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| Case Name:  | Wirrabara Village Pty Ltd v The Hills Shire Council |
| Medium Neutral Citation:  | [2020] NSWLEC 1043 |
| Hearing Date(s):  | 18-21 November 2019; written submissions filed 3,11 and 16 December 2019 |
| Decision Date:  | 14 February 2020 |
| Jurisdiction:  | Class 1 |
| Before:  | Morris AC |
| Decision:  | See orders at [170] |
| Catchwords:  | DEVELOPMENT APPLICATION — seniors living development — site compatibility statement — bushfire risk — ecology — suitability of the site — design principles — accessibility |
| Legislation Cited:  | Biodiversity Conservation Act 2016Conveyancing Act 1919Environmental Planning and Assessment Act 1979Retirement Villages Act 1999Rural Fires Act 1997State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004The Hills Local Environmental Plan 2012 |
| Texts Cited:  | The Hills Development Control Plan 2012Planning for Bush Fire Protection 2006 |
| Category:  | Principal judgment |
| Parties:  | Wirrabara Village Pty Ltd (Applicant)The Hills Shire Council (Respondent) |
| Representation:  | Counsel:C Ireland (Applicant)J Lazarus SC (Respondent) Solicitors:Dentons (Applicant)Wilshire Webb Staunton Beattie Lawyers (Respondent) |
| File Number(s):  | 2019/104980 |
| Publication Restriction:  | Nil |

Judgment

1. Wirrabara Village Pty Ltd authorised lodgement of Development Application DA 1035/2018/JP with The Hills Shire Council on 12 December 2018 seeking consent for the construction of seniors living development comprising 104 self-care dwellings in the form of dwelling houses, attached dwellings and apartments, a Residential Age Care Facility containing 36 beds and a community building.
2. The Sydney Central City Planning Panel is the consent authority and had not determined the application within the prescribed period. Wirrabara is appealing its deemed refusal pursuant to the provisions of s 8.10 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

The site and its context

1. The site is legally described at Lot 1 DP 534265, Lots 1 and 2 DP 560912 and known as Nos 3 and 5 Pellitt Lane and No 9 Wirrabara Road, Dural. It is located on the north western corner of the intersection of Pellitt Lane and Wirrabara Road and is rectangular in shape with an eastern street frontage of approximately 162.4m to Wirrabara Road, a southern street frontage of 105m to Pellitt Lane, and a depth of approximately 375m. The site has a total area of 63,220m2.
2. When viewed from Wirrabara Road the site is gently undulating and includes a variety of topographical changes. A portion of O’Hara’s Creek runs through the rear of the property with natural bushland. This is steeply sloped, densely vegetated and includes riparian corridor vegetation.
3. The western part of the site, generally aligned to the riparian vegetation is identified as bushfire prone land as are small pockets along the site’s southern boundary opposite Ellerman Park and the north-eastern corner.
4. Existing site improvements include three single storey dwellings and associated outbuildings with trees and vegetation that will require removal to facilitate the proposed development. Works within the Riparian Corridor are limited to the removal of dead trees and weeds however part of the proposed detention basin will impinge into the weeded area. No trees are to be removed as part of that work.
5. Vehicular access to the site is gained via Wirrabara Road and Pellitt Lane.
6. The locality to the north and east is predominately rural lifestyle lots with the site adjoined by rural residential allotments to the east and north. To the south of the site is Council land known as Ellerman Park and is adjacent to a conservation area. The park contains dense bushland, a library, child care centre and small sporting oval. To the south of the site is a development, known as The Centre, which incorporates a place of worship, an indoor sporting centre, Men’s Shed, play group centre and cafe. O’Hara’s Creek continues through that land.
7. To the west of the site is land associated with The Hills Grammar School. On the southern side of Kenthurst Road opposite The Centre is a recently constructed Seniors Housing multi-unit development with the Round Corner urban village located further south and east.
8. The Round Corner Shopping Centre and Dural Mall is located approximately 500m from the site. Within the shopping centre are two supermarkets (Woolworths and Aldi), specialty and non-retail tenants such as a liquor store, banks, restaurants and some medical services.

Background and the proposal

1. The original development application was lodged with the council at the end of 2018. Following filing of the appeal, a conciliation conference was held before another Commissioner of this Court. The conference was terminated however the applicant has amended the proposal and was granted leave to rely on amended plans on 10 October 2019. Further leave to rely on plans that amended the proposed fencing along Pellitt Lane and made provision for 2 x 50kl water tanks in the north-eastern corner of the site was granted on the second day of the hearing. No Order as to costs was sought nor made. In addition the applicant tendered and was granted leave to rely on further amended documents throughout the hearing.
2. The main plans, Exhibits C, D and M seek consent for an integrated development comprising: demolition of existing structures, removal of existing vegetation, construction of a seniors living development comprising a 36 bed residential aged care facility and 97 serviced self-care dwellings; provision of resident services including home delivered meals, personal care and home nursing, assistance with housework and a bus service providing access for residents to a local centre; bushfire mitigation works; construction of roads; provision of resident and visitor car parking; earthworks and civil engineering works.
3. The built form is to be concentrated at the eastern end of the site because of the bushfire prone nature of the riparian zone along O’Hara’s Creek. The location of the Asset Protection Zone defines the boundary of the built form with the western portion of the site to be managed as grassed banks and riparian vegetation. The western portion of the site would be maintained as an Asset Protection Zone.

Zoning

1. The site is zoned RU6 Transition under The Hills Local Environmental Plan 2012(LEP). Seniors housing is not included in those uses permitted with consent in that zone.

The site compatibility certificate

1. Because the development of the site for seniors housing is not permissible under the LEP, the applicant sought and obtained a Certificate of Site Compatibility pursuant to the provisions of clause 25(4)(a) of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors). That certificate was issued by the Deputy Secretary, Planning Services as delegate of the Secretary of the Department of Planning and Environment on 3 March 2018 and will remain current until 23 March 2020. It describes the project as: 104 serviced self-care dwellings in combination with a 72-bed residential care facility, community buildings and associated car parking.
2. The Secretary has formed the following opinion:

a. the site is suitable for more intensive development; and

b. the development described in Schedule 1 is compatible with the surrounding environment having had regard to the criteria specified in clause 25(5)(b); and

c. that development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding land uses only if it satisfies certain requirements specified in Schedule 2 of the certificate.

1. The requirements listed in Schedule 2 of the certificate are:

The location and final number of serviced self-care housing units/dwellings and number of beds in the residential care facility permitted on site shall be determined by Council through the assessment of the development application under section 79C of the Environmental Planning and Assessment Act 1979.

1. At the time the certificate was issued, the terms of clause 24(2) of SEPP Seniors was in the following form:

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

1. Clause 24(3) of SEPP Seniors is in the following form:

(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.

1. The effect of the certificate is to allow consent to be granted to the development provided it is no larger than that described despite the zoning of the land however, nothing prevents the consent authority to carry out the usual merit assessment of the proposal.

