

20 January 2021

Luke Downend
Acting Director, North District
Greater Sydney, Place and Infrastructure
4 Parramatta Square
12 Darcy Street, Parramatta
NSW 2150

Attn: Elvie Magallanes

our ref: 2021/009903

Dear Mr Downend

**Application for a Site Compatibility Certificate (SCC2020NBAC-4) – SEPP
(Housing for Seniors or People with a Disability) 2004 – 58 Laitoki Road, Terrey
Hills**

I refer to your letter dated 23 November 2020 seeking comments with respect to the application for a Site Compatibility Certificate (SCC) under *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP (HSPD))* at 58 Laitoki Road, Terrey Hills (**the Site**).

The documentation accompanying the SCC application has been reviewed and Council is of the opinion that the development is inconsistent with the criteria referred to under Clauses 25(5)(b) of the Policy.

Please find attached Council's detailed assessment with regards to the set criteria under Clause 25(5) (b) of the SEPP (HSPD). A number of the issues raised in Council's submission are similar to the issues raised by Council in relation to the previous application for a SCC for the site and the Development Application which was refused consent by the Panel and was subsequently the subject of Land and Environment Court proceedings.

Important changes have been made to SEPP (HSPD) since the time of the original SCC application and decision in the form of:

- a new decision maker, being the Panel; and
- a requirement for a cumulative impact study considering not only matters limited to the subject site but also the impacts arising from it and other proximate sites.

In relation to the first of those changes, the Panel must independently consider all relevant matters, and must not simply adopt conclusions from the decision made by the Department on the earlier SCC application, particularly given the Panel's refusal of the original development application which followed the SCC.

In relation to the second change, the Council's consideration of the material lodged in support of the current SCC application indicates that the applicant has failed to provide a meaningful cumulative impact study with the current SCC application and the SCC ought to be refused for failure to satisfy that new requirement, as well as by reason of the other issues raised by the Council.

Council appreciates the opportunity to make this submission and trusts that the submission will be taken into consideration in the decision as to whether a certificate is issued by the Panel.

Should you wish to discuss the matters raised or require any further clarification, please do not hesitate to contact Louise Kerr, Director Planning and Place on 9942 2949 or email council@northernbeaches.nsw.gov.au

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ray Brownlee', with a long horizontal stroke extending to the right.

Ray Brownlee PSM
Chief Executive Officer

ATTACHMENT A

NORTHERN BEACHES COUNCIL SUBMISSION SITE COMPATIBILITY CERTIFICATE – 58 Laitoki Road, Terrey Hills

CURRENT DEVELOPMENT AND SITE CONTEXT

In reviewing the proposal, the following key features of the site and its location are noted:

- The Site is zoned RU4 Primary Production Small Lots under the Warringah Local Environmental Plan 2011 (**WLEP 2011**), which envisages development primarily for the purposes of primary industry and other low intensity land uses in a rural setting.
- The Site is a corner property, having two street frontages; Laitoki Road to the east and Cooyong Road to the South. The adjoining property to the west is a large and unusual shaped block which wraps around the western end of the site and the adjoining Lot 46 to the north. That adjoining property is used for residential purposes and comprises a single dwelling house and ancillary structures. The adjoining northern lot is also used for residential purposes and contains a single dwelling house and ancillary structures. Both of these adjoining lots are also zoned RU4.
- The lots located opposite the site on the eastern side of Laitoki Road are zoned R2 Low Density Residential under WLEP 2011 and are characterised by single and two storey detached dwelling houses in landscaped settings.

Relevant Background

1. A previous Site Compatibility Certificate was approved for the site on the 14 July 2017.
2. Development Application (DA) No. 2018/1752 was refused by the Sydney North Planning Panel and was subsequently approved by the Land and Environment Court under Proceedings No. 2018/398283 on the 12 July 2019.
3. That decision was the subject of an Appeal by Council under Section 56A of the Land and Environment Court Act.
4. The s56A appeal was heard on 19, 24 and 25 March 2020 and on 3 August 2020 and a decision was handed down upholding the appeal in Council's favour. The grounds of appeal allowed by the Court were:
 - Ground 1: The Commissioner made a decision that bushfire safety had been satisfactorily addressed by the application even though at the time he reached that conclusion he acknowledged that he had insufficient evidence to reach that conclusion. This demonstrated apprehended bias or prejudgement in the making of the decision.

