ordinarily denotes an area without buildings: *Cranbrook School v Woollahra Council* (2006) 146 LGERA 313; *Punnett & Assoc*. The buildings that might be expected to be situated within an area of open space are normally incidental to the open space nature of the land (e.g. a toilet block in a park).
- 1.53 While ‘recreation’ can take place in an area of open space, land set aside for recreation purposes under the LEP is not necessarily limited to outdoor recreation. For example, the list of permissible uses in the RE2 zoning under the LEP includes ‘recreation facility

(indoor)' which means 'a building or place used predominantly for indoor recreation'. An indoor recreation facility is clearly at odds with the notion of 'open space' as defined by the Court of Appeal.

- 1.54 'Recreation', particularly, 'private recreation' is a much broader concept than 'open space'. A wide range of private recreation activities will be indoor, not outdoor. The differences in the meaning of the two expressions are very distinct, such that neither is a 'like description' of the other.
- 1.55 The LEP's identification of the land as 'Private Recreation' land does not bring the land under Schedule 1.

### **Conservation, critical habitat and environment protection**

- 1.56 The descriptions of 'environmentally sensitive land' in Schedule 1 include 'conservation', 'critical habitat' and 'environment protection'. We have considered whether the mapping of the land as 'biodiversity' in the LEP's 'Biodiversity Map' is a 'like description' for these words/expressions.
- 1.57 The LEP defines the word 'biodiversity' to mean:
- the variety of living animal and plant life from all sources, and includes diversity within and between species and diversity of ecosystems.
- 1.58 This definition is quite different from the definition of 'conservation'. According to the *Macquarie Dictionary* online it means:
1. the **preservation** of areas which are significant, culturally or scientifically, in their natural state.
  2. the **management** of the natural environment to ensure that it is not destroyed in the process of development.
  3. the **preservation** or conserving of natural resources, such as water, coal, etc (bold added).
- 1.59 The word 'biodiversity' merely describes a state of affairs, that is, the variety/diversity of flora and fauna. It is different from the word 'conservation' which describes the process of preservation or management. 'Biodiversity' is not a like description for 'conservation'.
- 1.60 The phrase 'critical habitat' plainly describes habitat that is of 'decisive importance' or 'crucial' (as per the *Macquarie Dictionary* online). The mere identification of land as having 'biodiversity' is not synonymous with saying that it is of decisive importance or crucial. Indeed, it is likely that **all** habitat exhibits some degree of biodiversity. The phrase 'critical habitat' is plainly targeting on a subset of habitat/biodiversity. 'Biodiversity' is not a like description for 'critical habitat'.
- 1.61 Similarly, the phrase 'environment protection' suggests not just that the environment exists, but that it must be protected. The simple label of 'biodiversity' cannot be considered a like description for 'environment **protection**'.
- 1.62 Accordingly, the LEP's identification of the land as 'Biodiversity' land does not bring the land under Schedule 1.
- 1.63 Clause 7.6 of the LEP is titled 'Biodiversity'. It relevantly says:
- (1) The objective of this clause is to maintain terrestrial, riparian and aquatic biodiversity by:
    - (a) **protecting** native fauna and flora, and
    - (b) **protecting** the ecological processes necessary for their continued existence, and
    - (c) encouraging the **conservation** and recovery of native fauna and flora and their habitats.
  - (2) This clause applies to land identified as "Biodiversity" on the Biodiversity Map.

- (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 (bold added).

1.64 **If:**

- (a) this clause uses words descriptively with reference to the subject land; and
- (b) those words are like descriptions for ‘conservation’, ‘critical habitat’ or ‘environment protection’,

then the subject land would be excluded from the operation of the Seniors Housing SEPP: (cf: *Punnett & Assoc* at [13]; *Pepperwood Ridge v Newcastle City Council* [2006] NSWCA 122 at [36]). This requires that the words relied upon be words of description that identify the land in accordance with one of the nominated words or expressions.

1.65 In *Pepperwood Ridge*, the Court of Appeal considered this zone objective (at [9]):

To conserve the rural or bushland character, and the biodiversity values or other conservation values, of the land

1.66 The Court concluded (at [43]) that these words were **not** used as words of description to identify the relevantly zoned land for the purpose of Schedule 1 of an earlier version of the Seniors Housing SEPP. The phrases scrutinised were ‘environment protection’ or ‘conservation’ (at [8]). Accordingly, the SEPP applied.