The planning controls

1. The Certificate of Site Compatibility does not alter the zoning of the land and therefore the provisions of LEP apply. Clause 1.9 provides that a State environmental planning policy can prevail over the LEP as provided by s 36 of the EPA Act. Accordingly, the LEP is subject to the provisions of SEPP Seniors in accordance with clause 5(3) to the extent of any inconsistency with the LEP. Where there is no inconsistency, the provisions of the LEP apply.
2. The aims of SEPP Seniors are at clause (2) as follows:

(1) This Policy aims to encourage the provision of housing (including residential care facilities) that will—

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

(b) make efficient use of existing infrastructure and services, and

(c) be of good design.

(2) These aims will be achieved by—

(a) 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, and

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

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

1. The parties agree that the site compatibility statement allows for consent to be granted and that the site is land adjoining land zoned primarily for urban purposes. That fact calls up additional considerations under SEPP Seniors. In particular, clause 17 limits the type of housing that is permitted on such land to a hostel, residential care facility and serviced self-care housing. The application is for a residential care facility and serviced self-care housing. Where self-care housing is proposed subclause (2) requires the consent authority must be satisfied that the housing will be provided for people with a disability, or in combination with a residential care facility, or as a retirement village (within the meaning of the *Retirement Villages Act 1999*). The application includes a residential care facility so I am satisfied the provisions of that clause are met.
2. Clause 18 restricts occupation of accommodation to seniors or people who have a disability, people who live within the same household with such persons and staff employed to assist in the administration of and provision of services to the housing provided. The clause requires conditions be imposed on any consent granted to ensure such occupancy and that a restriction as to user be registered on the title of the property under section 88E of the *Conveyancing Act 1919* limiting the use to accord with those provisions. The draft consent conditions, at 5 and 110 address this requirement and therefore I am satisfied the terms of the clause are met.
3. Clause 26 requires access to facilities and those parts relevant to the application are in the following form:

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

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

(b) community services and recreation facilities, and

(c) the practice of a general medical practitioner.

(2) Access complies with this clause if—

(a) the facilities and services referred to in subclause (1) are located at a distance of not more than 400 metres from the site of the proposed development that is a distance accessible by means of a suitable access pathway and the overall average gradient for the pathway is no more than 1:14, although the following gradients along the pathway are also acceptable—

(i) a gradient of no more than 1:12 for slopes for a maximum of 15 metres at a time,

(ii) a gradient of no more than 1:10 for a maximum length of 5 metres at a time,

(iii) a gradient of no more than 1:8 for distances of no more than 1.5 metres at a time, or

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

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

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

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

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

1. The applicant has prepared an Access Report and provided cross sections of the existing footpath in Kenthurst Road, details of the extent of work required to achieve the necessary grades and a proposed footpath to link the site to bus stops in that road together with bus timetables that indicate compliance with the provisions of this clause. Completion of that work, which the applicant agrees to undertake, would satisfy the provisions of this clause. The council does not accept the suitability of the bus stop locations because it maintains it is not safe for residents to access the one on the western side of Kenthurst Road. This matter is addressed later in this judgment.
2. Clause 27 relates to Bush fire prone land. The site is bush fire prone and therefore the clause applies. It is in the following form:

(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” 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 0 9751033 2 6, prepared by the NSW Rural Fire Service in co-operation with the Department of Planning, dated December 2006.

(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” 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.

1. The Rural Fire Service (RFS) had considered the original development application and queried some of the methodology used. It has not considered the current plans and therefore the Court must determine the application without its advice. This issue is the subject of expert evidence and addressed later in the judgment.
2. Clause 28 requires a consent authority to be satisfied, by written evidence, that the housing will be connected to a reticulated water system and has adequate facilities for the removal and disposal of sewage before consent can be granted. The applicant has provided a Services Infrastructure Report and Hydraulic Services Concept Plan (Exhibit D). The council does not contest that the provisions of that clause are met and, having regard to the evidence, I am satisfied that the requirements of the clause are met.
3. Clause 30 requires the consent authority to be satisfied that the applicant has taken into account a site analysis prepared in accordance with that clause before consent can be granted. This matter is not in dispute and a site analysis has accompanied the development application. Accordingly, I am satisfied that the provisions of that clause are met.
4. Clause 32 requires that consent to the development application must not be granted 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. This matter is also in contention and addressed by experts and discussed later in the judgment.
5. Clause 40 prevents the grant of consent unless the development standards for minimum sizes and building height are met. It is common ground that the proposed development meets those standards so this clause does not present a barrier to the grant of consent.
6. Part 5 applies to development on land adjoining land zoned primarily for urban purposes and therefore applies to the application. Subclause 42(1) prevents consent being granted for serviced self-care housing unless the consent authority is satisfied, by written evidence, that residents of the proposed development will have reasonable access to home delivered meals, and personal care and home nursing, and assistance with housework with that service not being government funded community supported programs. The applicant relies on documents forming part of Exhibit A and supplementary information contained in Exhibit R to satisfy this clause. Having reviewed this documentation, I am satisfied the terms of clause 42 are met.
7. Clause 43 requires written evidence that a bus capable of carrying at least 10 passengers will be provided to the residents of the proposed development that will drop off and pick up passengers at a local centre that provides residents with access to the following:
8. shops, bank service providers and other retail and commercial services that residents may reasonably require,
9. community services and recreation facilities,
10. the practice of a general medical practitioner, and
11. The bus must be 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. The applicant has provided details of arrangements made with a bus company to provide a service that will provide the necessary access to the shops at Dural Mall. I am satisfied that this written evidence satisfies the provisions of clause 43.
12. Clause 44 requires the consent authority to 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. The applicant does not propose to stage the development and accordingly, the services would be available when the development is occupied. The facilities to be provided on the site are a community garden, community recreation building and the residential care facility.
13. The final clause in SEPP Seniors to be satisfied is clause 55. This clause prevents the grant of consent to carry out development for the purpose of a residential care facility for seniors unless the proposed development includes a fire sprinkler system. The plans forming Part of Exhibit D address this requirement.
14. The relevant aims of the LEP are:

(a) to guide the orderly and sustainable development of The Hills, balancing its economic, environmental and social needs,

(b) to provide strategic direction and urban and rural land use management for the benefit of the community,

(c) to provide for the development of communities that are liveable, vibrant and safe and that have services and facilities that meet their needs,

(d) to provide for balanced urban growth through efficient and safe transport infrastructure, a range of housing options, and a built environment that is compatible with the cultural and natural heritage of The Hills,

(e) to preserve and protect the natural environment of The Hills and to identify environmentally significant land for the benefit of future generations,

1. Clause 2.3(2) of the LEP requires the consent authority to have regard to the objectives for development in a zone when determining a development application in respect of land within the zone. The objectives of the RU6 zone are:

• To protect and maintain land that provides a transition between rural and other land uses of varying intensities or environmental sensitivities.