The circumstances that led to that legal error also meant that the Commissioner decided to approve the application before considering the mandatory matter of bushfire safety.

- Ground 4: The Commissioner failed to give adequate reasons in respect of whether or not the proposed development contained sufficient detail about how bushfire risks would be managed.
- Ground 10: The Commissioner erred by finding that clause 26 of the SEPP does not apply to serviced self-care housing. The Commissioner failed to properly consider the mandatory consideration of whether the location of the proposed development met the requirements for location and access to facilities.

In the absence of an approved clause 4.6 request under the applicable LEP, clause 26 is a development standard which applies to all forms of development carried out with the benefit of the SEPP (HSPD).

Current Proposal for Seniors Housing

Council contends that a significant range of issues exist with the proposal for a seniors housing development on the site. The issues that relate to the current SCC proposal are outlined below and are the basis of Council's objection to the issue of a new Site Compatibility Certificate for the current proposal on the Site.

These issues relate to both the character and scale of the proposal, as well as issues relating to accessibility. Taken together, it must be concluded that the proposal is not compatible with future development within the RU4 zone and the adjoining R2 zone.

The issues detailed below are raised with reference to the provisions of Clause 25(5)(b)(i), (ii), (v) and (vi).

KEY FEATURES OF THE APPLICATION

Council notes that the key features of the application are as follows:

- Use of the Site for a Seniors Housing development, which comprises demolition of all existing structures and construction of sixty (60) serviced self-care dwellings within eight (8) separate accommodation blocks, each being two to three storeys in height and scale and a 90 bed residential care facility.
- Vehicular access is provided via two (2) separate driveways off Cooyong Road.
- Provision of basement parking.
- At grade parking for the nursing home facility with a central vehicular drop off zone.
- Associated Landscape works.

STATE ENVIRONMENTAL PLANNING POLICY (HOUSING FOR SENIORS OR PEOPLE WITH A DISABILITY) 2004

Permissibility

As mentioned above, under the WLEP 2011 the subject site is zoned RU4 Primary Production Small Lots. However, adjoining the land on the eastern side of Laitoki Road is zoned R2 Low Density Residential.

Seniors Housing is a prohibited use in the RU4 zone, however, the use of the site as a residential care facility and serviced self-care housing is made permissible by the SEPP (HSPD) as the site adjoins land zoned for urban purposes (R2 Low Density Residential), subject to obtaining a Site Compatibility Certificate.

It is acknowledged that the SCC is effectively a mechanism which permits a use that is not permitted under the local instrument. However, the SCC is a gateway to permissibility and like all other development that is permissible in the zone, there is nevertheless a requirement to test it against the objectives of the zone.

The zone objectives are an important consideration given the applicant is relying on Clause 4.6 in relation to the non-compliance with Clause 26 of SEPP (HSPD) in respect of the Residential Aged Care Facility component of the proposed development (proximity to services and facilities or a bus stop) which is discussed in detail below.

The objectives for the RU4 Primary Production Small Lots zone are as follows:

- *To enable sustainable primary industry and other compatible land uses.*
- *To encourage and promote diversity and employment opportunities in relation to primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature.*
- *To minimise conflict between land uses within this zone and land uses within adjoining zones.*
- *To minimise the impact of development on long distance views of the area and on views to and from adjacent national parks and bushland.*
- *To maintain and enhance the natural landscape including landform and vegetation.*
- *To ensure low intensity of land use other than land uses that are primary industry enterprises.*
- *To maintain the rural and scenic character of the land.*

When considering the proposal in the SCC application and the provisions of Clause 25 (5) (b) of the SEPP (HSPD), relative to the objectives of the RU4 zone, the following comments are made.

- The proposal fails to maintain the low intensity of land uses and the rural landscape character of the land, in that the extent and intensity of development is more typical of a development in an R3 Medium Density Residential zone.
- The proposal, as a result of its higher intensity and degree of land form change, does not maintain the existing rural and scenic character. If the proposal had

responded to rural character, it would be expected that there would be a significantly less intense form of development.

