



## Land and Environment Court New South Wales

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| <b>Medium Neutral Citation:</b> | <b>Zhiva Living Dural Pty Ltd v Hornsby Shire Council<br/>[2021] NSWLEC 1251</b>  |
| <b>Hearing dates:</b>           | 17 February 2021  |
| <b>Date of orders:</b>          | 14 May 20221  |
| <b>Decision date:</b>           | 14 May 2021   |
| <b>Jurisdiction:</b>            | Class 1   |
| <b>Before:</b>                  | Chilcott C  |
| <b>Decision:</b>                | <p>The orders of the Court are:</p> <ol style="list-style-type: none"> <li>(1) The Applicant is granted leave to amend its development application and to rely on amended plans, including amended landscape plans;</li> <li>(2) The appeal is upheld;</li> <li>(3) Development application DA/668/2018, as amended, for the demolition of existing structures and the construction of a 91 bed residential care facility and 66 dwelling seniors living development, and associated works, at 3 Quarry Road and 4 Vineys Road, Dural, is determined by the grant of consent, subject to the conditions attached at Annexure 'A';</li> <li>(4) The exhibits are returned, except Exhibits A, 1 and 18.</li> </ol>   |
| <b>Catchwords:</b>              | <p>DEVELOPMENT APPLICATION – Seniors living development – residential care facility – whether site compatibility certificate is properly made - whether requirements of site compatibility certificate are satisfied – whether Court can rely upon site compatibility certificate to grant consent – whether the character of the proposed development is compatible with the local environment and surrounding land uses – weight to North District Plan – public interest.</p>  |
| <b>Legislation Cited:</b>       | <p>Environmental Planning and Assessment Act 1979, ss 4.15(1)a), 4.15(3A), 4.16, 8.7(1)<br/> Environmental Planning and Assessment Regulation 2000, cl 50(2A), 77<br/> Hornsby Local Environment Plan 2013, cl 2.1<br/> Land and Environment Court Act 1979, s 56A<br/> Native Vegetation Act 2003, s 12<br/> Roads Act 1993, s 138<br/> Rural Fires Act, s100B<br/> State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cl 4, 4B, 16, 17, 24, 25, 27, 28, 30, 32, 33, 34, 40, 42, 43, 44, 48, 50, 54, 54A, 55<br/> State Environmental Planning Policy No 55 – Remediation of Land, cl 7<br/> State Environmental Planning Policy No 65–Design Quality of Residential Apartment Development, cl 6A, 23(2), Sch 1</p> |

**Cases Cited:**

Terrace Tower Holdings Pty Limited v Sutherland Shire Council (2003) 129 LGERA 195; [2003] NSWCA 289  
 Zhiva Living Dural Pty Limited v Hornsby Shire Council (2020) 242 LGERA 280; [2020] NSWCA 180  
 Zhiva Living Dural Pty Limited v Hornsby Shire Council (No 3) (2019) 240 LGERA 203; [2019] NSWLEC 152  
 Zhiva Living Dural Pty Ltd v Hornsby Shire Council [2019] NSWLEC 1222

**Texts Cited:**

Greater Sydney Commission, North District Plan, 2018  
 Hornsby Development Control Plan 2013  
 Land and Environment Court of NSW, COVID-19 Pandemic Arrangements Policy (December 2020)  
 NSW Department of Planning and Environment, Apartment Design Guide, 2015  
 NSW Rural Fire Service, Planning for Bush Fire Protection: A guide for councils, planners, fire authorities and developers, 2019

**Category:**

Principal judgment

**Parties:**

Zhiva Living Dural Pty Ltd (Applicant)  
 Hornsby Shire Council (Respondent)

**Representation:**

Counsel:  
 J Lazarus SC (Applicant)  
 M Wright SC (Respondent)  
  
 Solicitors:  
 Mills Oakley (Applicant)  
 Pikes and Verekers (Respondent)

**File Number(s):**

2018/292092

**Publication restriction:**

Nil

**JUDGMENT**

- 1 **COMMISSIONER:** In *Zhiva Living Dural Pty Ltd v Hornsby Shire Council* [2019] NSWLEC 1222 (the original proceedings) the Court determined, by way of refusal, the appeal by Zhiva Living Dural Pty Ltd (the Applicant) against the deemed refusal by Hornsby Shire Council (the Respondent) (subsequently an actual refusal by the Sydney North Planning Panel) of its development application DA/668/2018 for the demolition of existing structures, earthworks, tree and vegetation removal, and the construction of a seniors housing development (the proposed development) across two lots at 3 Quarry Road (Lot 2A in DP 158064) and 4 Vineys Road (Lot 1 in DP 230172), Dural (the Subject Site).
- 2 The reasons for refusal in the original proceedings concerned the non-inclusion of a fire sprinkler system in the Applicant's proposed aged care facility which was a jurisdictional precondition to the Court's powers to grant consent being enlivened.
- 3 The Applicant appealed the determination of the original proceedings (the first appeal) under s 56A of the *Land and Environment Court Act 1979* (LEC Act). In his judgment in *Zhiva Living Dural Pty Limited v Hornsby Shire Council (No 3)* (2019) 240 LGERA 203; [2019] NSWLEC 152, Moore J, notwithstanding identification of matters of procedural fairness, dismissed the appeal as the Applicant's Site Compatibility Certificate (SCC), upon which it relied for the permissibility of its Proposed Development, had expired.

The Applicant appealed the Court's determination in the first appeal, and in upholding that appeal in *Zhiva Living Dural Pty Limited v Hornsby Shire Council* (2020) 242 LGERA 280; [2020] NSWCA 180 (the second appeal), the NSW Court of Appeal made the following orders:

- “(1) Extend the time for filing the summons seeking leave to appeal until 28 January 2020.
- (2) Grant leave to appeal in the form of the amended draft notice of appeal dated 10 June 2020.
- (3) Grant leave to adduce further evidence on the appeal, being paragraphs 15 and 16 of the affidavit of Matt Sonter sworn on 1 May 2020 and the site compatibility certificate issued on 16 April 2020 and attached as Annexure A to that affidavit.
- (4) Allow the appeal.
- (5) Set aside order 2 made by Moore J on 28 October 2019.
- (6) Set aside order 2 made by Chilcott C on 22 May 2019.
- (7) Remit the matter to Chilcott C for determination by the Commissioner in accordance with the decision of this Court and the decision of Moore J.”

- 5 This matter now comes before me on remittal, and for determination, as ordered by the NSW Court of Appeal.
- 6 The appeal is made pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and was determined pursuant to the provisions of s 4.16 of the EP&A Act. It falls within Class 1
- 7 The Parties agreed that evidence tendered in the original proceedings should form evidence for the purposes of the remittal hearing.

## Background

- 8 The Subject Site is located at just off Old Northern Road, Dural, and is bounded by:
  - (1) Quarry Rd to its south west;
  - (2) Vineys Road to its north east;
  - (3) Dural Flower Farm, a residential property operating as a business, at 1 Quarry Rd, and a further residential dwelling at 833 Old Northern Rd, to its north west; and
  - (4) A nursery called Green Gallery, and residential properties at 6 and 8 Vineys Rd, to its south east.
- 9 The Q North Business Park is situated to the west of the Subject Site and, notwithstanding its position on the opposite side of Quarry Road, is located on land that adjoins the Subject Site and which is zoned B2 Local Centre.
- 10 The Subject Site is zoned RU2 Rural Landscape under Hornsby Local Environment Plan 2013 (HLEP). Seniors housing, including a seniors living development such as is proposed by the Applicant, is not a land use identified under HLEP as permissible, with or without consent, within RU2 zoned land, and so it is a prohibited form of development within that zone (see below at [42]).
- 11 However, because the Subject Site adjoins land that is zoned primarily for urban purposes, it is open to the Applicant to rely a SCC issued pursuant to the provisions of cl 24 of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors) to secure consent for the Proposed Development notwithstanding the Subject Site's RU2 zoning.

## The Proposed Development

- 12 The Proposed Development as it originally came before the Court in the original proceedings included the following elements:
  - (1) construction of:
    - (a) seven, two-storey buildings, referred to as Buildings A to G, with attics, containing 91 self-care housing units;
    - (b)