• To minimise conflict between land uses within this zone and land uses within adjoining zones.

• To encourage innovative and sustainable tourist development, sustainable agriculture and the provision of farm produce directly to the public.

1. The following map is an extract of the Land Zoning Map LNZ\_023 of LEP 2012 with the site highlighted:



1. As shown on the map above, the site is located opposite land zoned RE1 Public Recreation known as Ellerman Park. The Dural Mall and shopping centre is in the blue area zoned B2 Local Centre and the pink area contains detached dwelling houses that are within the Round Corner Village. That land is zoned R2 Low Density Residential.
2. There are a number of senior’s housing developments on the perimeter of that village, one to the west on the southern side of Kenthurst Road and two in Stonelea Ct, one adjacent and to the south of the R2 zone and one adjacent to and to the south of the B2 zone. These three developments are located within the RU6 zone.
3. The rear of the site is identified on the Terrestrial Biodiversity Map. Clause 7.4 of the help applies and is in the following form:

7.4 Terrestrial biodiversity

(1) The objective of this clause is to maintain terrestrial biodiversity, including by—

(a) protecting native fauna and flora, and

(b) protecting the ecological processes necessary for their continued existence, and

(c) encouraging the conservation and recovery of native fauna and flora and their habitats.

(2) This clause applies to land identified as “Biodiversity” on the Terrestrial Biodiversity Map.

(3) In deciding whether to grant development consent for development on land to which this clause applies, the consent authority must consider—

(a) whether the development is likely to have—

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

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

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

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

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

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

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

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

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

1. In addition to those provisions, clause 7.7 of the *Biodiversity Conservation Act 2016* must be considered and is in the following form:

7.7 Biodiversity assessment for Part 4 development (other than State significant development or complying development)

(1) This section applies to an application for development consent under Part 4 of the Environmental Planning and Assessment Act 1979, except—

(a) an application for development consent for State significant development, or

(b) an application for a complying development certificate.

(2) If the proposed development is likely to significantly affect threatened species, the application for development consent is to be accompanied by a biodiversity development assessment report.

1. A Biodiversity Development Assessment Report (BDAR) and a Biodiversity and Vegetation Management Plan form part of the Ecological Joint Expert Report, Exhibit 6. The BDAR assesses possible impact to the Dural Land Snail. There is debate between the parties as to whether the vegetation across the western portion of the site is Sydney Turpentine Ironbark Forest (STIF), a critically endangered ecological community. Despite the applicant concluding the vegetation to be impacted is not STIF, the BDAR takes a precautionary approach, with biodiversity offsetting to be provided for all native vegetation cleared, which, for the purposes of the assessment is assumed to be the critically endangered STIF. All wildlife habitat to be cleared will be offset via the purchase of species credits for Dural Land Snail and Powerful Owl.
2. The site is identified as Bushfire Prone across its western end in the vicinity of the creek.
3. The Hills Development Control Plan 2012 (DCP) is also a relevant consideration.

The issues

1. The first contention in the case, that of permissibility, is not pressed by the Council given the grant of the Site Compatibility Certificate. Those contentions remaining are:
* The proposed development is not suitable for the site and is not compatible with the surrounding environment;
* The development has not demonstrated that adequate regard has been given to the principles set out in Division 1, Part 2 of SEPP Seniors;
* The proposed development does not comply with Planning for Bush Fire Protection 2006 prepared by the NSW Rural Fire Service;
* The proposed development is not in the public interest and will establish an undesirable precedent in in the locality.
1. Other contentions regarding inadequacy of information have either been resolved through submission of supplementary plans, reports and information or are addressed by the experts in their joint reports.

The evidence

1. The hearing commenced on site with evidence heard from a number of residents, all of whom objected to the proposal. The site view included observation of the site from within the property to the immediate north of the site in the company of the owners of that site. Their primary concern was the impact of the proposal on their privacy to both their dwelling and recreation areas including pool.
2. Issues raised in objection to the proposal are summarised as follows:
* Proposal represents an overdevelopment of the site and is incompatible with the character the rural area;
* Adverse traffic, pedestrian, cyclist and safety impacts;
* Adverse impact on threatened species;
* Pellitt Lane too narrow for access to the site as the road is already congested, particularly when there are sporting events on the oval or functions held in The Centre;
* Already an oversupply of seniors housing in the area;
* Bushfire risk to vulnerable residents and road system is inadequate for safe evacuation;
* Proposal is inconsistent with regional planning documents;
* Site is poorly serviced by public transport;
* Inadequate services available for residents of the proposed facility.
1. Expert evidence was heard from:

Bushfire:

Mr J Travers (Applicant)

            Mr L Short (Respondent)

Planning

Mr J Wynne (Applicant)

            Mr S McDonald (Respondent)

Urban Design

Ms G Morrish   (Applicant)

Engineering

Mr S Fryer (Applicant)

            Mr K Ballurkar (Applicant)

Ms V Sivakumar (Respondent)

Landscaping

Ms J Irwin (Applicant)

Ecology

Dr D Robertson (Applicant)

            Dr A Clements (Respondent)

Bushfire

1. The *Rural Fires Act 1997* identifies the proposal as a Special Fire Protection Purpose (SFPP). The applicant has not obtained a Bushfire Safety Authority under s 100B of that Act.
2. Clause 27(1) of SEPPARH is a jurisdictional matter and therefore, unless the Court is satisfied that the terms of the clause are met, consent cannot be granted. This requires satisfaction that the development complies with the requirements of the document titled Planning for Bush Fire Protection, ISBN 0 9751033 2 6, prepared by the NSW Rural Fire Service in co-operation with the Department of Planning, dated December 2006 (PFB2006).
3. The expert report was prepared having regard to that document and also a Pre-Release version of a document with the same title and issued in August 2018 (PFB2018). Both experts agree that the latter is a more stringent document.
4. Mr Travers prepared a report Bushfire and Ecology Bushfire Protection Assessment of September 2019 (Exhibit A, Vol 2 Tab 89). The experts agree that the proposal, based on that report is able to comply with Planning for Bush Fire Protection however did not stipulate which version of the document they were referring to. This issue was the subject of considerable cross examination of the witnesses. In particular, much was put as to whether the adjoining land, Lot 24, described as “the Church land” or the site of The Centre, was required as an Asset Protection Zone (APZ).
5. With specific reference to Table A2.6 of PFB2006, the experts agree the proposal does not comply with those provisions however, an alternate solution put forward by Mr Travers that uses Method 2, included in both versions of the document, a performance-based solution, is correct and the proposed APZ meets the requirements of PFB2006.
6. They also agree that PFB2006 provides for alternative and performance-based solutions and that the Travers report follows this methodology.
7. The experts agree that the lands identified as “managed lands” for the purposes of an APZ, being those lands to the west, north-west and east of the site can be subject to a Plan of Management (POM) that addresses the necessary management regime and frequency of management required for those lands.
8. This is particularly relevant to the contentions in the case as it is the Council’s position that the application relies on APZs on adjoining land not under the ownership of the applicant and to which no owner’s consent has been provided. The applicant submits that this is not the case, that no works are required on those adjoining lands and that these areas are managed lands and fall within the “exceptional circumstances” provisions of clause 3.3 of PFB2006. In the alternate, the applicant submits that if the Court were to find the area of the Church land were an APZ and required management then, a deed entered into between the Church and the applicant would constitute the necessary owner’s consent and also ensure that the area would be managed to accord with the requirements of PFB2006.
9. The experts agree that the required 8m wide perimeter road reservation is shown on the plans and this portrays two elevations showing 8m reservation with ‘knock down’ short grassy garden shrubs. Whilst not meeting the prescriptive width requirements, part of the road described as O’Hara’s Terrace achieves the intent of the performance criteria and is said to be acceptable.
10. It is noted that the Biodiversity and Vegetation Management Plan dated November 2019 (included in Exhibit 6) includes the Church land, identifies it as an APZ and relies on the covenant for works (APZ creation and maintenance).