- The subject site is not a transition site, as the current zoning, separated as it is across opposite sides of a road, has deliberately sought to establish a demarcation of lands, distinct from the urban area.
- The range of uses in the RU4 zone varies and many of the permissible uses would not result in the need for substantial internal roads and they are uses which are more likely to be able to have built form dispersed and distributed across sites.

SITE COMPATIBILITY CRITERIA

The criteria under Clause 25(5) (b) of the SEPP (HSPD) have been used to provide a detailed review of the application. Council's comments with respect to the criteria are provided as follows:

Criteria 1 – The natural environment and the existing and approved uses of land in the vicinity of the proposed development.

Comment:

The site is characterised by the following significant environmental features:

- The proposed development is located adjacent to Neverfail Creek, a tributary within the Kierans Creek catchment. According to the Warringah Creek Management Study (2004), the Kierans Creek catchment is classified as a Group B catchment which is characterised as generally having “*some degradation in the upper catchments, but high ecological value downstream; generally 10-15% existing connected impervious area*”.
- Approximately 0.08ha of the Duffys Forest EEC of 0.28ha located on site will be directly impacted.
- The site is classified as Waterways and Riparian Lands for the purposes of Council's Protection of Waterway and Riparian Lands Policy and Clause E8 – Waterways and Riparian Land under the Warringah Development Control Plan 2011(**WDCP 2011**). A riparian zone is mapped as per WDCP 2011 and no development, including installation of sewer or stormwater infrastructure, is to take place within the riparian zone.
- The site is identified as Landslip prone land under the WLEP 2011).

With regards to other issues, any development on the site for the purposes of Seniors Housing will require significant new infrastructure, including footpaths and road construction. This is likely to include widening of Laitoki and Cooyong Roads and construction of footpath works along both frontages.

Such infrastructure works have the potential to impact on the environmental features of the site and the adjoining road reserves.

Bushfire Impacts

The SEPP (HSPD) (Clause 27(2)) states that the consent authority must not consent to a development on a site within the vicinity of bush fire prone land unless the matters in Clause 27(2) are comprehensively addressed by the applicant in order for Council and the NSW RFS to make a proper assessment.

It is noted that the bushfire report submitted with the SCC dated 1 July 2019 does not address the specific provisions of Clause 27(2) of the SEPP, particularly having regard to the size of the existing population within the locality, other seniors housing developments within the locality that are existing or under assessment, and the capacity of the road network. Further, clause 25(5)(b)(i) requires that the proposed developments compatibility with the natural environment (including hazards) be considered before any Certificate is granted.

Although the applicant's position is that the issue of bushfire impacts may be dealt with as a condition of consent following the issue of a SCC, Council considers it inappropriate that the preliminary step of a Certificate being issued is taken in circumstances where it is clear that the Site is not compatible with the safe and orderly development of Bushfire Prone Land.

Relevantly, the issue of bushfire assessment and impact was a matter raised in the Section 56A appeal as determined by the LEC in favour of Council. The Court found that insufficient detail had been provided and that the Court had prejudged the issue by giving preliminary consent "subject to" further detail being provided.

The SCC application provides no additional information on this important topic

Criteria 2 – The impact that the proposed development is likely to have on the future uses of the land.

Comment:

As mentioned previously, Seniors Housing is not a permissible use within the RU4 zone under the local planning controls.

However, SEPP (HSPD) is a state wide planning policy and allows a density and intensity of development not necessarily reflected in local planning instruments. The intensity of the proposed development exceeds the density controls of the WLEP 2011.

The RU4 Primary Production Small Lots zone envisages that development would comprise:

'....primary industry enterprises, particularly those that require smaller lots or that are more intensive in nature'.

Permissible uses in the zone include animal boarding or training establishments; aquaculture; extensive agriculture; intensive plant agriculture; plant nurseries; recreation areas and landscape material supplies.

The granting of an SCC for a residential development of the density and scale of what is proposed, has the potential to prejudice the development of the adjoining RU4 zoned

lots for uses such as those mentioned above, as the likely future surrounding uses may be in conflict with the level of amenity expected by residents in a significantly more dense residential development such as seniors housing.

