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Dear Daniel

**Advice on requirements for sewer connection pursuant to cl 28 of (SEPP Seniors)**  
**Development Application: DA 2021/056/1**  
**Property: 24 Coronation Road, Congarinni North (Lot 188 DP 755537)**

We refer to your request to provide advice in relation to the proposed redevelopment of the above site which seeks consent for the construction of 271 self-contained dwellings, a 75 bed residential aged care facility and provision of recreation facilities pursuant to *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors)*.

Specifically, you have asked us to advise on the requirement for the seniors housing to have adequate facilities for the removal and disposal of sewage and the considerations under cl 28 of SEPP Seniors. Importantly, you have asked us to confirm whether a license to operate the proposed onsite sewerage system under the *Water Industry Competition Act 2006* is required to be obtained prior to the grant of development or can be the subject of a condition of consent.

### Summary

In our view, based on the applicable legislation, judicial consideration of the matters raised by the Council and the relevant facts set out below, we advise as follows:

- The proposed development seeks consent for on-site sewerage treatment works to accommodate the development's servicing requirements rather than connection to the surrounding reticulated system as no additional capacity has been made available since the rezoning of the site to expressly permit seniors housing.
- Cl 28 of SEPP Seniors does not require that licensing be obtained or arranged for the proposed on-site sewerage treatment plant prior to the grant of consent (see *Crighton Properties Pty Limited v Kiama Municipal Council* [2006] NSWLEC 297).
- The Land and Environment Court has confirmed that arrangements for licensing under the *Water Industry Competition Act 2006* may lawfully be made after the grant of development consent and be the subject of a condition of development consent (see *Crighton Properties Pty Limited v Kiama Municipal Council* [2006] NSWLEC 297; *Treysten Pty Limited v Hornsby Shire Council* [2011] NSWLEC 1364).

### Background

We understand the relevant facts to be as follows, based on the documentation provided and

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correspondence received:

- You have submitted a development application to Nambucca Valley Council (**Council**) for the redevelopment of 24 Coronation Road, Congarinni North for the purpose of a seniors housing development.
- Council has provided a request for information which includes the following query:

**Sewer and Water** - *Sufficient information has not been provided to satisfy Council that water and sewerage services are available. As you would be aware in addition to Clause 7.4 of Nambucca LEP 2010, Clause 28 of SEPP (Housing for Seniors or People with a Disability) 2004 apply to the proposal.*

*Clause 28 of the Policy is in the following terms:*

## **28 Water and sewer**

*(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.*

*Council understands that the water supply to the site is subject to capacity constraints, which may be addressed by extending the undersized Council water main to an on-site privately owned reservoir, booster pump and reticulation within the site. The location of the reservoir has not been provided.*

- Your development application proposes an on-site treatment system for the servicing of the development, the details of which are to be included in the material provided to Council as part of any response to the RFI and with indicative locations shown on the plans.
- You have sought our (Mills Oakley) advice in relation to the application of the above provisions and requirements for the current DA.

## **Detailed advice**

### **1. What form of satisfaction does cl 28 of SEPP Seniors require in relation to the sewer servicing of the Site.?**

1. The question of what is required by cl 28 of SEPP Seniors and the approach to servicing of a site is a matter which has been considered by the Land and Environment Court on numerous occasions.
2. The relevant provisions of cl 28 are helpfully set out in the Council RFI which is extracted above but importantly, require a consent authority to be *satisfied, by written evidence, that the housing will... have adequate facilities for the removal or disposal of sewage.*
3. The application proposes to construct an on-site packaged sewerage plant, the by product of

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which is to be used around the site as 'grey water' for the purpose of watering gardens and toilet flushing etc. The impacts of the water re-use on site has also been the subject of an assessment by an ecologist to ensure that such use is acceptable from an amenity and ecological perspective.

4. The development application, if approved would be required to construct and provide the sewerage system as designed and identified in the application documents.
5. In our view, the application contains sufficient detail, in written form, which clearly identifies the way in which the facilities will be provided for the disposal and processing of sewerage. This approach reflects that which has been adopted by the Court in its consideration of the issue in other matters that dealt with that specific provision in relation to Seniors Housing.
6. In the matter of *Crichton Properties Pty Limited v Kiama Municipal Council* [2006] NSWLEC 297 the Chief Justice Preston considered in detail the predecessor to the current cl 28 of SEPP Seniors.
7. SEPP Seniors was at that date titled *State Environmental Planning Policy (Seniors Living) 2004* and contained within it cl. 27 of *Part 2 – Site Related Requirements*, which provided:

## **27 Water and sewer**

*(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.*

8. The terms of the clause are the same as the current cl. 28 within SEPP Seniors.
9. In considering the clause and what is in fact required by it in terms of satisfaction, his Honour made the following findings, which are directly applicable in the present situation:

*44 Secondly, the clauses do not require that "arrangements" have been made. Rather, the clauses require the consent authority to be satisfied that the matters referred to in the clauses "will" be provided. The clauses do not look to the past (namely that arrangements have been made) but to the future (that the matters referred to in the clauses will be provided).*

*45 Thirdly, the written evidence upon which the consent authority is to be satisfied as to the matters referred to in each clause, does not necessarily require proof of arrangements that have been made to provide for those matters. There may be a number of ways in which the written evidence may satisfy the consent authority that the matters referred to in the clauses will be provided...*

*47 Another way would be for the written evidence that is supplied to the consent authority to state that, although arrangements in relation to the provision of the matters referred to in cl 27(1) and 74(1) have not yet been made, nevertheless such arrangements may be made in the future. This may be on some date specified or on or after the happening of some event, including the grant of development consent for the development.*

*48 Obviously, the more uncertain and contingent the making of arrangements in the future with external service providers for the provision of the matters referred to in cll 27(1) and 74(1) may be, the more difficult it may be for an applicant for development consent to satisfy the consent authority that the matters will be provided. This fact, however, does not remove the possibility that an applicant could satisfy a consent authority that the matters referred to in the clauses will be made, by providing written evidence that an arrangement in respect to matters will be made in the future, even though such an arrangement has not yet been*

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made.

49 Yet another way of establishing that the matters referred to in cl 27(1) and 74(1) of SEPP (SL) will be provided may not involve the making of arrangements with external service providers at all, but instead may be for the development itself to provide the matters referred to in those clauses.

50 For example, in relation to cl 27(1), the proposed development may involve an onsite system for removal or disposal of sewage, or, perhaps less likely, a reticulated water system. Clause 27(2) contemplates such arrangements. The written evidence for such systems would be in the development application and accompanying documents. The consent authority could be satisfied by that written evidence that, if consent were to be granted, including with appropriate conditions requiring the ongoing provision and maintenance of the systems, the housing will be connected to a reticulated water system and have adequate facilities for the removal and disposal of sewage.

10. His Honour's conclusions helpfully provide a range of scenarios in which he determines a consent authority can be satisfied about the provision of facilities to service the development.
11. Importantly, his findings are clear and unambiguous in relation to the fact that arrangements and (being an agreement with a licensing authority) are not required to be entered into prior to the grant of development consent.
12. In this regard, the conclusion at [50] above confirms that satisfaction required by cl 28 can be achieved through sufficient detail provided within application documents in relation to facilities proposed to be provided, the maintenance and use of which can readily for the basis of conditions of development consent.
13. Relevantly, this approach was adopted and applied by the Court in the matter of *Treysten Pty Limited v Hornsby Shire Council* [2011] NSWLEC 1364.
14. That matter dealt with a Seniors Living application which was located in an area that did not have access to a reticulated sewer system. In response to that, the applicant put forward a design for a wastewater pump out system, which provided for an associated cost to future residents on an annualised basis.
15. Relevantly, the experts in that matter agreed that the system would likely require a license under the *Water Industry Competition Act 2006* and that a condition of consent ought be imposed which addressed that requirement.
16. In concluding that the application should be approved, the Court found at [69] and [70]:

*69. We are however satisfied on the evidence available that the preliminary design for the system is appropriate and that satisfactory arrangements have been made for the removal and disposal of sewage.*

***70. We note that the proposed system would require Sydney Water licensing and approval prior to development of the site proceeding. Accordingly, the grant of the appropriate approvals and licences by Sydney Water must occur prior to any consent for the site becoming operative and this can be assured by way of deferred commencement provisions.***

17. The Court in that matter directly applied the principles set out by the Chief Judge in *Crighton* in terms of both the requirements for satisfaction for the purpose of cl. 28 and also the mechanism by which any licensing process could be dealt with.

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18. In our view the application of those principles must similarly apply in the current circumstances.
19. The proposed development provides for a form of facilities to service the site for the removal and disposal of sewerage and any approval of the application in accordance with those documents will require as necessity that they be constructed.
20. In line with the Court's approach, the licensing of those facilities is a matter that can be dealt with by way of condition and has been done so by the Court previously.
21. We recommend that you bring the above matters to the attention of the Council and request that they proceed with the assessment of the application on the basis that the facilities as proposed will be constructed as part of any approval.

If you have any questions or require further information please do not hesitate to contact Matt Sonter on +61 2 8035 7850 or [msonter@millsoakley.com.au](mailto:msonter@millsoakley.com.au)

Yours sincerely



Matt Sonter  
**Partner**

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