Planning and Urban Design

1. The experts agree that the western portion of the site is physically and environmentally constrained and, if the eastern portion is deemed suitable for the site of the proposed development, the extent of any potential development footprint is the matter the Court must consider.
2. The fundamental difference of opinion between the applicant’s experts and those of Mr McDonald for the Council is whether or not the seniors housing development on the site within the proposed location is a development that is compatible with the surrounding environment. It is the position of the applicant’s experts that it is and Mr McDonald that it is not.
3. Arising from this overall comment and statement of opinions, they agree that, in the event that the Court determines that this proposed Seniors Living development is compatible with the surrounding environment, then no further substantial design changes are required to the current proposal.
4. They also agree that sufficient information had been provided to address some of the servicing and jurisdictional issues under the policy or could be provided during the hearing. They endorse imposition of consent conditions to reflect those requirements.
5. Mr McDonald cites the DCP and in particular Section B1 which applies to land zoned RU6, the aim to ensure that rural development is compatible with the capability of land, has regard to the natural environment, scenic qualities and rural character and contributes to the social and economic wellbeing of the rural area. The section includes outcomes and controls for new development including 5m side and rear setbacks, fencing to be of open style, cut not to exceed 1m and fill not to exceed 600mm, dwellings, including attached dual occupancies and secondary dwellings should fit within the rural landscape while providing for a residential lifestyle, and community facilities, recreation facilities and places of public worship do not impact on amenity of surrounding development or character of the rural area.
6. It is his evidence that the urban footprint of the environment surrounding the site is restricted to the south of Pellitt Lane. In particular, the south-east to north-west section of that road, that is bordered by the R2 land which is the effective boundary that separates the urban and rural land uses and character.
7. Rural/residential development on the northern side of Pellitt Lane and extending along Wirrabara Road is characterised by large lots on which are located very low density single detached dwelling houses in open rural landscapes. Fencing styles vary and include planted hedges and open timber and wire fencing. The more recent houses are large in scale and appear to represent rural “lifestyle” forms of development rather than active rural or agricultural uses.
8. Both sides of Pellitt Lane and Wirrabara Road have the character and appearance of rural roads featuring a simple bitumen strip and no kerb and gutter and also lined with unfenced sections of substantial trees within the informal road reserve. There is clear visual and rural character distinction, with the site located within the relative informality and open rural landscape to the north of Pellitt Lane and along Wirrabara Road.
9. The transition in character from urban to rural is also evident in the northward movement along Pellitt Lane from the southern extent at the intersection with Kenthurst Road, to the northern bend of the street opposite the southern boundary of the site. The gentle climb traverses from the highly structured and busy intersection of the main road to the informal rural character along Pellitt Lane. The predominantly open, informal and low density rural character of the surrounding environment is reinforced along the Pellitt Lane and Wirrabara road frontages to both the site and the locality.
10. The site is located within an environment characterised by large lots on which are located very low density detached dwelling houses in open rural landscapes and with expansive and open setbacks to boundaries, including the dwelling house adjoining to the north. There exist some substantial buildings within the existing environment, including The Centre to the south of the site which includes a church and sporting facilities. Within Ellerman Park are community facilities including a long day care centre and library which have their major presence to Kenthurst Road and are on the north-western edge of the urban area, opposite and associated with suburban and seniors housing.
11. Mr McDonald says that it is not unusual to have community facilities, recreational facilities and places of worship in both urban and rural areas and locations and their existence does not characterise the site as lying within an urban area.
12. In terms of the masterplan, Mr McDonald says the proposal is to locate a structured urban village within the rural environment, housing an estimated 200-225 people and occupying individual dwelling lots varying in size from approximately 205sqm, together with semi-detached dwellings, apartment buildings and the residential aged care facility (RACF).
13. In order to accommodate the proposed urban village, the public infrastructure servicing the site is also required to be changed in character, transform the Pellitt Lane and Wirrabara Road frontages from the relatively informal country roads to suburban streets with road widening, kerb and gutter, upgraded carriageways, footpaths, pedestrian refuge and a roundabout at the corner of Pellitt Lane and Wirrabara Road. The highly urbanised streetscape of Kenthurst Road will be largely replicated in order to accommodate the development. This urban road form and structure is in turn replicated on the site itself with the new rectilinear street network servicing the small lots, apartment buildings and the RACF.
14. McDonald cites the description of ‘What is rural character’ in the DCP and the statement of outcomes applying to site planning for rural subdivision (minimum lot size 20,000sqm) and says the 3 existing lots that make up the site area combine to provide 63,220sqm with the pattern not requiring intervention into the environmentally sensitive areas on the western half of the three lots. The proposed subdivision pattern includes 97 dwellings in the form of attached dwellings and apartments with small lots varying in size from a minimum of approximately 205sqm. The urban village form of small lots, attached dwellings and apartment buildings does not maintain the open scenic and rural character. One access point on each of Wirrabara Road and Pellitt Lane is proposed.
15. The extent of the intended urban footprint and density of development results in reasonably extensive cut and fill across the site although he acknowledges the greatest extent of land modification is through the centre. The desire to modify the existing land form by fill in this location is a function of the extent of the development footprint and the scale and intensity of development.
16. The traffic movement associated with the development will be greater in number than would otherwise be anticipated by a permissible form of development including low density ‘lifestyle’ rural housing and the council has determined that significant public infrastructure improvement works would be required along Pellitt Lane and Wirrabara Road should the development be approved.
17. DCP controls for dwellings is that front elevations of dwellings must not be greater than 50% of the street frontage. The site has a 162m frontage to Wirrabara Road and the proposed development has an elevation of approximately 96.5m or 60%. Along Pellitt Lane that increases to 80%. Originally a 1.8m high wall was proposed along that boundary for fire purposes however, the agreed position of the Bushfire experts was that this could be reduced to 1m and still achieve the necessary rating.
18. Mr McDonald says that whilst landscaping will assist in softening the urban streetscape the resultant built form is inconsistent with the stated outcomes for rural development as outlined in the DCP and also incompatible with the established and predominant open, low density and unstructured rural character of the surrounding environment. The density, footprint and structure of the development is not compatible with the surrounding open, informal and unstructured rural environment and is inconsistent and incompatible with the existing surrounding environment. The scale and density of development and the relationship to the neighbouring property is not characteristic of, or compatible with, the location or surrounding development.
19. The northern side of Pellitt Lane is rural in character because of the nature of the land uses and the open spaces and the existence of buildings dotted, placed throughout the rural landscape
20. The Council’s ongoing strategic planning documents seek to preserve and protect rural lands due to their integral character and the development does not achieve this.
21. Mr McDonald agrees with Ms Morrish’s comments that the primary urban design considerations under SEPP Seniors are created by the design principles themselves and he notes that they were included in the policy a number of years before the introduction of the provisions allowing for site compatibility certificates relating to land adjoining land zoned for urban purposes. Although the design principles are relevant, they are, in his opinion, framed in the context of considering seniors housing development in an urban, not necessarily rural context.
22. Mr Wynne says the proposal is suitable for the site and is compatible with the surrounding environment. While situated in an RU6 zone, the site adjoins and has a strong physical and functional relationship with the Round Corner urban area, citing its proximity to the business, retail, medical and urban services as well as the Hills Grammar School and other seniors living developments.
23. He says the proposal has been sensitively designed and planned to ensure it achieves a compatible relationship with the surrounding environment through restricting development to the part of the site which is largely clear of vegetation, providing a density and form of development complying with relevant planning provisions and specified development standards relating to Floor Space Ratio (FSR), building height, landscaped area, deep soil zones and car parking. An overall FSR of 0.24:1 and 0.44:1 on the ‘urban capable’ area of the site and with no buildings exceeding two storeys, ensures the proposal achieves a density and scale of development that sits comfortable within the surrounding environment.
24. The proposal provides a high quality, attractive living environment for future residents while responding sensitively to the natural features of the site and the character of the surrounding area. Housing is integrated within large areas of landscaping and open space provided in large setbacks, screened from adjoining properties and local streets, ensuring development makes a positive contribution to the character of the area.