- a central facilities building, fronting Quarry Rd and connecting so-called Buildings A and D, containing a reception, restaurant, resident lounge, cinema, offices, café, gym, swimming pool, and spa;
- (c) a two-storey residential aged care facility (RACF), with attic, fronting Vineys Road;
- (2) construction of car parking spaces across the proposed development, consisting of:
- (a) 48 car parking spaces for the residential care facility's staff and visitors; and
- (b) 195 residential and visitor car parking spaces associated with the self-contained dwellings, with all car parking spaces located in basement levels;
- (3) vehicular access to the development from both Quarry Road and Vineys Road;
- (4) an internal road connecting Quarry Road and Vineys Road located along the north western side of the Subject Site;
- (5) an internal road along the south eastern boundary that would terminate at a cul-de-sac.;
- (6) a total of 25 staff to be present on the site at any one time, in association with the residential aged care facility building.
- 13 On 5 November 2020, the Applicant was granted leave to amend its development application and to rely on amended plans. Those plans provide:
- (1) the inclusion of a fire sprinkler system within the Applicant's proposed residential care facility, in satisfaction of the provisions of cl 55 of SEPP Seniors;
- (2) amendments to the scale of the proposed residential care facility which now provide for 66, rather than 74, beds;
- (3) the retention of a tree identified as tree T10, a Sydney Blue Gum, on the Subject Site in response to a requirement of the Applicant's current SCC (see below at [20(3)]) that consideration be given to the retention of that tree;
- (4) the proposed removal of a tree identified as T21, a Forest Red Gum, following consideration of options for its retention as required under the Applicant's current SCC (see below at [20(3)]).
- 14 At the commencement of the remittal proceedings, the Applicant sought further leave to amend its development application and to rely on the following plans and documents, and that leave was granted, without objection:
- (1) amended landscape plans prepared by SiteDesign +Studios, along with a letter accompanying the plans. The Applicant said that these plans had been considered by the Parties' expert town planners who had confirmed that the plans maintained the landscaping intent of the Proposed Development. The letter accompanying the amended landscaping plans identified that the plans complied with requirements within the general terms of approval (GTAs) provided by the NSW Rural Fire Service (RFS) and received on 21 January 2021. These GTAs had clarified requirements concerning inner asset protection areas (IPAs) for the Proposed Development. The GTAs had confirmed requirements that:
- (a) tree canopy cover on the Subject Site would not exceed 15%;
- (b) trees on maturity would not touch or overhang buildings, including decks;
- (c) a preference should be made for smooth barked and evergreen trees, such that 80.5% of all trees proposed would be smooth barked, and 100% of trees would be evergreen;
- (d) shrub coverage should not exceed 10%;
- (2) an amended construction management plan (CMP), which the Parties submitted was now an agreed document for the purposes of the proceedings; and
- (3) an amended plan of management (PoM) which satisfied certain jurisdictional provisions of SEPP Seniors (see below at [32(4)(k)]) in relation to:
- (a) clause 43, concerning transport services to local centres; and
- (b) clause 44, concerning the availability of facilities and services.

### The Applicant's Site Compatibility Certificate

- 15 In the original proceedings, the Applicant had relied upon a Certificate of Site Compatibility, referred to in the hearing as a site compatibility certificate (and hereafter referred to as an "SCC"), issued by the Deputy Secretary (Planning Services) as the delegate of the Secretary of the Department of Planning and Environment under the

provisions of cl 25(4)(a) of the SEPP Seniors to enable use of the Subject Site for the purpose of seniors housing, which would otherwise be a prohibited use on the RU2 land use zone.

- 16 That SCC had been dated 17 May 2017. It remained current for 24 months from that date and has now expired.
- 17 The Applicant now relies on a SCC issued by the Chair of the Sydney North Planning Panel and dated 16 April 2020. It remains current for 24 months from that date.
- 18 The Applicant's most recent SCC certifies that, in the opinion of the Panel:
  - (1) the site described in Schedule 1 of the SCC is suitable for more intensive development;
  - (2) the development described in Schedule 1 is compatible with the surrounding environment having regard to the criteria specified in cl 25(5)(b) of SEPP Seniors; and
  - (3) development for the purposes of seniors housing of the kind proposed in the Applicant's development application is compatible with the surrounding land uses only if it satisfies certain requirements specified in Schedule 2 of the certificate.
- 19 Schedule 1 of the SCC provides the following information:
  - (1) **Site Description:** 3 Quarry Road (Lot 2A DP 158064) and 4 Vineys Road (Lot 2A DP 158064 and Lot 1 DP 230172 respectively), Dural.
  - (2) **Development Description:** The subject proposal is for a seniors living development comprising:
    - (a) 91 self-care 2 and 3 bedroom seniors living dwellings in 8 three storey buildings;
    - (b) 74 bed three-storey residential care facility along the frontage of Vineys Road;
    - (c) basement car parking for 225 car spaces (177 for the serviced self-care housing and 48 for the aged care facility);
    - (d) office facilities fronting Quarry Road;
    - (e) landscaping across the site.
  - (3) Access to the site will be from both Quarry Road and Vineys Road, the basement car parking for the office facilities and the aged care facility operate independently from Vineys Road but will tie in pedestrian links to the dwellings at the rear. The vehicle access to the seniors living dwellings will be from Quarry Road.
  - (4) The proposal is supported by various plans and reports (Attachments A2-A23). The proposal will have a maximum height of 10.5m (three storeys) and maximum FSR of 0.65:1.
  - (5) The height and bulk of the development is concentrated within the central portion of the site and will be planted out with trees and landscaping at its edge. From Vineys Road the development will appear as a single storey development, whereas the appearance of the development from Quarry Road will be two storeys with a loft.
  - (6) The development at Vineys Road will be setback 10m and 11m from the western and eastern site boundaries respectively, and at Quarry Road will be setback 11m and 20m from the western and eastern site boundaries respectively. Added to this the central development will be setback 20m from the site's eastern boundary.
- 20 The SCC also includes a section, entitled Schedule 2, which provides the following information concerning requirements imposed on determination:
  - (1) ensure any development application incorporates a reticulated sewer for servicing the site to the satisfaction of Sydney Water;
  - (2) ensure that the height, bulk, scale, setbacks and impacts to adjoining development are suitably addressed at the development application stage. This includes the need for the development to be compatible with the surrounding environment;
  - (3) demonstrate that the development is compatible with, and complements, the landscape character of the locality, including more mature planting, stronger screen planting on the northern boundary and consideration of retention of the two mature, isolated, high landscape significance native trees (Tree 10 Sydney Blue Gum and Tree 21 Forest Red Gum in Urban Forestry Australia (2019) Aboricultural Impact Assessment);

- (4) protect and enhance the areas of remnant Blackbutt Gully Forest and Sydney Turpentine Ironbark Forest identified as offset areas on the site by Cumberland Ecology (2019);
- (5) resolve overland flood management; and
- (6) resolve bushfire planning and management to the satisfaction of the Rural Fire Service (RFS).

### Objector evidence

- 21 The Applicant's Proposed Development has been notified by the Respondent, consistent with the provisions of cl 77 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) and Hornsby Development Control Plan 2013 (HDCP), as follows:
  - (1) on 31 August and 24 September 2018, for 30 days on each occasion, and in response received 240 submissions;
  - (2) on 12 March 2019 until 17 April 2019, and in response to which the Respondent had received 188 submissions;
  - (3) on 12 November 2020 until 11 December 2020, and in response to which a further 69 submissions were received.
- 22 Prior to the original proceedings commencing at Court, an on-site view was undertaken at the Subject Site, during which the following individuals made submissions to the Court in relation to the appeal:
  - (1) Mr Peter Thornburn, a resident of Quarry Road, who spoke on behalf of agricultural and horticultural business in the local area;
  - (2) Mr Mario Campo, a resident of Quarry Road, who, in addition to raising his own concerns, said that he endorsed the submissions of Mr Thornburn;
  - (3) Ms Jan Primose, a resident of Hornsby, representing the organisation 'Protecting Your Environment Inc', who provided a lengthy oral submission concerning ecology and watercourse matters on-site;
  - (4) Ms Patricia Brown, a resident of Beecroft, representing the 'Byles Creek Valley Union Inc' who also provided a lengthy oral submission concerning bushfire risk;
  - (5) Ms Prue Mettam, a resident of Quarry Road, who spoke about her concerns relating to traffic impacts and water consumption impacts;
  - (6) Mr Colin Norris, a resident of Quarry Road, who spoke about his concerns relating to traffic impacts, particularly in relation to emergency services;
  - (7) Ms Doedie Fatt, a resident of Quarry Road, who said she opposed the development in its entirety, including for reasons of traffic, access, sewerage, and scale;
  - (8) Mr Ben Seale, a resident of an adjoining property on Vineys Rd, who spoke principally in relation to traffic and access to the proposed development, notably via Vineys Road;
  - (9) Mr Matthew Murphy, a resident of Vineys Road, who mentioned his concerns in relation to character and traffic;
  - (10) Mr Scott Ashwood, a resident of an adjoining property on Vineys Road, who raised concerns in relation to construction impacts, including noise, stormwater related impacts, and potential impacts on trees.
- 23 In summary, the principal issues of concern at that time that were raised by the objectors were as follows:
  - (1) whether, contrary to the SCC upon which the Applicant relied in the original proceedings, the Proposed Development was compatible with the character of the local area, which many of the objectors characterised as being predominantly of a rural nature;
  - (2) whether the Proposed Development was consistent with the objectives of the RU2 zoning of the Subject Site and the zoning of land surrounding the Subject Site which was also zoned RU2;
  - (3) whether the potential impacts of the Proposed Development were acceptable given the character of the area, the businesses operating on land adjoining the site, and the residential dwelling in proximity to the site;
  - (4) whether the design of the Proposed Development would provide adequate amenity to future residents of the facility in light of the Subject Site's location within an area that was zoned RU2 Rural Landscape;
  - (5) whether the Proposed Development would adversely impact businesses in the local area, many of which were said to be horticultural businesses;

- (6) whether the potential traffic impacts and proposed vehicular access arrangements to and from the Subject Site, via both Quarry Road and Vineys Road, were acceptable;
  - (7) whether the potential flora and fauna impacts of the Proposed Development, including the proposed removal of trees, were acceptable;
  - (8) whether the potential impacts of the Proposed Development on the flow of water, including stormwater flows, across the Subject Site, were acceptable; and
  - (9) whether the potential impacts of the Proposed Development in relation to bushfire were acceptable.
- 24 The matters raised by objectors were also the subject of evidence and/or testimony from experts during the original proceedings.
- 25 On remittal, the Court took further objector evidence from the following individuals:
- (1) Hon Philip Ruddock AO, who noted that his submission was made in a personal capacity;
  - (2) Ms Jan Primose, Mr Ben Seale, Mr Mario Campo, Mr Peter Thorburn, Mr Colin Norris and Mr Scott Ashwood, each of whom who had addressed the original proceedings.
- 26 The issues of concern identified by the objectors were consistent with those raised in the original proceedings identified above (at [23]), and also included:
- (1) whether demand existed for further supply of seniors living accommodation in the area, given existing supply which was said to be adequate;
  - (2) the need for protection of a scenic landscape;
  - (3) the requirements for tree retention including retention of trees T11, T12 and T13, which were said not to be isolated paddock trees;
  - (4) whether the Proposed Development should provide three levels of basement car parking, with a suggestion that the B3 level parking be removed from the Applicant's Proposed Development;
  - (5) whether the proposed levels of excavation required were acceptable.