1.67 The key reason for the Court’s conclusion was that such an objective is a **general** objective to be considered through the operation of a specific provision of the LEP and not necessarily always achieved in the development of the land in the zone (at [41]). The Court emphatically said that **it was not an identifying description of that land**.

1.68 This is directly applicable to the present situation. Clause 7.6(1) uses the words ‘protecting’ and ‘conservation’ but does not purport to describe the mapped biodiversity land as ‘conservation’ or ‘protection’ land.

1.69 In clause 7.6(3) a regime of **consideration** is established, but the operation of that provision does not necessarily achieve the objective.

- 1.70 Clause 7.6(4) is expressed in mandatory terms, however, it is not mandatory for (a) to be applied. That is, it is not mandatory for 'any significant adverse environmental impact to be avoided. It is not mandatory for (b) to be applied. That is, it is not mandatory for the management of a development to minimise its impact.
- 1.71 It **is** mandatory (if (a) and (b) are not applied) for any significant adverse environmental impact of development be **mitigated**. However, in our view (given that 'mitigation' plainly does not mean 'avoid' or 'minimise') this obligation falls well short of notions of conservation and/or environmental protection. All that mitigation requires is a moderation of the severity of a significant adverse environmental impact.
- 1.72 In short, clause 7.6 does not exclude the land from the operation of the Seniors Housing SEPP.

***Special provisions on land adjoining land zoned primary for urban purposes***

- 1.73 Clause 17 of the Seniors Housing SEPP is as follows:
- (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*) (bold added).
- 1.74 The Seniors Housing SEPP defines 'serviced self-care housing' as follows:
- seniors housing that consists of self-contained dwellings where the following services are available on the site: meals, cleaning services, personal care, nursing care.
- 1.75 Section 3.3 of the Statement of Environmental Effects (Ethos Urban, 17 December 2017) says (on pages 35-36) that the development is to:
- be operated as a retirement village (within the meaning of the *Retirement Villages Act 1999*) including the following services:
- Meals;
  - Nursing services;
  - Personal care; and
  - Cleaning services.
- 1.76 The proposed development is, for the purposes of the Seniors Housing SEPP, plainly 'serviced self-care housing'. It satisfies clause 17 of the Seniors Housing SEPP.

***The need for a site compatibility certificate***

1.77 Clause 24(1) of the Seniors Housing SEPP is as follows:

This clause applies to a development application made pursuant to this Chapter in respect of development for the purposes of seniors housing ...if:

- (a) the development is proposed to be carried out on any of the following land to which this Policy applies:
  - (i) **land that adjoins land zoned primarily for urban purposes, ...**
  - (ii) land that is within a zone that is identified as “special uses” under another environmental planning instrument ...
  - (iii) **land that is used for the purposes of an existing registered club ...**(bold added).

1.78 Clause 24(2) of the Seniors Housing SEPP was — at the time that the certificate was issued — as follows:

- (2) A consent authority **must not** consent to a development application to which this clause applies **unless** the consent authority is satisfied that the ..[Secretary] has certified in a current site compatibility certificate that, in the ...[Secretary’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** (bold added)...

1.79 Accordingly, a site compatibility certificate is required before development consent can be granted.

1.80 A certificate was issued in the present case (on 27 March 2017). This requirement has been satisfied. The certificate continues in effect (despite other changes the Seniors Housing SEPP) under clause 54A(3) of the Seniors Housing SEPP.

1.81 Clause 24(2) requires that — when dealing with any development application — the consent authority must be satisfied that the development of the kind proposed in the development application is of the kind that is the subject of site compatibility certificate. This issue is dealt with in detail in section 2 below.

**2. Whether the certificate certifies that the kind of development for the purposes of seniors proposed in the development application as being compatible with the surrounding environment**

2.1 As explained above (in paragraph 1.78) any site compatibility certificate is, at its heart, an expression of an opinion as to two things.

2.2 Firstly, that a given site is suitable for more intensive development.

2.3 Secondly, that a certain kind of development for the purposes of seniors housing is compatible with the surrounding environment.

2.4 With regard to this latter opinion, the Seniors Housing SEPP expressly says (at clause 25(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** (bold added).