25. Mr Wynne says the proposal is appropriate because there are other similar developments in the RU6 zone; it is not located adjacent to or near any properties used for agriculture production and will not conflict with such uses. The urban fringe location ensures future residents are supported by transport, civil infrastructure and access to services and facilities; the sensitive approach to density, scale and form supplemented by significant landscaping and setback of buildings from boundaries ensures amenity, visual and privacy impacts on adjoining properties and the broader area are minimised; buildings in the development are sensitively designed reflecting and responding appropriately to the urban fringe character. The proposal does not necessitate the widening of Pellitt Lane or removal of trees, is consistent with the aims of SEPP Seniors through increasing the supply and diversity of residences that meet the needs of seniors or people with a disability.
26. Mr Wynne characterises this location as an urban fringe location, it adjoins a zoned urban area, a developed urban area with a range of residential business type activities, typically of an urban settlement which is serviced by full infrastructure. He says close to those locations you tend to see a more intense surrounding land use as people and activities congregate close to the urban settlement. You see schools, we’ve got a school on one of the boundaries here, there’s two schools within the close locality, there’s childcare centres, there are other uses that are permissible in the RU6 zone or through other instruments.
27. The development application has sought to maintain a - if you like a rural character to that road at Wirrabara Road, it hasn’t proposed to put kerb and channelling, it hasn’t proposed to create an openness, it’s been designed specifically to create a low density, low impactful appearance across Wirrabara Road to pick up on the important attributes of that area, so it’s sought to integrate with that character in an appropriate way.
28. He concludes that the development is capable of existing in harmony with existing and future surrounding development.
29. Ms Morrish notes SEPP Seniors seeks to set aside local planning controls that would prevent the development provided it meets the criteria and standards in the policy and follows the design principles incorporated.
30. The Site Combability Certificate states that any development of the site can be smaller but not larger than the scale described, being a 72 bed RACF and 104 self-care dwellings with associated facilities. The proposal is for 36 aged care beds and 97 self-care buildings so is smaller than described.
31. There is a strong overlap between what is sought by Design Principles at Division 2 of SEPP Seniors and whether the development is of a suitable character and appropriate for such a development. The principles seek to ensure development responds to the desirable elements of a location’s character, that it maintains reasonable neighbourhood amenity and residential character by providing setbacks to reduce bulk and overshadowing; responds to topography; adopts street front heights that are compatible in scale with adjacent development and considers the impact of boundary walls on neighbours.
32. Ms Morrish says the front building line and planting is to be in sympathy but not necessarily the same as existing buildings. Visual and acoustic privacy is to be considered and managed and adequate solar access is to be provided. The important point to note is the way these principles are written is that the test is to be in sympathy with but not necessarily the same as. It is not reasonable to expect a development for Seniors living to present as though it is a rural subdivision into 2ha lots with rural houses upon them and with rural houses upon them and 300sqm shed or to present exactly as one might expect a rural residential development. SEPP Seniors has development standards with which it must comply or cannot be used to refuse consent and the proposal meets those standards.
33. The primary urban design considerations therefore left under SEPP Seniors are created by the design principles themselves and those most relevant are Neighbourhood amenity; Streetscape and Visual and Acoustic privacy with the desirable elements of the location’s character.
34. The site is located to the north west of the core of Round Corner. The primary access route into the centre is Kenthurst Rd which connects the centre to Old Northern Road, Glenhaven, Kenthurst, Dural and Castle Hill. The neighbourhood for Round Corner seems to be defined by the Seniors Living development and the Centre which consists of a Baptist community centre, recreation centre to the west along Kenthurst Road. To the east the neighbourhood seems to commence at the intersection with Old Northern Road and New Line Road and buts into the ridge of Dural. To the south Old Northern Road provides the containment to the neighbourhood. To the north however, the character of the neighbourhood approach is different. Wirrabara Road provides the main northern approach. It is a local road and arrival at Road Corner is really announced by passing out through the band of bushland that stretches from north east to west along O’Hara’s Creek.
35. Ms Morrish describes the varying entry points to the centre by way of landscape and fencing, grassed verges and says that at the intersection of Pellitt Lane and Wirrabara Road the character changes to a more manicured treatment of the boundary edge with rural fencing and tall hedge planting which inhibits the majority of views into the rural lot. This creates a very contained vista down the roadway with any glimpse across the properties occurring either between tree trunks and lower vegetation or at gaps in hedges or at driveways.
36. To the western side the bushland finishes at No 7 Wirrabara Road. It provides a tall, dense cypress hedge and stone entry walls to the driveway. This creates a more suburban feeling of having arrived at the neighbourhood centre rather than being part of the rural landscape.
37. Pellitt Lane is different in its character from Wirrabara Road. Within the visual catchment is the bushland and oval of the park. The character of this space varies from the semi suburban (the parking and oval) to the bushland pocket at the corner that allows landscape to dominate.
38. To the southern side of Pellitt Lane past the park the R2 housing begins. These lots are some 22-30m wide but the houses upon them have generally been allowed to straddle the majority of the front boundary. They vary from one to two storey with large double garages and driveways. These houses tend to have no or low front fences. The verge is kerbed with footpath. The northern side of Pellitt Lane, from the intersection until adjacent to the R2 houses is created by a quite dense hedge to the lot behind and a post and rail fence. The height and density of the hedge does not really offer vistas across the land.
39. Further to the east along Pellitt Lane the character varies from quite suburban houses to other rural residential developments. The houses on these lots are quite sprawling and the site edges vary from hedges with rural fences to pockets of bushland which offers easier viewing to the houses across the land but this is outside the visual catchment of the site.
40. Ms Morrish says the desirable elements of the neighbourhood and streetscape is the landscape quality. Most particularly this is the bushland edges on these lots that have been retained and supplemented their trees rather than relying on introduced hedging. Fencing and verge treatment is also a factor and she says the proposal responds well to this character.
41. The built form also varies, ignoring the R2 houses, a number of the dwellings in the rural lots are relatively hidden but where it is visible the houses are large and expose their greatest length to the road. Whilst they are setback, they expose their driveway forecourts to the street which creates quite a dominant landscape in front of the house.
42. These houses are 40-50m long facing the street which is considerable length of built form and are single and two storey, often with vast sprawling roofs and contemporary materials and design. The materials and architecture are not a particularly desirable element.
43. Further along Pellitt Lane to the south west and joining Kenthurst Road the laneway formalises. It has double white lines on the roadway around the corner and then has kerb edges and more suburban plantings other than the park edge. The Church and its surrounds are quite suburban in the built form and parking character and this part of Pellitt Lane is clearly part of the centre of Round Corner. The development as proposed facing this part of the laneway is appropriate in character. It is the bushland that marks the change from a more man-made environment and character to the rural hinterland around it. The lots to the north are not real rural holdings but are lifestyle lots with large houses framed by the bushland around this part of the village. Whilst the proposal is denser in its housing and its proximity, it is compatible and can exist in harmony in this setting and has carefully treated its site edges to respond to these character elements.
44. The RU6 zone is a transition zone and, despite the extent of the zone, the sites closest to the R2 and B2 zones do have a job to do in providing a sense of transition in character and form from the intensity of the centre to the open rural country side. Ms Morrish says the lots along the northern side of the neighbourhood up to the bushland corridor are the appropriate lots to provide this sense of transition and the development is well designed and an appropriate form of transition. The desirable elements are carried into the design of the proposal. Therefore the street, setback and verge character is compatible with the area around it and the RU6 zone and is less formal than other parts of Pellitt Lane and the rural lifestyle lots.
45. The built form to both streets is complementary to the visual catchment and character as well without having to be the same as it. The housing clusters along Wirrabara Road are sized to respond to the frontage width and footprint of the lifestyle living houses on the large lots.
46. The courtyard house clusters to Wirrabara Road have a frontage presentation of 31.3m which is similar to or less than the houses on the rural lots. They are grouped as 3 forms with landscape spaces between them. This is responsive to the intent of the Council’s controls for 3 rural lifestyle dwellings over 3 lots on the land.
47. Ms Morrish considers the grouping of buildings, setbacks, height, and design are appropriate and compatible development that provides a harmonious senior living scheme relative to the RU6 zone, desired future character and controls. She also is of the view that the design principles are the relevant consideration under SEPP Seniors.