The cumulative impacts of the proposed intensity are such that the very character of the RU4 zone, and for that matter the adjacent R2 zone to the east, which clearly demonstrate rural and low rise detached dwelling typologies respectively, will be significantly altered.

Criteria 3 – The services and infrastructure that are or will be available to meet the demands arising from the development (particularly, retail, community, medical and transport services having regard to the location and access requirements set out in clause 26) and any proposed financial arrangements for infrastructure provision.

Comment:

The site is not located within 400 metres of essential facilities and services and is substantially further than 400 metres from a public transport service (bus), being measured at 492m to 575m to the north bound bus stops on Cooyong Road from the south-east corner of the site. From the indicative site exit, this distance extends to between 548m and 631m. Council continues to hold significant concerns with the grade of the road and road reserve in Cooyong Road and question the ability of the proposal to satisfy the requirements of Clause 26.

Compliance with the requirements of Clause 26 of the SEPP to existing public transport services is not achievable. Therefore, the proposal is considered unsuitable for the site in this regard.

It is also noted that the Planning Report, prepared by Minto Planning Services and submitted with the SCC, stipulates that Clause 43 of the SEPP overrides the requirements of Clause 26 in relation to the serviced self-care housing component of the development. Council disagrees with the applicant's position for the reasons that Clause 26 is only applicable to the proposed Residential Care Facility (RAC) component of the development and that the serviced self-contained housing component of the development is excluded from the operation of Clause 26, given the applicability of Clause 43 of SEPP (HSPD) 2004.

Clause 26 is a mandatory provision that is applicable to all seniors housing developments. The requirements of Clause 26 must be met in addition to the requirements of Clause 43 for the self-contained housing component of the development.

The issue of the applicability of Clause 26 to the serviced self-contained housing component was a matter raised in the Section 56A appeal. The Court determined as much, finding that in the absence of an approved clause 4.6 request, clause 26 of the SEPP (HSPD) was a development standard that must be met.

In addition, the applicant's Planning Report refers to Clause 4.6 for the residential care facilities component of the development which is a non-compliance with Clause 26, but it appears that a Clause 4.6 has not been submitted with the SCC application.

Therefore, the application is deficient in addressing the requirements of Clause 26 of SEPP (HSPD) 2004, and in this respect the granting of SCC ought to be declined.

Criteria 4 – In relation to land that is zoned open space or special uses – the impact that the proposed development is likely to have on the provision of land for open space or special uses in the vicinity of the development.

Comment:

The site is not zoned for open space or special uses.

Criteria 5 – The impacts that the bulk and scale, built form and character of the proposed development is likely to have on the existing uses, approved uses and future uses of land in the vicinity of the development.

Comment:

The surrounding development consists of low density residential accommodation. The dominant built form is single and two storey residences. The SCC application states that the proposed development will be of a similar type, form and design as the existing senior's housing development located within the locality.

Development to the east of the site is generally characterised by low density detached dwelling houses on lots of approximately 700sqm. Larger lots are characteristic in the RU4 zone to the north, west and south, being developed as larger single dwelling houses and other buildings and structures which are permissible uses in the RU4 zone such as horse stables, produce stores, and large outbuildings for the storage and/or production of landscape supplies.

The built form controls under the WDCP 2011 which are relevant to the RU4 zone, do not envisage multi-dwelling housing with a density as that proposed on the subject lot. The proposal represents a change in character of the locality, which includes the low density residential development to the east and the primary production small lots to the south, west and north.

The extent of separation between the respective buildings is very minimal. The design is not considered to be conducive to providing a good outcome for the character of the development itself and the broader character of the area when viewed from the adjoining RU4 zoned land, as well as when viewed from Cooyong Road to the south of the site and Laitoki Road.

Should senior's housing development be deemed as compatible on the subject site, any SCC should be issued subject to a condition that the proposed development should present as a maximum of two storeys with a distinctly detached configuration and a highly articulated form which is reflective of the adjoining R2 Low Density Residential Zone.

Front, rear and side setbacks should also be compatible with those required for the RU4 zone of WDCP 2011 and landscaped.