## Statutory Considerations

### *Environmental Planning and Assessment Act 1979*

- 27 Section 4.15(1)(a) of the EP&A Act requires that, in determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application:
- (a) the provisions of:
    - (i) any environmental planning instrument, and
    - (ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and
    - (iii) any development control plan, and
    - (iiia) any planning agreement that has been entered into under section 93F, or any draft planning agreement that a developer has offered to enter into under section 93F, and
    - (iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph), and
    - (v) (repealed)
 that apply to the land to which the development application relates,
  - (b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,
  - (c) the suitability of the site for the development,
  - (d) any submissions made in accordance with this Act or the regulations,
  - (e) the public interest.
- 28 Section 4.15(3A) of the EP&A Act further provides that:
- If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:
- (a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

(c) may consider those provisions only in connection with the assessment of that development application.

### *Rural Fires Act 1997*

29 Section 100B of the Rural Fires Act 1997 (RF Act), provides as follows:

100B Bush fire safety authorities

(1) The Commissioner may issue a bush fire safety authority for -

(a) a subdivision of bush fire prone land that could lawfully be used for residential or rural residential purposes, or

(b) development of bush fire prone land for a special fire protection purpose.

(2) A bush fire safety authority authorises development for a purpose referred to in subsection (1) to the extent that it complies with standards regarding setbacks, provision of water supply and other matters considered by the Commissioner to be necessary to protect persons, property or the environment from danger that may arise from a bush fire.

(3) A person must obtain such a bush fire safety authority before developing bush fire prone land for a purpose referred to in subsection (1).

(4) Application for a bush fire safety authority is to be made to the Commissioner in accordance with the regulations.

(5) Development to which subsection (1) applies –

(a) does not include the carrying out of internal alterations to any building, and

(a1) does not include the carrying out of any development excluded from the operation of this section by the regulations, and

(b) is not complying development for the purposes of the Environmental Planning and Assessment Act 1979, despite any environmental planning instrument.

(6) In this section—

special fire protection purpose means the purpose of the following—

(a) a school,

(b) a child care centre,

(c) a hospital (including a hospital for the mentally ill or mentally disordered),

(d) a hotel, motel or other tourist accommodation,

(e) a building wholly or principally used as a home or other establishment for mentally incapacitated persons,

(f) seniors housing within the meaning of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004,

(g) a group home within the meaning of State Environmental Planning Policy No 9—Group Homes,

(h) a retirement village,

(i) any other purpose prescribed by the regulations.

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

30 SEPP Seniors aims to encourage the provision of housing (including residential care facilities) that will:

(1) increase the supply and diversity of residences that meet the needs of seniors or people with a disability;

(2) make efficient use of existing infrastructure and services; and

(3) be of good design.

31 SEPP Seniors says that it will achieve these aims by:

(1) setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy;

(2) setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form; and

(3) ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes.

32 The following provisions of SEPP Seniors are of particular relevance in this appeal:



- (1) Clause 4, concerning land to which the policy applies, and which, *inter alia*, relevantly 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.

....

4) Land that adjoins land zoned primarily for urban purposes

For the purposes of this Policy, land that adjoins land that is zoned primarily for urban purposes includes (but is not limited to) land that would directly adjoin land that is zoned primarily for urban purposes but for the presence of a public road to which there is direct vehicular and pedestrian access from the adjoining land.

- (2) Clause 4B, which commenced operation on 29 July 2020 following an amendment to SEPP Seniors, and which identifies land to which SEPP Seniors applies in relation to metropolitan rural areas in the Greater Sydney Region, as follows:

- (1) This Policy does not apply to land identified on the metropolitan rural areas exclusion zone map as a metropolitan rural area exclusion zone.
- (2) This Policy continues to apply to development on land referred to in subclause (1) if -
- (a) the relevant development application was lodged before the commencement of this clause, or
  - (b) the relevant development application was lodged after the commencement of this clause but the development application relies on a site compatibility certificate and the application for that certificate was lodged before the commencement of this clause.
- (3) A site compatibility certificate may be issued for land referred to in subclause (1) after the commencement of this clause if the application for that certificate was lodged before the commencement of this clause.
- (4) In this clause—

**metropolitan rural areas exclusion zone map** means the map marked "State Environmental Planning Policy—Housing for Seniors or People with a Disability, Metropolitan Rural Areas Exclusion Zone Map" approved by the Minister on the making of State Environmental Planning Policy (Housing for Seniors or People with a Disability) Amendment (Metropolitan Rural Areas Exemption) 2020 and made available on the NSW Planning Portal.

- (3) Chapter 2, which describes key concepts addressed by SEPP Seniors, including the concepts of Seniors, People with Disability, Seniors Housing, Residential Care facilities, Hostels and Self-Contained Dwellings.
- (4) Chapter 3, concerning the development for seniors housing, and which includes the following provisions:
- (a) Clause 16 in relation to when development consent is required under SEPP Seniors and which says:
 

Development allowed by this Chapter may be carried out only with the consent of the relevant consent authority unless another environmental planning instrument allows that development without consent.
  - (b) Clause 17 in relation to development on land adjoining land zoned primarily for urban purposes, and which provides:
    - (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).

Note. Clause 13 (3) defines serviced self-care housing as seniors housing that consists of self-contained dwellings where meals, cleaning services, personal care and nursing care are available on site. Clause 42 requires the consent authority to be satisfied that residents of such housing have reasonable access to services. Clause 42 also provides that if services are limited to those provided under Government provided or funded community based care packages, this does not constitute reasonable access to services.

- (c) Clause 24, in relation to site compatibility certificates being required for certain development applications, and which, *inter alia*, relevantly provides as follows:

(1) This clause applies to a development application made pursuant to this Chapter in respect of development for the purposes of seniors housing (other than dual occupancy) 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,

.....

(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).

Note. Clause 50(2A) of the Environmental Planning and Assessment Regulation 2000 requires a development application to which this clause applies to be accompanied by a site compatibility certificate.

(3) Nothing in this clause:

(a) prevents a consent authority from:

(i) granting consent to a development application to which this clause applies to carry out development that is on a smaller (but not larger) scale than the kind of development in respect of which a site compatibility certificate was issued, or

(ii) refusing to grant consent to a development application to which this clause applies by reference to the consent authority's own assessment of the compatibility of the proposed development with the surrounding environment, or

(b) otherwise limits the matters to which a consent authority may or must have regard (or of which a consent authority must be satisfied under another provision of this Policy) in determining a development application to which this clause applies.

Note. Nothing in this clause affects a consent authority's duty to give effect to non-discretionary standards set out in this Policy. See, for example, clauses 48, 49 and 50.

- (d) Clause 25, concerning the making of an application for site compatibility certificate, and which, *inter alia*, relevantly provides as follows:

(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, ....

(e) Clause 27, concerning bush fire prone land, and which requires that:

(1) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development on land identified on a bush fire prone land map certified under section 10.3 of the Act as “Bush fire prone land—vegetation category 1”, “Bush fire prone land—vegetation category 2”, “Bush fire prone land—vegetation category 3” or “Bush fire prone land—vegetation buffer” unless the consent authority is satisfied that the development complies with the requirements of the document titled Planning for Bush Fire Protection, ISBN 978 0 646 99126 9, prepared by the NSW Rural Fire Service in co-operation with the Department of Planning, Industry and Environment, dated November 2019.

(2) A consent authority, in determining a development application made pursuant to this Chapter to carry out development on land in the vicinity of land identified on a bush fire prone land map certified under section 10.3 of the Act as “Bush fire prone land—vegetation category 1”, “Bush fire prone land—vegetation category 2”, “Bush fire prone land—vegetation category 3” or “Bush fire prone land—vegetation buffer”, must take into consideration the general location of the proposed development, the means of access to and egress from the general location and other relevant matters including the following –

(a) the size of the existing population within the locality,

(b) age groups within that population and the number of persons within those age groups,

(c) the number of hospitals and other facilities providing care to the residents of the facilities within the locality, and the number of beds within those hospitals and facilities,

(d) the number of schools within the locality and the number of students at those schools,

(e) existing development within the locality that has been carried out under this Policy or State Environmental Planning Policy No 5—Housing for Older People or People with a Disability,

(f) the road network within the locality and the capacity of the road network to cater for traffic to and from existing development if there were a need to evacuate persons from the locality in the event of a bush fire,

(g) the adequacy of access to and from the site of the proposed development for emergency response vehicles,

(h) the nature, extent and adequacy of bush fire emergency procedures that are able to be applied to the proposed development and its site,

(i) the requirements of New South Wales Fire Brigades.

(3) In exercising its functions under subclause (1) or (2), a consent authority must consult with the NSW Rural Fire Service and have regard to its comments. ...

(f) Clause 28, concerning water and sewer services, and which requires that:

(1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied, by written evidence, that the housing will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage.

(2) If the water and sewerage services referred to in subclause (1) will be provided by a person other than the consent authority, the consent authority must consider the suitability of the site with regard to the availability of reticulated water and sewerage infrastructure. In locations where reticulated services cannot be made available, the consent authority must satisfy all

relevant regulators that the provision of water and sewerage infrastructure, including environmental and operational considerations, are satisfactory for the proposed development.