2.5 This means that (relevantly) it is the job of a consent authority (when considering a development application) is to:

- (a) identify the kind of development which the certificate says is compatible with the surrounding environment (including any requirements that the certificate says

should be satisfied); and

- (b) satisfy itself that development of the kind proposed in the development application is the same kind of development that the certificate says is compatible.

2.6 In this regard the certificate says the following:

- (a) The certificate says:

I certify that in my opinion:

- the site described in Schedule 1 is suitable for more intensive development; and
- the development described in Schedule 1 is compatible with the surrounding environment and surrounding land uses, having had regard to the criteria specified in clause 25(5)(b).

- (b) Schedule 1 says:

**Site description:** Bayview Golf Course, Bayview (Lot 1 DP 662920, Lot 6 DP 45114 and Lot 1 DP 19161).

**Project description:** To permit 95 in-fill self-care units and ancillary facilities for the purpose of seniors living.

- (c) Schedule 2 says:

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 Cardo 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 the 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.

2.7 The site compatibility certificate is a public document which operates for the benefit of third parties (such as members of the public and future owners). This is apparent from the following provisions of the Seniors Housing SEPP (as they stood at the time the certificate was issued):

- (a) Clause 24(2) is quoted in paragraph 1.78 above. Significantly, this provision operates irrespective of whether the person who will benefit from the certificate was the person who applied for the certificate or who owned the land at the time that the certificate was issued.

- (b) Clause 25(1) says that:

An application for a site compatibility certificate for the purposes of clause 24 may be made to the ...[the Secretary]:

- (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.

Significantly, this provision explicitly contemplates that the applicant for a certificate may not be the person who ultimately benefits from the certificate.

- 2.8 Accordingly, the legal principles applicable to the interpretation of development consents also apply to the interpretation of site compatibility certificates.
- 2.9 The legal principles for the interpretation of a development consent can be summarised as follows:
- (a) A development consent, being a public document which operates for the benefit of third parties (such as members of the public and future owners), must be interpreted without material that exists outside the consent itself (other than to identify a thing or place referred to in it): *Allandale Blue Metal v Roads and Maritime Services* [2013] NSWCA 103 at [44].
  - (b) Plans and other documents may be incorporated in a development consent expressly or by necessary implication: *Allandale* at [24], [43]-[48], [153]-[163].
  - (c) A document attached to a development consent or referred to in it for the purpose of identifying or describing something dealt with in the consent, will for that reason be expressly incorporated in the consent: *Allandale* at [45].
  - (d) The mere approval of a development application does not necessarily have the effect of incorporating everything stated in the application, such as assertions of intention: *Ryde Municipal Council v Royal Ryde Homes* [1970] 19 LGRA 321; *Lismore City Council v Ihalainen* (No 2) [2014] NSWLEC 198 at [93]- [114]). For example, in *Royal Ryde Homes* a development application for a laundry stated the proposed working hours but the record of the development consent did not refer to working hours. The Court held that the consent did not include any limitation of working hours.
- 2.10 This means that when the consent authority seeks to identify the kind of development which the certificate says is compatible with the surrounding environment, it should **not** seek to examine drawings, reports, etc that were submitted as part of the application for the certificate. These drawings, etc are not incorporated into the certificate — either expressly or by necessary implication. This lack of incorporation is made explicit by paragraph 2 of schedule 2 (quoted in clause 2.6(c) above).
- 2.11 It follows that, as far as the certificate goes, the development that is compatible with the surrounding environment is development that complies with the following:
- (a) It is **up to** 95 'in-fill self-care units and ancillary facilities for the purpose of seniors living' (noting that clause 25(3)(a)(i) of the Seniors Housing SEPP permits the granting of development consent for a development that is smaller in scale than the one described in a certificate);
  - (b) Any seniors housing is limited to the 'development footprint area' **within** the site.

***'In-fill self-care units and ancillary facilities for the purpose of seniors living'***

- 2.12 Clause 13(2) of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (the **Seniors Housing SEPP**) defines 'in-fill self-care housing' as:
- 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 (bold added).
- 2.13 However, the certificate does **not** refer to 'in-fill self care **housing**'. It refers to 'in-fill self-care **units**'.
- 2.14 This is not surprising, as that the RE2 land (in which the site sits) **is not** zoned primarily for urban purposes (see paragraph 1.48 above). 'In-fill self care housing' cannot be

approved on this land under the Seniors Housing SEPP (as per clause 17, see paragraph 1.73 above).