Engineering

1. The engineers and landscape architect for the applicant joint conferenced and prepared a Joint Report, Exhibit 8. At the time the report was prepared there was outstanding information and the applicant tendered various reports, plans and documents throughout the hearing in an attempt to address the original deficiencies in the application and to clarify issues raised during the site view. Much of that information addressed concerns raised by the Council’s engineer. Other details suggest that minor regrading of the footpath along the southern side of Kenthurst Road would be required to ensure the gradients complied with the relevant Australian Standard. It is noted that the footpath was constructed recently and had been considered by the council during its assessment of the Seniors Living Development to the west of the intersection with Pellitt Lane. Agreed consent conditions have been imposed to address this requirement.
2. Similarly, the engineers agreed that conditions could be imposed to address concerns about fill and the means of retaining the proposed Onsite detention basins. Ms Sivakumar says there is no need for the open basin as the proposed underground facility is of sufficient capacity to deal with the runoff. Mr Fryer says the above ground basin has benefits for water quality and improves the flow to the creek.
3. The engineers did not agree whether the proposed pedestrian refuge could be accommodated within the Pellitt Lane road reserve without the need for road widening. They do agree that the development would not generate sufficient traffic to require a roundabout at the intersection of Pellitt Lane and Wirrabara Road however Ms Sivakumar says that land at that intersection should be dedicated for future construction of the device if and when required. I do not accept this proposition.
4. The engineers agreed that, subject to some design changes waste collection can be managed on site with bins stored in the basement and brought to the proposed internal streets. Conditions of consent can address this requirement.

Ecology

1. The principal area of disagreement between the ecologists was whether the vegetation community on the site was Sydney Turpentine Ironbark Forest (STIF). Dr Clements says that the area is revegetating and probably to STIF whereas Dr Robertson says it is an area that has been cleared over a number of years for orchards, contains no Ironbark or Turpentine trees and the soil types are not truly reflective of the community. Dr Robertson considers that the forest area could be classified as Smooth-barked Apple – Turpentine – Blackbutt tall open forest on enriched sandstone slopes and gullies of the Sydney region (PCT 1841).
2. Despite this disagreement, the applicant has taken a precautionary approach, acknowledging the historical presence of STIF, and proposes the offsetting of the impact through purchase of Biodiversity Credits and accepts conditions to that effect. The area that is either STIF or, as maintained by the applicant, more correctly described as PCT 1841m covers an area of 2.4ha and the APZ will involve modification or loss of approximately 0.4ha of that area.
3. It submits that that the development will not significantly impact the Dural Land Snail and that if there are any impacts they will be addressed by mitigation (Vegetation Management Plan and stormwater management) and purchase and retirement of species credits. The Powerful Owl is similarly considered and any potential impacts proposed to be offset. It says any impacts are minimal and the proposal will lead to an improvement in forest condition and threatened species habitat.
4. The experts do not agree whether the assessment of impact to the snail has been adequately addressed.
5. There is no agreement as to the calculations of Vegetation Integrity scores.
6. The applicant would accept a condition that provides for an independent assessment of the Credits due.
7. Dr Clements is critical of the BDAR saying it has not satisfactorily considered the impacts of the APZ on the STIF, impacts on riparian corridors, suggests conflicting management practices, impacts of fill and slope, identification of plot locations and proposed work areas and failure to assess slashing impacts both on site and within the Church land.
8. Dr Robertson says these issues have been satisfactorily addressed, cites the historical aerial photography that indicates clearing of the site for decades, says the batter and stormwater design is appropriate and provides for rehabilitation and improvement to a currently weed infested area. He notes the “managed lands” within the Church property are currently mown and this will not change.