- (g) Clause 30, concerning site analysis, and which most relevantly requires that:
- (1) A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied that the applicant has taken into account a site analysis prepared by the applicant in accordance with this clause.
- (2) A site analysis must -
- (a) contain information about the site and its surrounds as described in subclauses (3) and (4), and
  - (b) be accompanied by a written statement (supported by plans including drawings of sections and elevations and, in the case of proposed development on land adjoining land zoned primarily for urban purposes, an aerial photograph of the site)—
  - (i) explaining how the design of the proposed development has regard to the site analysis, and
  - (ii) explaining how the design of the proposed development has regard to the design principles set out in Division 2.
- (h) Clause 32, concerning design of residential development. It refers to Division 2, containing cl 33 to 39 of SEPP Seniors, and which requires that:
- A consent authority must not consent to a development application made pursuant to this Chapter unless the consent authority is satisfied that the proposed development demonstrates that adequate regard has been given to the principles set out in Division 2.
- (i) Clause 33, concerning neighbourhood amenity and streetscape, and which requires that:
- The proposed development should:
- (a) recognise the desirable elements of the location's current character (or, in the case of precincts undergoing a transition, where described in local planning controls, the desired future character) so that new buildings contribute to the quality and identity of the area, and
  - (b) retain, complement and sensitively harmonise with any heritage conservation areas in the vicinity and any relevant heritage items that are identified in a local environmental plan, and
  - (c) maintain reasonable neighbourhood amenity and appropriate residential character by:
    - (i) providing building setbacks to reduce bulk and overshadowing, and
    - (ii) using building form and siting that relates to the site's land form, and
    - (iii) adopting building heights at the street frontage that are compatible in scale with adjacent development, and
    - (iv) considering, where buildings are located on the boundary, the impact of the boundary walls on neighbours, and
  - (d) be designed so that the front building of the development is set back in sympathy with, but not necessarily the same as, the existing building line, and
  - (e) embody planting that is in sympathy with, but not necessarily the same as, other planting in the streetscape, and
  - (f) retain, wherever reasonable, major existing trees, and
  - (g) be designed so that no building is constructed in a riparian zone.
- (j) Clause 34, concerning visual and acoustic privacy, and which requires that:
- The proposed development should consider the visual and acoustic privacy of neighbours in the vicinity and residents by:
- (a) appropriate site planning, the location and design of windows and balconies, the use of screening devices and landscaping, and
  - (b) ensuring acceptable noise levels in bedrooms of new dwellings by locating them away from driveways, parking areas and paths.
- (k) Clause 40(1), concerning certain development standards in relation to minimum sizes and building height, and which requires that:
- (1) A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.
- (l) Clauses 42, 43 and 44, concerning development on land adjoining land zoned primarily for urban purposes, and which provide as follows:

#### **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.

#### **44 Availability of facilities and services**

A consent authority must be satisfied that any facility or service provided as a part of a proposed development to be carried out on land that adjoins land zoned primarily for urban purposes will be available to residents when the housing is ready for occupation. In the case of a staged development, the facilities or services may be provided proportionately according to the number of residents in each stage.

- (m) Clauses 48 and 50, concerning standards that cannot be used to refuse development for residential care facilities and self-contained dwellings, and which provide:

#### **48 Standards that cannot be used to refuse development consent for residential care facilities**

A consent authority must not refuse consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a residential care facility on any of the following grounds:

- (a) **building height:** if all proposed buildings are 8 metres or less in height (and regardless of any other standard specified by another environmental planning instrument limiting development to 2 storeys), or
- (b) **density and scale:** if the density and scale of the buildings when expressed as a floor space ratio is 1:1 or less,
- (c) **landscaped area:** if a minimum of 25 square metres of landscaped area per residential care facility bed is provided,
- (d) **parking for residents and visitors:** if at least the following is provided:
  - (i) 1 parking space for each 10 beds in the residential care facility (or 1 parking space for each 15 beds if the facility provides care only for persons with dementia), and
  - (ii) 1 parking space for each 2 persons to be employed in connection with the development and on duty at any one time, and
  - (iii) 1 parking space suitable for an ambulance.

#### **Note.**

The provisions of this clause do not impose any limitations on the grounds on which a consent authority may grant development consent.

#### **50 Standards that cannot be used to refuse development consent for self-contained dwellings**

A consent authority must not refuse consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a self-contained dwelling (including in-fill self-care housing and

served self-care housing) on any of the following grounds:

- (a) **building height:** if all proposed buildings are 8 metres or less in height (and regardless of any other standard specified by another environmental planning instrument limiting development to 2 storeys),
- (b) **density and scale:** if the density and scale of the buildings when expressed as a floor space ratio is 0.5:1 or less,
- (c) **landscaped area:** if:
  - (i) in the case of a development application made by a social housing provider—a minimum 35 square metres of landscaped area per dwelling is provided, or
  - (ii) in any other case—a minimum of 30% of the area of the site is to be landscaped,
- (d) **Deep soil zones:** if, in relation to that part of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) that is not built on, paved or otherwise sealed, there is soil of a sufficient depth to support the growth of trees and shrubs on an area of not less than 15% of the area of the site (the **deep soil zone**). Two-thirds of the deep soil zone should preferably be located at the rear of the site and each area forming part of the zone should have a minimum dimension of 3 metres,
- (e) **solar access:** if living rooms and private open spaces for a minimum of 70% of the dwellings of the development receive a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter,
- (f) **private open space for in-fill self-care housing:** if:
  - (i) in the case of a single storey dwelling or a dwelling that is located, wholly or in part, on the ground floor of a multi-storey building, not less than 15 square metres of private open space per dwelling is provided and, of this open space, one area is not less than 3 metres wide and 3 metres long and is accessible from a living area located on the ground floor, and
  - (ii) in the case of any other dwelling, there is a balcony with an area of not less than 10 square metres (or 6 square metres for a 1 bedroom dwelling), that is not less than 2 metres in either length or depth and that is accessible from a living area,

**Note.**

The open space needs to be accessible only by a continuous accessible path of travel (within the meaning of AS 1428.1) if the dwelling itself is an accessible one. See Division 4 of Part 4.

(g) (Repealed)

(h) **parking:** if at least the following is provided:

- (i) 0.5 car spaces for each bedroom where the development application is made by a person other than a social housing provider, or
- (ii) 1 car space for each 5 dwellings where the development application is made by, or is made by a person jointly with, a social housing provider.

**Note.**

The provisions of this clause do not impose any limitations on the grounds on which a consent authority may grant development consent.

- (n) Clauses 54 and 54A, concerning savings provisions, and which provide as follows:

**54 Savings and transitional provisions—site compatibility amendments**

Clause 24, as amended by *State Environmental Planning Policy (Repeal of Site Compatibility Provisions) 2011*, applies to a development application for development to which that clause applies that was made, but not determined, before the commencement of the amendments.

**54A Savings and transitional provisions - State Environmental Planning Policy (Housing for Seniors or People with a Disability) Amendment 2018**

- (1) Subject to subclause (2), clause 25, as amended by the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) Amendment 2018*, extends to an application for a site compatibility certificate made, but not determined, before 1 October 2018 if the application was made on or after 10 November 2017.
- (2) The relevant panel, and not the Planning Secretary, is to determine applications for site compatibility certificates made, but not determined, before 1 October 2018.
- (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.

- (o) Clause 55, concerning the need for a fire sprinkler system in residential aged care facilities, and which provides as follows:

**55 Residential care facilities for seniors required to have fire sprinkler systems**

A consent authority must not grant consent to carry out development for the purpose of a residential care facility for seniors unless the proposed development includes a fire sprinkler system.

### *State Environmental Planning Policy No 55 – Remediation of Land*

- 33 The objective of State Environmental Planning Policy No 55 – Remediation of Land (SEPP55) is to provide for a Statewide planning approach to the remediation of contaminated land. In particular, SEPP55 aims to promote the remediation of contaminated land for the purpose of reducing the risk of harm to human health or any other aspect of the environment by :
- (1) specifying when consent is required, and when it is not required, for a remediation work,
  - (2) specifying certain considerations that are relevant in rezoning land and in determining development applications in general and development applications for consent to carry out a remediation work in particular, and
  - (3) requiring that a remediation work meet certain standards and notification requirements.
- 34 Relevantly in this appeal, cl 7 of SEPP55 provides:
- (1) A consent authority must not consent to the carrying out of any development on land unless:
    - (a) it has considered whether the land is contaminated, and
    - (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
    - (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.
  - (2) Before determining an application for consent to carry out development that would involve a change of use on any of the land specified in subclause (4), the consent authority must consider a report specifying the findings of a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.
  - (3) The applicant for development consent must carry out the investigation required by subclause (2) and must provide a report on it to the consent authority. The consent authority may require the applicant to carry out, and provide a report on, a detailed investigation (as referred to in the contaminated land planning guidelines) if it considers that the findings of the preliminary investigation warrant such an investigation.
  - (4) The land concerned is:
    - (a) land that is within an investigation area,
    - (b) land on which development for a purpose referred to in Table 1 to the contaminated land planning guidelines is being, or is known to have been, carried out,
    - (c) to the extent to which it is proposed to carry out development on it for residential, educational, recreational or child care purposes, or for the purposes of a hospital—land:
      - (i) in relation to which there is no knowledge (or incomplete knowledge) as to whether development for a purpose referred to in Table 1 to the contaminated land planning guidelines has been carried out, and
      - (ii) on which it would have been lawful to carry out such development during any period in respect of which there is no knowledge (or incomplete knowledge).