Therefore, the overall built form of the proposed development is considered unacceptable and unsuitable for this location.

Criteria 6 – If the development may involve the clearing of native vegetation that is subject to the requirements of section 12 of the Native Vegetation Act 2003 – the impact that the proposed development is likely to have on the conservation and management of native vegetation.

Comment:

The *Native Vegetation Act 2003* (**the NV Act**) has been repealed and replaced with a new framework for Land Management and Biodiversity Conservation.

Complicated transitional provisions apply whereby references to the NV Act are to be taken as references to the *Biodiversity Conservation Act 2016* (NSW) (**the Biodiversity Act**). The Biodiversity Conservation Act then provides the open standing provisions to remedy or restrain a breach of, among other things, the native vegetation clearing regime now contained in the *Local Land Services Act 2013* (NSW) (**the Local Land Services Act**).

As part of the new framework the Local Land Services Act was amended in 2016 to include Part 5A, which regulates the clearing of native vegetation in various parts of the State, including those captured by the SEPP (Vegetation in Non-Rural Areas) which applies to the Site.

It seems possible that this criterion still applies, to require consideration of the impact that the proposed development is likely to have on the conservation and management of native vegetation under the new legislative regime. In any event, the Panel is still required to positively conclude that the proposed development is compatible with the surrounding land uses having regard to the natural environment including known significant environmental values and resources which similarly requires consideration of the impact of the development on native vegetation.

Criteria 7 – The impacts identified in any cumulative impact study provided in connection with the application for the certificate

Comment:

Amendments to the SEPP (HSPD) made in October 2018 include a requirement for a Cumulative Impact Study (CIS) to be provided when an application is lodged within a one-kilometre radius of two or more parcels of land in respect of which SCC applications are current or pending.

The site is within the one-kilometre radius of other SCC application on at least 1 parcel of land (excluding land where consents have subsequently been granted), therefore this requirement does apply. The applicant has submitted experts' reports to address the requirement of this Clause.

However, the material submitted by the applicant falls short of this requirement and does not adequately address the impact of the subject development. They refer to the Terrey Hills locality, which has multiple existing and established seniors housing developments that together already contribute to cumulative infrastructure impacts and impacts on the low density rural residential character of the locality. To permit additional facilities in the same locality without adequate consideration of these cumulative impacts is a significant concern for Council and the wider community.

The cumulative impact material fails to consider at all the cumulative impact of aged housing development the subject of SCCs on bushfire and other emergency services in the Terry Hills locality. It should be noted that the reference to “services” in clause 25(2C) (a) is broader than just water, reticulated sewers and public transport.

In Council’s opinion, these key services are likely to be further stretched in terms of capacity in the event of a major bushfire event by the addition of higher density aged care accommodation on the urban fringe at Terrey Hills.

CONCLUSION

The site is considered unsuitable for a seniors living development of the size, scale and intensity as proposed under this application. Accordingly, having regard to the criteria set out in clause 25(5)(b) of the Seniors Housing SEPP, the SCC application should not be supported and the certificate not issued on the following grounds:

- The character outcome generated by the built form, density and configuration of the proposed buildings does not allow for sufficient open space and landscaping which is reflective of the rural character of the area.
- The suitability of the site for housing for seniors or people with a disability has not been demonstrated given the excessive distance and grades to the closest public transport services and hence to services and facilities.
- Given the site’s isolated location relative to transport, services and facilities, the density of the proposed development and the planning outcomes envisaged under the SEPP (HSPD) and the RU4 zone, any future redevelopment of the site should be more compatible, complementary and sympathetic with the context of the area and be more consistent with the planning objectives and design standards.
- The proposed development is not sympathetic to the scenic and visually sensitive character of the location and its interface with low density residential development to the east and rural character to the north of the site.
- Insufficient consideration has been given to bushfire impacts and to the cumulative impact of SCCs in the vicinity on bushfire and emergency services provision.

For the above reasons, Council does not consider that the proposal is compatible with the criteria under Clause 25(5)(b) of the SEPP (HSPD) and it is requested that all matters raised in this submission be addressed in the Department’s determination of the SCC application.