Conclusion and findings

1. For consent to be granted there are a number of jurisdictional tests in SEPP Seniors and the LEP that must be met.
2. I have addressed a number of these preconditions above however, for the sake of completeness, I consider each below.
3. The power to grant consent relies on the Site Compatibility Certificate issued by the Deputy Secretary, Planning Services as delegate of the Secretary of the Department of Planning and Environment on 3 March 2018. That certificate provides that consent can be given to a development for Seniors Housing no larger than 104 serviced self-care dwellings in combination with a 72-bed residential care facility, community buildings and associated car parking. As only 97 serviced self-care dwellings and a 36 bed residential aged care facility are proposed, the certificate would allow consent to be granted.
4. The terms of clause 24(3) of SEPP Seniors allow a consent authority to grant consent to a development application 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 refuse to grant consent to a development application by reference to the consent authority’s own assessment of the compatibility of the proposed development with the surrounding environment, or does not otherwise limit 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 the clause applies.
5. The terms of the Site Compatibility Certificate therefore provide the Court the necessary power to consent to or refuse the development application following a merit assessment of that application.
6. Clause 26 requires the consent authority to be satisfied, by written evidence, that residents of the proposed development will have access that complies with subclause (2) to shops, bank service providers and other retail and commercial services that residents may reasonably require, community services and recreation facilities, and the practice of a general medical practitioner. The terms of subclause (2) provide that these services must be either within 400m of the site with access via a suitable access pathway of defined grades or able to be reached by way of a bus service that is able to be accessed within 400m of the site and terminating within 400m of those services. The bus service must run at least once per day Monday to Friday.
7. It is common ground that the services available within the Round Corner centre are further than 400m from the site and therefore the applicant must rely on a bus service to meet the provisions of this clause.
8. The applicant has provided details of the means of satisfying this clause and relies on bus services that run along Kenthurst Road. There are two bus routes, the 639 which runs from Maraylya to Castle Hill (and through Round Corner) and the 641 which runs from Rouse Hill Station to the Round Corner Centre. The timetables for these services are provided at Exhibit S.
9. An Access Review Report and Traffic Impact Assessment Report are included in the Applicant’s Bundle of Documents, Exhibit A addressing the requirement. Mr Fryer prepared a plan of the works required to install an accessible pathway that would comply with the provisions of clause 26(2), Exhibit T.
10. The Council submits that to access the bus stop on the southern side of Kenthurst Road will require crossing a busy road. There is a roundabout at the intersection with Pellitt Lane and whilst the splitter islands constructed as part of that facility are not designed specifically for pedestrian purposes, they do provide a form of refuge point midway across the roadway to assist in safer access. The Court notes that the bus stops to be utilised by the applicant are proximate to the existing Seniors Living development and therefore must have been considered acceptable in that case despite the non-compliant grade and the fact that to use both services, it is necessary to cross the road. The applicant proposes regrading of the footpath along Kenthurst Road to ensure compliance.
11. For these reasons, I am satisfied that the terms of clause 26 are met.
12. Clause 27 requires the consent authority to be satisfied that the development complies with the requirements of the document titled Planning for Bush Fire Protection, ISBN 0 9751033 2 6, prepared by the NSW Rural Fire Service in co-operation with the Department of Planning, dated December 2006. Subclause (2) sets out matters that must be taken into consideration in determining an application for bushfire prone land.
13. As the site is bushfire prone the provisions of the clause apply. The bushfire experts have considered the matter and agree that the terms of the clause are met.
14. A Bushfire Safety Authority has not been issued by the RFS and therefore the Court must determine the application on the basis of the evidence of the experts.
15. The Council submits that there is noncompliance with the RFB2006 as there are no “exceptional circumstances” that provide for the APZ to be located on the Church land.
16. Having regard to the evidence, I accept the position of both experts that the development would comply with the terms of PFB2006 on the basis of the performance-based solution proffered by the applicant. Because the Church land is ‘managed land’ and is already developed for a ‘compatible purpose’, that being one that involves both residential occupation of the site but more importantly, the congregation of large numbers of people, the terms of clause 3.3 of RFB2006 are met.
17. Whilst the Joint Report, Exhibit 7, does not specifically refer to which version of the document was considered I am satisfied that the terms of the 2006 document are met with the additional considerations of what is agreed to be a more onerous and relevant document, the 2018 document, also considered.
18. For that reason, I am satisfied that the matter has been sufficiently addressed and conditions of consent can be imposed to ensure compliance.
19. The requirements of clause 28 require satisfaction, 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. These details are included in Exhibit D, Hydraulic Services Concept Plan and Services Infrastructure Report dated 14 November 2019. The Council does not contest these provisions.
20. Similarly, there is no contention that the terms of clause 30, requiring satisfaction that the applicant has taken into account a site analysis prepared by the applicant in accordance with this clause. The documentation lodged with the application included a detailed site analysis and I am satisfied the provisions of the clause are met.
21. Clause 32 requires satisfaction that the proposed development demonstrates that adequate regard has been given to the principles set out in Division 2. These are the Design Principles and are detailed in clauses 33-39.
22. Clause 33 relates to Neighbourhood amenity and streetscape and requires the development recognises 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.
23. In addition, the development should maintain reasonable neighbourhood amenity and appropriate residential character by providing building setbacks to reduce bulk and overshadowing; use building form and siting that relates to the site’s land form; adopt building heights at the street frontage that are compatible in scale with adjacent development, and consider, where buildings are located on the boundary, the impact of the boundary walls on neighbours, and 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.
24. The development should be designed to embody planting that is in sympathy with, but not necessarily the same as, other planting in the streetscape; retain, wherever reasonable, major existing trees, and be designed so that no building is constructed in a riparian zone.
25. Having regard to the evidence, I am satisfied that the terms of this clause are met. Much of the planning and urban design evidence went to addressing the desirable elements of the location’s current and future character. In this regard, I accept the evidence of the applicant’s experts that the site adjoins and has a strong physical and functional relationship with the Round Corner urban area. The character of the area is varied and, as stated by Ms Morrish, the desirable elements of the neighbourhood and streetscape is the landscape quality. The density of development varies from the more intense R2 zone detached dwelling houses, the seniors living development on Kenthurst Road and the community facilities on both the Council and Church land to the lower density rural lifestyle developments along the northern side of Pellitt Lane.
26. The area within the RU6 zone is undergoing a transition and that is through the replacement of the older style dwellings with large, expansive new homes. That form of development is contemplated by the Council’s planning controls for the area and is not inconsistent with the objectives of the zone. Neither is the proposed development inconsistent as it would maintain land that provides a transition between rural and other land uses of varying intensities or environmental sensitivities and has been designed to minimise conflict between land uses within this zone and land uses within adjoining zones with the new buildings designed to contribute to the quality and identity of the area.