### *State Environmental Planning Policy No 65 Design Quality of Residential Apartment Development*

- 35 State Environmental Planning Policy No 65 Design Quality of Residential Apartment Development (SEPP65) aims to improve the design quality of residential flat development in New South Wales, and recognises that the design quality of residential flat development is of significance for environmental planning for the State due to the economic, environmental, cultural and social benefits of high quality design.
- 36 SEPP65 applies to residential flat buildings, shop top housing and mixed use developments with a residential component, if the building has three or more storeys, and contains four or more dwellings.
- 37 SEPP65 sets a consistent policy direction for residential flat development in New South Wales and provides a uniform State-wide framework for more detailed planning for residential flat development. It has a statutory effect on development and as a

consequence may supplement the provisions of state environmental planning policies, local environmental plans and development control plans.

- 38 SEPP65 has a close and integrated relationship with the Apartment Design Guide ('ADG') published by the NSW Department of Planning and Environment (see below at [46] to [48]) which provides consistent planning and design standards for residential apartments in New South Wales.
- 39 SEPP65 came into effect on 17 July 2015 and applies to development applications for residential flat development made after that date. It is applicable to the development application that is the subject of the current appeal.
- 40 The following provisions of SEPP65 are of particular relevance in this appeal:
- (1) Clause 6A, which provides:
    - (1) This clause applies in respect of the objectives, design criteria and design guidance set out in Parts 3 and 4 of the Apartment Design Guide for the following:
      - (a) visual privacy,
      - (b) solar and daylight access,
      - (c) common circulation and spaces,
      - (d) apartment size and layout,
      - (e) ceiling heights,
      - (f) private open space and balconies,
      - (g) natural ventilation,
      - (h) storage.
    - (2) If a development control plan contains provisions that specify requirements, standards or controls in relation to a matter to which this clause applies, those provisions are of no effect.
    - (3) This clause applies regardless of when the development control plan was made.
  - (2) Clause 28(2), which provides:
 

In determining a development application for consent to carry out development to which this Policy applies, a consent authority is to take into consideration (in addition to any other matters that are required to be, or may be, taken into consideration):

    - (a) the advice (if any) obtained from the design review panel, and
    - (b) the design quality of the development when evaluated in accordance with the design quality principles, and
    - (c) the Apartment Design Guide.
  - (3) Schedule 1, which provides design quality principles in relation to residential apartment development.

#### *Hornsby Local Environment Plan 2013*

- 41 Development on the Subject Site is subject to the provisions of Hornsby Local Environmental Plan 2013 (HLEP), and under the provisions of cl 2.1 of HLEP it is zoned RU2 Rural Landscape, the objectives of which are to:
- encourage sustainable primary industry production by maintaining and enhancing the natural resource base.
  - maintain the rural landscape character of the land.
  - provide for a range of compatible land uses, including extensive agriculture.
  - encourage land uses that support primary industry, including low-scale and low-intensity tourist and visitor accommodation and the provision of farm produce direct to the public.
  - ensure that development does not unreasonably increase the demand for public infrastructure, services or facilities..
- 42 Within this RU2 zone, development for the purposes of seniors housing, such as is proposed by the Applicant, is a prohibited development.

#### *Hornsby Development Control Plan 2013*

- 43 The Hornsby Shire Development Control Plan 2013 (HDCP) was adopted by Hornsby Shire Council on 19 December 2012 and came into effect on 11 October 2013.

44



Development on the Subject Site is subject to the provisions of HDCP, the objectives of which are to:

- “provide a comprehensive document that provides a framework for development of land in the Hornsby Local Government Area,
- clearly set out the processes, procedures and responsibilities for the involvement of the community and key stakeholders in the development of land,
- promote development that is consistent with Council’s vision of creating a living environment, „
- protect and enhance the natural and built environment, and ensure that satisfactory measures are incorporated to ameliorate any impacts arising from development,
- encourage high quality development that contributes to the existing or desired future character of the area, with particular emphasis on the integration of buildings with a landscaped setting,
- protect and enhance the public domain,
- minimise risk to the community, and
- ensure that development incorporates the principles of Ecologically Sustainable Development (ESD).”

- 45 The provisions HDCP in Part 1B.6, which provides controls relating to tree and vegetation preservation, and those in Part 1C, which provide a suite of general controls applicable to development in the Hornsby Local Government Area (LGA), are of particular relevance in this appeal.

#### *Apartment Design Guide*

- 46 The Apartment Design Guide (the ADG), published by the NSW Department of Planning and Environment, provides consistent planning and design standards for residential apartments in New South Wales.
- 47 Part 2 of the ADG explains the application of building envelopes and primary controls including building height, floor space ratio, building depth, separation setbacks. It provides tools to support strategic planning processes in the preparation of planning controls.
- 48 Parts 3 and 4 of the ADG provide objectives, design criteria and design guide for the siting, design and amenity of apartment development.

### **Contentions**

#### *Contentions addressed at the original proceedings*

- 49 At the commencement of the original proceedings, and notwithstanding the range of issues raised by objectors as noted above at [23], the Parties agreed that the contentions between them in this appeal fell into two broad areas:
- 50 The first area of contention concerned the SCC issued by the Delegate of the Secretary of the Department of Planning and Environment under the provisions of cl 24 and 25 of SEPP Seniors, and, more specifically.
- (1) whether the Applicant, and the Court in this Appeal, can rely upon the SCC, issued by the Delegate of the Secretary of the Department of Planning and Environment under the provisions of clause 24 of SEPP Seniors, for the purposes of obtaining a consent to its development application in two respects:
    - (a) whether the ‘requirements imposed on determination’ identified within Schedule 2 of the SCC, have weight for the purposes of the certification under the SCC;
    - (b) whether the Applicant’s proposed development is consistent with project description in Schedule 1 of the SCC such that the SCC can be relied upon by the Applicant for the purposes of its proposed development.
  - (2) whether the Applicant’s development is of a form that can be determined consistent with the provisions of cl 17 of SEPP Seniors for a development that is proposed to be carried out on land that adjoins land zoned primarily for urban purposes.

These contentions are now otiose as a consequence of the Applicant's reliance on a new SCC (see above at [17]), Upon remittal, the Parties agree that the Proposed Development is largely consistent with the terms of the Applicant's current SCC. The most significant remaining matter in contention in relation to the requirements of the new SCC is the Applicant's proposed removal of tree T21, which the new SCC identified should be a matter of consideration by the Applicant in finalising the design of its Proposed Development;

52 The second area of contention had related to the design of the proposed development, and whether it satisfies the provisions of SEPP Seniors beyond those in cl 17 and cl 24 and 25, as well as the relevant provisions of HLEP and HDCP, in particular in relation to:

- (1) character and context as concerns:
  - (a) neighbourhood amenity and streetscape, in relation to the provisions of SEPP Seniors cl 33;
  - (b) visual and acoustic privacy, in relation to the provisions of SEPP Seniors cl 34;
  - (c) location access and facilities in relation to the provisions of SEPP Seniors cl 26;
  - (d) the objectives for the RU2 zoned land in relation to the provisions of HLEP cl 2.1;
- (2) the management of stormwater in relation to the provisions of Seniors SEPP cl 36, and HDCP Part 1C.1.2.b;
- (3) the management of waste, in relation to the provisions of HDCP Part 1C.2.3;
- (4) the remediation of land, in relation to the provisions of SEPP 55 cl 7(1);
- (5) traffic impacts and access arrangements, in relation to the provisions of HDCP Part 1C.2.1;
- (6) potential impacts on ecology, including:
  - (a) proposed tree removals in relation to the provisions of HDCP Part 1B.6;
  - (b) the proposed management of trees and vegetation in relation to the provisions of HDCP Parts 1C.1.1 and 1C.2.9;
  - (c) the proposed management of riparian lands in relation to the provisions of HDCP Part 1C.1.3.

53 In the original proceedings, these issues were narrowed on the basis of the further amended plans, as well as:

- (1) the receipt of general terms of approval (GTAs) from the NSW Rural Fire Service (RFS) as required un the provisions of s 100B of the RF Act (see above at [29]);
- (2) the receipt of general terms of approval (GTAs) from the NSW Department of Primary Industries,
- (3) the receipt of confirmation from the NSW Roads and Maritime Services, that the proposed development did not give rise to any potential impacts in relation to the management of roads under its responsibilities;
- (4) the Applicant's preparation of an amended Construction Management Plan; and
- (5) evidence provided with joints reports of certain experts.

54 The Applicant had confirmed in the original proceedings that:

- (1) it had received GTAs from the NSW RFS, which had been accepted by the Respondent. These GTAs had been incorporated into draft conditions of consent for the proposed development and on this basis the Parties agreed that the contention concerning potential impacts in relation to bushfire risk had been resolved;
- (2) it had also received GTAs from the NSW Department of Primary Industries in relation to management of the riparian corridor within the proposed development, and which had been incorporated into draft conditions of consent for the proposed development. The Parties agreed that the specific contention raised by the Respondent concerning these GTAs had been resolved;
- (3) an amended CMP for the proposed development had been prepared and the Parties agreed that a contention in relation to the acceptability of the Applicant's CMP had been resolved.

55 The Parties had also confirmed that:

- (1) on the basis of a joint expert report of the contamination experts, Mr Simon Caples (for the Applicant) and Ms Nichole Clarke (for the Respondent), the contention in relation to the remediation of land on the Subject Site had been resolved, and the provisions of cl 7(1) of SEPP 55 had been satisfied. Having considered the submissions of the Parties and having reviewed the joint report of the contamination experts, which included a detailed environmental site assessment for the Subject Site, I agree with the submissions of the Parties and accept that the provisions of cl 7(1) of SEPP55(see above at [34]) have been satisfied;
- (2) on the basis of further information provided by the Applicant, the contention in relation to the management of waste from the proposed development had been resolved.