- 2.15 The certificate would serve **no functional purpose** if it merely certified that seniors housing of a kind that was **impermissible** (on the relevant site) was **compatible** with the surrounding environment.
- 2.16 Where there are two competing interpretations of a certificate available:
- (a) one of which means that the certificate is functional; and
  - (b) one which means it is not functional,
- the interpretation that means that the certificate is functional should be preferred (cf *Botany Bay City Council v Saab Corp Pty Ltd* [2011] NSWCA 308 at [2]).
- 2.17 Accordingly, it is plain that the reference to ‘in-fill self-care **units**’ should not be read as a reference to the defined expression ‘in-fill self-care **housing**’.
- 2.18 Accordingly, the reference to ‘in-fill self-care units and ancillary facilities’ should be given its ordinary meaning. The certificate is saying that the kind of the development for the purposes of seniors housing that is compatible with the surrounding environment comprises two elements:
- (a) **Housing on the site, being an infill site.** The site is an ‘infill’ site in the ordinary sense of the word — as it is largely surrounded by residential development (*Ryan v Port Stephens Council* [2008] NSWLEC 66 at [33]).
  - (b) **Housing with ancillary facilities.** The proposed development includes such facilities (see paragraph 1.75 above).

***Seniors housing is to be limited to the ‘development footprint area’ within the site.***

- 2.19 The project description set out in schedule 1 of the certificate says:
- Project description:** To permit 95 in-fill self-care units and ancillary facilities for the **purpose** of seniors living (some bold added).
- 2.20 Schedule 2 of the certificate says:
- 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 Cardo and dated February 2017 (bold added).
- 2.21 It is significant that the word ‘purpose’ is used in the project description, **but not in schedule 2.**
- 2.22 We explained the difference between the characterisation of the development by its purpose versus its nature earlier (in paragraphs 1.6-1.10).
- 2.23 The project description includes any development (use of land, works) that would be for the **purpose** of seniors living. However, schedule 2 only confines that part of the development to the footprint area if it is, **by nature**, seniors housing. Ancillary works or uses of land that are not in themselves seniors housing are not captured by this restriction in schedule 2.
- 2.24 This is unsurprising, given that the proposal put to the Secretary’s delegate involved an ancillary use of land for the purpose of seniors housing outside of the development footprint area (see paragraphs 1.38-1.41 above).
- 2.25 The asset protection zone is for the **purpose** of seniors housing, but is not in the **nature** of seniors housing. Therefore the fact that this zone is outside of the development footprint area is not problematic.

***In short***

2.26 The certificate certifies that the kind of development proposed in the development application is one that is compatible with the surrounding environment (provided that all development that is in the nature of seniors housing is limited to the development footprint area).

**3. Whether there is any benefit in obtaining an amended site compatibility certificate**

3.1 The Sydney North Planning Panel has nominated two reasons (among others) for its refusal of the development application:

- (a) 'The permissibility of the proposal under the Site Compatibility Certificate (SCC) and SEPP (HSPD) 2004 is not fully resolved'.
- (b) 'The works (including construction and Asset protection zone) associated with the proposed development will occur outside the "land" approved for seniors housing under the SCC. Construction related works will occur within the Environmentally Sensitive portion of the site (being defined as natural hazard within Schedule 1), therefore the SEPP is not applicable to the proposed development.'

3.2 There remains a risk that the Council will continue to oppose the development application on the grounds that:

- (a) uncertainty is created by the reference to 'in-fill self-care units' in the certificate; and
- (b) the absence of an express statement confirming that land that is within the site, but outside the development footprint area, may be the subject of development for the purposes of seniors housing (eg for asset protection zones and access), so long as actual seniors housing built form is confined to the development footprint area.

The Council is the respondent in the Court proceedings (albeit under the control and direction of the Sydney North Planning Panel).

3.3 This may ultimately take up a disproportionate amount of time at the hearing of the matter in January 2019. Accordingly, it is a sensible course of action to seek to eliminate the need for unnecessary legal arguments. This can be done by seeking an amended certificate that deals with the above issues in a conclusive way. This will enable the Land and Environment Court to focus on any merit issues and avoid unnecessary legal debate.

Please do not hesitate to contact me on (02) 8035 7858 if you would like to discuss this advice.

Yours sincerely




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