27. The development does not have to be the same and SEPP Seniors does not contemplate this.
28. I also accept Ms Morrish’s evidence that the development maintains reasonable neighbourhood amenity and appropriate residential character by providing building setbacks to reduce bulk and overshadowing; uses building form and siting that relates to the site’s land form; adopts building heights at the street frontage that are compatible in scale with adjacent development. There are no buildings located on the boundary. The front building of the development is set back in sympathy with, but not necessarily the same as, the existing building line.
29. The development has been designed to embody planting that is in sympathy with, but not necessarily the same as, other planting in the streetscape; retaining major existing trees, with all buildings constructed well outside the riparian zone.
30. Clause 34 addresses visual and acoustic privacy and the experts agree that the design of the development satisfactorily addresses these requirements. The owners of the adjoining property to the north of the site raised concerns in relation to this aspect however, based on the observation of the existing vegetation and assessment of the plans, setbacks (10m at ground level walls and 18.2m to upper walls), floor plans and orientation of windows, particularly from the second floor, landscaping and fencing I am satisfied that these issues are satisfactorily addressed.
31. Similarly, I accept the evidence that the design has adequate regard to the principles for solar access and design for climate (clause 35) stormwater (clause 36), crime prevention (clause 37) accessibility (clause 38) and waste management (clause 39).
32. There is no dispute the relevant development standards in Part 4 of SEPP Seniors are met.
33. The provisions of Part 5 development on land adjoining land zoned primarily for urban purposes apply and in particular clause 42. This requires, before consent can be issued, the consent authority to be satisfied, by written evidence, that residents of the serviced self-care housing within the proposed development will have reasonable access to home delivered meals; personal care and home nursing, and assistance with housework by non-government providers. The applicant has provided as part of Exhibit A correspondence from Carino Care dated 30 September 2019 and a Residents services commitment letter dated 17 December 2018 in Exhibit Q. The Council submits that the applicant has failed to demonstrate a contractual arrangement has been entered into. I do not consider that this is necessary at this stage, only that the service can be provided and will be available when the development is occupied. Conditions of consent can be imposed to ensure the services are available for the life of the development.
34. Clause 43 requires satisfaction, before consent can be issued, that a bus capable of carrying at least 10 passengers will be provided to the residents of the serviced self-care housing component of the development. That bus will drop off and pick up passengers at a local centre that provides residents with access to the following: shops, bank service providers and other retail and commercial services that residents may reasonably require; community services and recreation facilities; and the practice of a general medical practitioner. The bus must be 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.
35. The applicant has provided as part of Exhibit A, a letter from Chalker Pty Ltd and a Heads of Agreement (Exhibit R) that addresses this issue. I am satisfied the requirements of this clause are met.
36. Clause 44 requires the 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. The development is to be completed in one stage and therefore all buildings and services proposed would be available prior to an occupation certificate being issued. This is not a precondition to consent and can be satisfactorily guaranteed through imposition of appropriate consent conditions.
37. Part 7 of SEPP Seniors lists Development standards that cannot be used as grounds to refuse consent. There is no contention that these standards are not met.
38. Finally, clause 55 prevents consent being granted for the purpose of a residential care facility for seniors unless the proposed development includes a fire sprinkler system. Exhibit D, the Hydraulic Services Concept Plan addresses this requirement and the applicant also proposes the installation of a water tank to assist with ensuring water is available for fire-fighting purposes.
39. In relation to the Ecological contentions, I am satisfied, based on the evidence of Dr Robertson that, through the adoption of the vegetation management plan and other recommendations made in his reports, in particular the BDAR, that the proposed development is designed, sited and will be managed to avoid any significant adverse environmental impact to the ecological communities on the site and that, through application of the Biodiversity conservation offsets, any potential impacts are addressed. Weed removal and maintenance of the forest area to address fire risk is required. The applicant has designed the development to minimise the extent of works required in the area and prepared a comprehensive Biodiversity and Vegetation Management Plan (Part of Exhibit 6). I am satisfied the design of the development and the adoption of this plan minimise the impact of the development on the communities and the development can be managed to mitigate that impact.
40. As there was no agreement as to the calculation of the Offset Credits, I accept the applicant’s position that this should be subject to an independent assessment and an appropriate consent condition imposed to reflect this.
41. Having regard to the issues raised by objectors to the proposal, I accept the evidence of the engineers that the road system is capable of handling the traffic generation and, subject to imposition of conditions that provide construction of footpath and modification to existing footpaths, adequate pedestrian pathways are available to bus stops and services. The construction of this infrastructure does not result in a form of development that is not compatible with the character of the area. Kerb and gutter exist and will be extended to the site.
42. I have addressed the issue of compatibility and whist the development would be more dense than three dwelling houses that could be accommodated on the site reflective of its area, the design of the development is not incompatible with the bulk and scale of buildings in the locality, in particular The Centre which adjoins the site to the south and the Seniors Living development on Kenthurst Road opposite its intersection with Pellitt Lane. The design concentrates built from away from important riparian corridors and, as I have stated above minimises the potential for any adverse impact on threatened species. SEPP Seniors does not contemplate a form of development that would be the same as that permitted in the RU6 zone. What is required is a development that new buildings contribute to the quality and identity of the area.
43. There is no evidence of an oversupply of seniors housing in the area and if there was, it is not a matter for the Court.
44. I accept the evidence of the experts that the Bushfire risk can be managed.
45. The proposal is not inconsistent with regional planning documents as it would provide a form of housing recognised under the terms of SEPP Seniors as being appropriate on land adjoining land zoned for urban purposes.
46. Based on the evidence of bus routes, and the provision of accessible pathways to those routes, together with the bus that will operate from the development I do not consider the site is poorly serviced by public transport. These services will ensure that residents have access to necessary services.
47. For the reasons detailed above, there are no reasons why consent could not be granted.
48. As the hearing ran over four days and the parties filed written submissions, conditions of consent were not finalised.
49. Having found there are no reasons why consent should not be granted I make the following Orders:
50. The parties are to file agreed conditions of consent that reflect the findings of this Judgment within 7 days of these Orders being made.
51. On receipt of these conditions, final orders, granting consent to Development Application DA 1035/2018/JP for demolition of existing structures, removal of existing vegetation, construction of a seniors living development comprising a 36 bed residential aged care facility and 97 serviced self-care dwellings; provision of resident services including home delivered meals, personal care and home nursing, assistance with housework and a bus service providing access for residents to a local centre; bushfire mitigation works; construction of roads; provision of resident and visitor car parking; earthworks and civil engineering works at Lot 1 DP 534265, Lots 1 and 2 DP 560912 and known as Nos 3 and 5 Pellitt Lane and No 9 Wirrabara Road, Dural will be made in Chambers.

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Sue Morris

Acting Commissioner of the Court

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