56 Consequently, and putting aside the contentions relating to the Applicant's previous SCC which are no longer of relevance on remittal, the Parties had confirmed that the principal questions for resolution in the original proceedings were as follows:

- (1) in relation to the matters concerning further provisions of SEPP Seniors:
  - (a) is the design of the Applicant's proposed development acceptable in relation to the character and context of the local area, as concerns:
    - (i) neighbourhood amenity and streetscape?
    - (ii) potential noise impacts?
    - (iii) location access and facilities?
    - (iv) the objectives of the RU2 zone?
  - (b) are the Applicant's proposals for managing the potential impacts of stormwater flows, through the proposed development acceptable?
  - (c) are the Applicant's proposals for managing the potential traffic impacts of the proposed development acceptable?
  - (d) are the Applicant's proposals for managing access to and from the proposed development, including access by emergency services, waste service and removalist service vehicles, acceptable?
  - (e) are the potential ecology impacts, including those concerning flora, fauna, tree removal, and riparian corridors, acceptable?

57 During the original proceedings, the Court had taken evidence in relation to these questions from the following expert witnesses:

- (1) in relation to noise contentions:
  - (a) Mr Graham Atkins, for the Respondent, and
  - (b) Mr Glenn Campbell, for the Applicant.
- (2) in relation to town planning contentions:
  - (a) Mr Scott Barwick, for the Respondent; and
  - (b) Mr Jeffrey Mead, for the Applicant.
- (3) in relation to engineering contentions:
  - (a) Mr Chris Fraser, for the Respondent; and
  - (b) Mr Stephen Fryer and Mr James Gilligan, for the Applicant.
- (4) in relation to traffic and access contentions:
  - (a) Mr Maynard, for the Respondent; and
  - (b) Mr Hollioake, for the Applicant.
- (5) in relation to landscaping:
  - (a) Mr Steve Wilkie, for the Respondent; and
  - (b) Ms Catriona Mackenzie, for the Applicant.
- (6) in relation to ecology matters, including tree loss and management of the riparian lands though the Subject Site:
  - (a) Mr Mark Hood, for the Respondent; and
  - (b) Dr David Robertson, for the Applicant.

#### *Contentions requiring resolution at the remittal proceedings*

58 At the commencement of the remittal proceedings the Parties confirmed that a majority of the contentions that had been the subject of expert evidence at the original proceedings had now been resolved through the Applicant's further amended plans,

further joint and individual reporting of the above experts, and the Parties agreed conditions of consent that had, *inter alia*, incorporated refined GTAs provided by NSW RFS in January 2021.

59 They further confirmed that, as a consequence, the remaining contentions requiring resolution in this appeal concerned the following:

- (1) whether the requirements of Applicant's current SCC have been satisfied such that the Proposed Development, as amended, can be determined;
- (2) whether approval of the Applicant's Proposed Development was in the public interest; and
- (3) whether a suite of remaining matters concerning the provision of further information had been resolved.

60 I'll address each of these contentions in turn.

*Have the requirements of the Applicant's current SCC been satisfied such that the Proposed Development, as amended, can be determined?*

#### **The terms of the Applicant's current SCC**

61 As noted above at [17], the Applicant's current SCC was issued on 16 April 2020 by the Chair of the Sydney North Planning Panel under cl 25(4)(a) of the SEPP Seniors, and remains current for 24 months from the date of issue recorded in the certificate.

62 The SCC is required by the consent authority, or the Court on appeal, because:

- (1) the provisions of cl 24(1) of SEPP Seniors apply to the Applicant's Proposed Development which is the subject of a development application for the purposes of seniors housing (other than dual occupancy) and is proposed to be carried out on land that adjoins land zoned primarily for urban purposes; and
- (2) under the provisions of cl 24(2) of SEPP Seniors:
  - (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).

63 In this appeal, the SCC issued by the Chair of the Sydney North Planning Panel states that the Panel has determined the application for a SCC made by Zhiva Living Dural Pty Ltd on 16 July 2019 by issuing the certificate under cl 25(4) of SEPP Seniors. This certificate (the current SCC)::

- (1) certifies that the site described in Schedule 1 to the certificate is suitable for more intensive development, which in my assessment satisfies provisions of subcl 24(2)(a) of SEPP Seniors;
- (2) further certifies that, in the Panel's opinion, the development in Schedule 1 of the SCC is compatible with the surrounding environment having regard to the criteria specified in cl 25(5)(b) of SEPP Seniors, which in my assessment satisfies the requirements of subcl 24(2)(b) of SEPP Seniors;
- (3) certifies that development for the purposes of seniors housing of the kind proposed in the development application is compatible with surrounding land uses only if it satisfies certain requirements specified in Schedule 2 of the certificate;
- (4) includes at Schedule 1 descriptions of the site and development to which the certificate applies; and
- (5) includes at Schedule 2 (see above at [20]) certain requirements imposed on determination of the development to which the certificate relates. Unlike the Applicant's previous SCC, Schedule 2 in the current SCC is referenced in the Panel's certification.

64 Based on the considerations above in [63], and on my satisfaction with respect to the requirements of cl 24(2)(b), along with the agreement of the Parties that the SCC fulfils the provisions of cl 24(2)(a), I find that:

- (1) the SCC issued by the Chair of the Sydney North Planning Panel has been issued within power; and, as a consequence,

- (2) the Court is able to rely on the SCC to determine the Applicant's development application, as amended.

**Have the requirements of the current SCC been satisfied?**

- 65 Under the provisions of cl 25(7) of SEPP Seniors, 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. In the current appeal, Schedule 2 of the Applicant's current SCC (see above at [20]) identifies such requirements as are referred to in cl 25(7) of SEPP Seniors.
- 66 The Applicant explained at the hearing, relying on evidence provided by its expert town planner, Mr Mead, how, in its submission, the requirements of Schedule 2 of its current SCC had been satisfied, as follows:
- (1) in relation to the first requirement, concerning reticulated sewer servicing, the Applicant had received a feasibility letter dated 10 July 2018 from Sydney Water confirming that Sydney Water will service the Proposed Development, and including details of how this would be achieved. On the basis of this evidence, unchallenged by the Respondent, I am satisfied that the first requirement of the Applicant's current SCC has been satisfied;
  - (2) in relation to the second requirement, that concerned the height, bulk, scale, setbacks and impacts to adjoining development, including the need to demonstrate that the development is compatible with the surrounding environment, I am satisfied that this requirement of the Applicant's current SCC has been satisfied for the following reasons:
    - (a) the Applicant's current SCC certifies that a development as described in Schedule 1 of the SCC would be compatible with the surrounding environment having regard to the criteria in cl 25(5)(b) of SEPP Seniors;
    - (b) consistent with the description in Schedule 1, the Applicant's Proposed Development now includes:
      - (i) a residential aged care facility in one building containing 66 beds, which I conclude, and the Respondent agreed, is less than the number of beds specified within the SCC;
      - (ii) a total of 91 self-care seniors living dwellings, which is the number of self-care seniors living dwellings certified in the SCC, and which is consistent with the SCC;
      - (iii) seven (7), two-storey buildings, referred to as Buildings A to G, with attics, incorporating central facilities space for a reception, restaurant, resident lounge, cinema, offices, café, gym, and swimming pool, which, when taken together with the residential aged care facility building, is consistent with, although lower in height than, the SCC's description of eight (8) three-storey buildings;
      - (iv) basement car parking, which is identified within SEPP Seniors as a consideration in the design of seniors housing, and which I conclude is consistent with the SCC;
      - (v) access to the site will be from both Quarry Road and Vineys Road, with the basement car parking for the office facilities and the aged care facility to operate independently from Vineys Road, with tie in pedestrian links to the dwellings at the rear;
      - (vi) vehicle access to the seniors living dwellings is to be from Quarry Road;
      - (vii) compliance with a maximum height of 10.5m, albeit now in two (2) storeys, and with a maximum floor space ratio of 0.65:1;
      - (viii) that the height and bulk of the development are concentrated within the central portion of the site and will be planted out with trees and landscaping at its edge;
      - (ix) a design that is consistent with requirements that from Vineys Road the development should appear as a single storey development, whereas the appearance of the development from Quarry Road should be of two storeys with a loft;
      - (x) setbacks from Vineys Road of at least 10m and 11m from the western and eastern site boundaries respectively, and setbacks at Quarry Road of at least 11m and 20m from the western and eastern site boundaries respectively; and
      - (xi) the central development is setback at least 20m from the Subject Site's eastern boundary.

- (c) the Parties' expert town planners agreed in their most recent joint report, tendered as evidence at the remittal hearing, that the Proposed Development, as amended, complies with:
    - (i) the height of buildings development standard in cl 4.3 of HLEP;
    - (ii) the FSR development standard in cl 4.4 of HLEP; and
    - (iii) the numerical setback requirements of HDCP;
  - (d) the Parties' expert town planners had also agreed that the Proposed Development, as amended, would not have any adverse impact on the amenity of adjoining properties having regard to matters of privacy and solar access;
  - (e) notwithstanding a disagreement of the Parties' expert town planners as to the compatibility of the bulk and scale of the Proposed Development given the rural zoning of the Subject Site, I am satisfied that, because the Proposed Development is consistent with the description in Schedule 1 of the SCC which was issued for the purposes described above at [11], I favour the evidence of the Applicant's expert, Mr Mead, and agree with him that the bulk and scale of the Proposed Development, including its presentation Quarry Road, is acceptable;
  - (f) in order to issue the current SCC the Sydney North Planning Panel was required to have regard to the criteria in cl 25(5)(b) of SEPP Seniors, which are:
    - (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) 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;
    - (v) whether the development may involve the clearing of native vegetation that is subject to the requirements of section 12 of the *Native Vegetation Act 2003* and the impact that the proposed development is likely to have on the conservation and management of native vegetation;
    - (vi) the impacts identified in any cumulative impact study provided in connection with the application for the certificate.
- (3) in relation to the third requirement, concerning landscape character, plantings, and the potential for retention of high landscape significance native trees, I am satisfied that this requirement of the Applicant's current SCC has been satisfied for the following reasons:
- (a) I am satisfied, on the basis of amended plans and the evidence of the landscaping experts, that the Applicant's landscape plans, as amended, are now compatible with, and complement, the landscape character of the locality, and provide for more mature plantings, stronger screen planting on the northern boundary;
  - (b) I have reviewed the submissions of the Parties in relation to current SCC's requirement that consideration be given to the retention of trees identified as T10 and T21;
  - (c) the Applicant's landscape plans now include retention of tree T10, a Sydney Blue Gum, the consideration of which was required by the Applicant's current SCC;
  - (d) I am satisfied that the Applicant has given consideration to retention of the Forest Red Gum tree identified as T21, and that it has presented cogent evidence to me to demonstrate the fact. In that regard I accept the specific evidence of Ms Mackenzie in her letter of 16 October 2020 to the Applicant in Exhibit R in the proceedings, that the impacts of retention of tree T21 on ground level changes required to facilitate the operation of the existing drainage swale and works associated with the proposed built footprint, would be too significant to retain the tree. I also note the agreed evidence of the Parties' expert town planners, Mr Barwick and Mr Mead, who stated in their most recent joint expert report, tendered as evidence at these remittal proceedings, that "consideration has been given to the retention of Tree 21";

- (4) in relation to the fourth requirement concerning certain remnant vegetation communities, I am satisfied, having regard to the evidence of the ecology experts in the joint report that formed Exhibit 19 in these proceedings, that the Applicant's Proposed Development, as amended, together with its amended landscape plans, will provide for the protection and enhancement of the remnant Blackbutt Gully Forest and Sydney Turpentine Ironbark Forest communities, which were identified as offset areas on the Subject Site by Cumberland Ecology in its report of 2019. This outcome was not challenged by the Respondent in the proceedings, and I am satisfied that the fourth requirement of the Applicant's current SCC has been satisfied;
- (5) in relation to fifth requirement concerning overland flood management, and based on the agreed submissions of the Parties that these issues have been resolved, I am satisfied that the fifth requirement of the Applicant's SCC has been satisfied through the provision of plans produced for the Applicant by Martens Associates, which is proposed to be supported through the imposition of proposed conditions of consent;
- (6) in relation to the sixth and final, requirement concerning bushfire planning and management, I note that it was the agreed position of the Parties that these matters had been resolved to their satisfaction and that of the NSW RFS, including through amendment to the Applicant's landscape plans, and the imposition of the GTAs through the Parties proposed conditions of consent.
- 67 Finally, I note that cl 24(3)(a)(i) of SEPP Seniors provides that nothing in cl 24 prevents a consent authority from granting consent to a development application to which the clause applies to carry out development that is on a smaller (but not larger) scale than the kind of development in respect of which a SCC was issued.
- 68 I am satisfied that the Applicant's Proposed Development, as amended, is of a smaller scale than the kind of development in respect of which a SCC was issued, and so, consistent with the provisions of cl 24(3)(a)(i) of SEPP Seniors, is of a kind that can be determined by the grant of consent.
- 69 On the basis the above (at [66] to [68]), I find that all requirements specified on the Applicant's current SCC have been satisfied, consistent with the provisions of cl 25(7) of SEPP Seniors.
- 70 I conclude that because the Applicant's development application, as amended, satisfies the provisions of its current SCC, it can be relied upon for the purposes of determining the Proposed Development, consistent with the provisions of cl 17 of SEPP Seniors.
- 71 I will now move on to address the remaining questions requiring resolution in this appeal as identified above at [59].

*Is Approval of the Applicant's Proposed Development in the Public Interest*

- 72 The Respondent submitted that the grant of consent to the Applicant's Proposed Development would not be in the public interest for the following two reasons:
- (1) notwithstanding the provisions of SEPP Seniors, the public interest would be best served by not approving a seniors living development within the Subject Site because:
- (a) consistent with the Greater Sydney Commission's North District Plan, seniors housing had been excluded from the Metropolitan Rural Area (MRA);
- (b) the Subject Site is located within the MRA; and
- (2) as confirmed by the submissions of objectors during the appeal, the Proposed Development had generated significant public opposition which should weigh against the grant of consent.

**Exclusion of seniors living development from the MRA**

- 73 In relation to the first of these reasons, the Parties submitted as follows:
- (1) the Respondent said that its expert town planner, Mr Barwick:
- (a) had addressed the District North Plan which had been drafted to clarify a previously ambiguous strategic policy position of government which:
- (i) on the one hand, sought to protect the MRA by excluding seniors living as a permissible form of development in the MRA; and
- (ii)

on the other hand, included the facultative provisions of SEPP Seniors which permitted the grant of consent for seniors living housing developments within the MRA in certain circumstances;

- (b) had stated that, in his opinion, there would need to be an overwhelming demonstration of the need and suitability for approval of the Proposed Development in light of the intent of the North District Plan to protect the MRA from urban development;
  - (c) had also stated that, in his opinion, the Applicant had not demonstrated what he said was the required need for, and suitability of, the Proposed Development to override the policy intent of the North District Plan's exclusion of seniors living development from the MRA;
- (2) the Applicant had submitted that its expert town planner, Mr Mead, had said in the joint report of the planners that:
- (a) clause 4B(3) of SEPP Seniors (see above at [32(2)]) had been inserted specifically to protect the Applicant's development application, as the Applicant had applied for and been issued prior to the commencement of cl 4B of SEPP Seniors;
  - (b) clause 4B(2) of SEPP Seniors had also been inserted to protect the Applicant's development application which had been lodged before the restrictions introduced through the insertion of cl 4B had been adopted;
  - (c) the savings provisions afforded the Applicant's development application identified that the policy position and intent of the provisions of cl 4B is not to restrict the assessment or determination of a development on land such as the Subject Site or an SCC application lodged prior to the commencement of the clause.

74 I have considered the submissions of the Parties above (at [73]) and concluded that I agree with the submissions of the Respondent, supported by the evidence of its expert town planner, Mr Mead, which I adopt.

75 In summary, it is my view that the insertion of cl 4B within SEPP Seniors clearly anticipated the circumstances in the current appeal and the need to weigh the provisions of the SEPP Seniors against the strategic policy intent of the North District Plan with respect to the future of the MRA. In doing so, the savings provisions within cl 4B are clear that the determination of a development application lodged prior to the commencement of the clause should proceed without the restrictions that that the clause would otherwise introduce to future development applications.

#### **Matters raised in objector submissions**

76 In relation to the submissions of the objectors (see above at [21] to [26]), it is my assessment that the matters raised by the objectors have been the subject of evidence from the Parties' experts and have been considered by the Parties in their submissions.

77 I am satisfied that, to the extent required, the matters raised by the objectors have been addressed and resolved by the Applicant through its various amendments to its development application, and through the Parties' proposed conditions of consent that should be imposed on the Proposed Development if the Applicant's development application were to be determined through the grant of consent.

78 In closing, and in response to submissions made by objectors at the remittal hearing, the Applicant noted that:

- (1) in relation to the submission of Mr Ashwood concerning potential stormwater discharge to his land, the Applicant confirmed, and the Respondent did not challenge, that the stormwater engineering experts had stated that:
  - (a) there would be no such discharge of stormwater generated by the Proposed Development; and
  - (b) no easement was sought or required across Mr Ashwood's land for this purpose;
- (2) in relation to the submission of Mr Norris concerning bushfire matters, the Applicant confirmed, and the Respondent did not challenge, that its amended landscape plans achieved compliance with the NSW RFS GTAs and provided that canopy cover on the Subject Site would be less than 15%;
- (3) in relation to the submission of Mr Seale, the Applicant said, and the Respondent did not challenge, that:



- (a) his concerns in relation to the vehicle passing on Vineys Road had been addressed through the Parties' proposed conditions of consent;
- (b) no consent was sought in the current proceedings for roadworks outside the Subject Site; and
- (c) any roadworks to be undertaken outside the Subject Site would be the subject of future applications to be made under s 138 of the *Roads Act 1993*.

#### Conclusions in relation to the public interest contentions

- 79 For reasons provided above at [74] to [78], I do not consider that the Respondent's submissions in relation to the public interest provide grounds to refuse the Applicant's development application.
- 80 The Respondent had drawn the Court's attention to the judgment in *Terrace Tower Holdings Pty Limited v Sutherland Shire Council* (2003) 129 LGERA 195; [2003] NSWCA 289 (hereafter referred to as *Terrace Tower*) (at [81]) the Court identified that "matters relevant to the public interest touching a particular application are not confined to those appearing in published environmental planning instruments, draft or final".
- 81 While I accept this position, I note, as identified by the Applicant, that the Court in *Terrace Tower* also stated that "... such instruments carry great and at times determinative weight...".
- 82 It is my finding that in the current appeal, the weight that should be afforded to the statutes, including to the savings provisions in cl 4B of SEPP Seniors, should be determinative given that the matters raised by objectors in the proceedings have been addressed to my satisfaction (see above at [77]).

#### Further matters identified by the Parties for consideration

##### Insufficient information

- 83 At the hearing the Parties confirmed that certain contentions relating to matters of insufficient information had been substantially resolved through the Applicant's amended plans and further documentation for which leave had been granted or through the proposed imposition of conditions of consent proposed by the Respondent and embraced by the Applicant. These contentions had concerned:
- (1) the Proposed Development's compliance with cl 43 and 44 of SEPP Seniors, which was not pressed in the proceedings;
  - (2) the Applicant's proposed plan of management and its satisfactory inclusion of information relating to the management of bushfire risk, site evacuation in relation to bushfires and the operation of the premises as a retirement village, and none of these matters was pressed in the proceedings;
  - (3) certain details relating to landscape elements within the Proposed Development, which had been resolved through the proposed imposition of conditions of consent;
  - (4) a contention concerning ventilation systems, which was not pressed in the proceedings.
- 84 However, the Respondent did press a contention that the Applicant's Proposed Development should include a mechanism to identify to prospective residents the apartments that may be subject to potential adverse impacts from external noise sources and which may require residents to close windows to achieve desired levels of acoustic amenity.
- 85 The Applicant's expert town planner, Mr Mead, had stated within his joint expert report with Mr Barwick that the mechanism proposed above (at [84]) was unnecessary as an occupant's decision to close a window in response to a potential noise source is a personal preference. I agree with him.

86

In my assessment, a resident wishing to mitigate any perceived noise impact that may arise from an external source will simply elect to close the window and so reduce the level of perceived noise. No mechanism, such as that proposed by the Applicant, would be required to achieve this outcome and I am satisfied that no condition related to such a mechanism is required.

#### Conditions of consent

- 87 The Parties had provided conditions that should be imposed by the Court should it find that the proposed Development should be subject to the grant of consent.
- 88 The Respondent has proposed a condition (identified as proposed condition 2 and reflected in other proposed conditions), requiring, *inter alia*, that tree T21 be retained should the Proposed Development be determined by the grant of consent.
- 89 The Applicant said that it had properly considered the retention of tree T21 but that its removal was required as part of the Proposed Development. It also noted that the imposition of a condition requiring the retention of tree T21 would be tantamount to a constructive refusal.
- 90 I am satisfied that, as a consequence of my finding above that the Applicant had considered the retention of tree T21, and that the removal of that tree is nevertheless required for the Proposed Development for reasons identified above at [66(3)], along with the Applicant's amended landscape plans. I conclude that the Applicant's version, and not the Respondent's version, of proposed conditions should be imposed with the grant of consent.
- 91 Otherwise, the conditions identified for imposition with the grant of consent to the Applicant's proposed development are agreed between the Parties.

#### Additional jurisdictional considerations

- 92 The Applicant submitted that the following further jurisdictional considerations had also been satisfied by the Proposed Development, as amended, and as required through the imposition of the Parties' agreed conditions of consent:
- (1) the provisions of cl 17 of SEPP Seniors concerning development on land adjoining land zoned in relation to the provision of a residential care facility are addressed through documentation tendered as evidence by the Applicant at the hearing and would be further addressed through the imposition of proposed condition 79;
  - (2) the provisions of cl 18 of SEPP Seniors concerning restrictions on occupation of senior housing allowed under SEPP would be addressed through proposed condition 78 which requires registration of a restriction as to user regarding the use of accommodation and proposed condition 84 concerning a restriction on the occupation of seniors housing;
  - (3) the provisions of cl 26 of SEPP Seniors in relation to the location and access to facilities, and which requires that residents of the Proposed Development have access to a range of identified services and facilities. I am satisfied that the Applicant has confirmed by written evidence tendered as evidence at the hearing that the access required will be provided;
  - (4) the provisions of cl 27 of SEPP Seniors, concerning bushfire prone land, and based on the written evidence provided by the Applicant at the hearing, and the GTAs provided by the NSW RFS, I am satisfied that the development will comply with the requirements of Planning for Bush Fire Protection (2019);
  - (5) the provisions of cl 28 of SEPP Seniors, concerning water and sewer services, I am satisfied on the basis of evidence tendered by the Applicant at the hearing, that the water and sewerage infrastructure proposed are satisfactory for the Proposed Development;
  - (6) the provisions of cl 30 of SEPP Seniors in relation to site analysis, in relation to which I am satisfied that the Applicant's development application, as amended, and as provided within its supporting documentation, has taken account of that the Applicant's analysis of the Subject Site, including its attributes and constraints, and is responsive to the matters identified in cl 30(2) of SEPP Seniors. I also note that no contention was identified by the Respondent in relation to the provisions of cl 30 of SEPP Seniors;

- (7) the provisions of cl 32, concerning design of residential developments, and in relation to which I am satisfied, based on the documentation that forms part of the Applicant's development application, as amended, that adequate regard has been had to the principles set out in Part 3 Division 2 of SEPP Seniors;
- (8) the provisions of cl 40 of SEPP Seniors, concerning development standards for minimum sizes and building height, in relation to which I am satisfied, on the basis of the Applicant's site survey and architectural plans, that the Proposed Development complies with the requirements of cl 40(a) and 40(b), and that the provisions of cl 40(4) and 40(5) do not apply to the Proposed Development;
- (9) the provisions of cl 42 of SEPP Seniors, concerning self-care housing, in relation to which I am satisfied, based on the Applicant's amended plan of management dated 16 February 2021, that the Proposed Development, as amended, complies with the provisions of cl 42(1);
- (10) the provisions of cl 43 of SEPP Seniors, concerning transport to local centres, and in relation to which I am satisfied, based on the Applicant's amended plan of management dated 16 February 2021, that the Proposed Development, as amended, complies with the provisions of cl 43(1);
- (11) the provisions of cl 44 of SEPP Seniors, concerning the availability of facilities and services, and in relation to which I am satisfied, on the basis of the Applicant's amended plan of management dated 16 February 2021, that the facilities and services provided as part of the Proposed Development will be available to residents when the housing is ready for occupation;
- (12) the provisions of cl 55, concerning the requirement for residential care facilities for seniors to have a fire sprinkler system, the provision of which is confirmed within the architectural plans prepared by Marchese Partners International Pty Ltd (Rev B.1; 13 October 2020). These were included in Exhibit MS-2 to the affidavit of Mr Matt Sonter, affirmed on 21 October 2020, which was read in the notice of motion proceedings on November 2020, as a consequence of which the Applicant was granted leave to rely on those plans.

## Conclusions

93 Having considered the submissions of the Parties, and the evidence of their experts (see above at [57]), including the evidence of the expert town planners, Mr Barwick and Mr Mead, as well as the objector submissions (see above at [21] to [26]), I am satisfied that:

- (1) as confirmed above (at [66]), the Applicant's development application, as amended, fulfils the requirements of the current SCC issued to the Applicant by the Chair of the Sydney North Planning Panel and dated 16 April 2020, for the reasons identified above (at [69]), and the Court is able to rely on the SCC to determine the Applicant's development application (DA/668/2018), as amended, for its Proposed Development on the Subject Site;
- (2) the Applicant's development is of a form that can be determined consistent with the provisions of cl 17 of SEPP Seniors for a development that is proposed to be carried out on land that adjoins land zoned primarily for urban purposes;
- (3) as confirmed by the Parties, the merits issues that had previously been in contention between them at the original proceedings (see above at [52], [53]) and [56], were substantially resolved either by:
  - (a) the documentation and reporting of experts identified above at [54] and [55] provided during the original proceedings; or
  - (b) the further joint reporting of the Parties' experts in relevant disciplines, or by the Applicant's amended plans and other documents, for which leave has been granted and upon which the Applicant now relies (see above at [14]); or
  - (c) the imposition of the Parties' proposed conditions of consent;
- (4) all remaining jurisdictional considerations and requirements have been addressed by the Applicant's Proposed Development, as amended, including:
  - (a) those related to the requirements of the Applicant's current SCC (see above at [66]), notably in these remittal proceedings, consideration of retention of tree T21 (see above at [66(3)]);
  - (b) those required under the provisions of SEPP Seniors (see above at [92]);
- (5) matters relating to the provision of information by the Applicant have been resolved (see above at [83] and [86]).

94 I am further satisfied that:

- (1) matters concerning the relative weight to be afforded to the recent exclusion of seniors housing from the MRA, reflecting priorities in the North District Plan, and in the context of recent amendments related to this in SEPP Seniors and

savings provisions therein, have been considered and resolved (see above at [75]);

- (2) matters raised in public submissions during the original proceedings as well as in the remittal hearing, have been considered, and addressed by the Applicant through its amendments to the Proposed Development, the submissions made during the hearing, and through the imposition of proposed conditions of consent.

95 On the basis of my findings above (at [93] and [94]), I have concluded that, as the provisions of s 4.15(1)(a) have been satisfied, the Applicant's Proposed Development, as amended, is in the public interest and should be approved, subject to conditions.

## Orders

96 The orders of the Court are:

- (1) The Applicant is granted leave to amend its development application and to rely on amended plans, including amended landscape plans;
- (2) The appeal is upheld;
- (3) Development application DA/688/2018, as amended, for the demolition of existing structures and the construction of a 91-bed residential care facility and 66-dwelling seniors living development, and associated works, at 3 Quarry Road and 4 Vineys Road, Dural, is determined by the grant of consent, subject to the conditions attached at Annexure 'A';
- (4) The exhibits are returned, except Exhibits A and 1, 18.

.....

**Michael Chilcott**

**Commissioner of the Court**

[Annexure A \(609665..pdf\)](#)

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Decision last updated: 14 May 2021