

COUNCIL ASSESSMENT REPORT - MODIFICATION APPLICATION

SYDNEY NORTH PLANNING PANEL

PANEL REFERENCE & DA NUMBER	PPSSNH-686 - DA/668/2018/B
PROPOSAL	S4.56 modification to amend the timeframe on deferred commencement conditions
ADDRESS	Lot 2A DP 158064 & Lot 1 DP 230172, Nos. 3 Quarry Road and 4 Vineys Road, Dural
APPLICANT	Living Choice Australia Pty Ltd
OWNER	Dural Gardens Land Pty Ltd
MOD LODGEMENT DATE	2 July 2025
ORIGINAL DA DETERMINATION DATE	14 May 2021 (LEC 2018/0022092)
APPLICATION TYPE	Modification Application under Section 4.56
REGIONALLY SIGNIFICANT CRITERIA	Clause 2, Schedule 6 of State Environmental Planning Policy (Planning Systems) 2021: General Development over \$30 million and a Section 4.56 application
CIV	\$97,050,000 (excluding GST)
CLAUSE 4.6 REQUESTS	N/A
KEY SEPP/LEP	<ul style="list-style-type: none"> State Environmental Planning Policy (Biodiversity and Conservation) 2021 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Housing) 2021 State Environmental Planning Policy (Planning Systems) 2021 State Environmental Planning Policy (Resilience and Hazards) 2021 State Environmental Planning Policy (Transport and Infrastructure) 2021 Hornsby Local Environmental Plan 2013
TOTAL & UNIQUE SUBMISSIONS KEY ISSUES IN SUBMISSIONS	<p>Four unique submissions with the key issues being:</p> <ul style="list-style-type: none"> Three submissions were in relation to the original assessment of the application, with concerns over traffic, local water pressure, bush fire, and that the development is out of character in a rural setting. These concerns were addressed under the original consent.

	<ul style="list-style-type: none"> One submission raised concerns regarding the proposed modification to the deferred commencement condition wording and timing of the provision of documents to Council.
DOCUMENTS SUBMITTED FOR CONSIDERATION	Statement of Modification - S4.56
SPECIAL INFRASTRUCTURE CONTRIBUTIONS (S7.24)	N/A
RECOMMENDATION	Approval
DRAFT CONDITIONS TO APPLICANT	Yes
SCHEDULED MEETING DATE	TBC
PLAN VERSION	No change to plan version
PREPARED BY	George Papworth, Senior Town Planner
COI DECLARATION	No conflict of interest declared
DATE OF REPORT	25 August 2025

EXECUTIVE SUMMARY

The modification application has been lodged pursuant to Section 4.56 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and seeks consent for amendments to a consent granted under DA/668/2018 approved in the Land and Environmental Court on 14 May 2021 as modified under DAM/668/2018/A approved by the Sydney North Planning Panel on 14 July 2024.

The 29,892m² site comprises two irregularly shaped lots and has two frontages, located on the northern side of Quarry Road and southern side of Vineys Road, Dural. The site predominantly comprises of cleared land with low density structures and vegetation throughout. Traversing the site from east to west is a drainage swale which has been integrated into the approved development. The site is bushfire prone and is surrounded by rural/residential land in all directions, a nursery to the east and industrial/commercial precinct to the south-west.

The original development application No. DA/668/2018 was approved in the Land and Environment Court on 14 May 2021 (LEC 2018/0022092) for the demolition of existing structures, earthworks, tree and vegetation removal and construction of a seniors housing development comprising:

- Seven, two storey (with attics) Independent Living Unit (ILUs) buildings containing 91 self-care housing units.
- A two storey (with attic) Residential Aged Care Facility (RACF) with a capacity of 66 beds
- A central facilities building fronting Quarry Road; and
- A total of 225 car parking spaces.

No staging of the works was approved under the original consent.

The development as modified is substantially the same development for which consent was originally granted.

The modified proposal has been publicly exhibited in accordance with Council's Community Engagement Plan from 15 July 2025 to 29 July 2025. Four submissions from nearby property owners were received. Three of the submissions were in relation to the original assessment of the application, with concerns over traffic, local water pressure, bush fire, and that the development is out of character in a rural setting. These concerns were addressed under the original consent. One submission raised concerns regarding the proposed modification to the deferred commencement condition wording and timing of the provision of documents to Council. The matters raised in the submissions have been reviewed and do not warrant refusal of the application. These issues are considered further in this report.

Whilst the original development was approved in the Land and Environment Court, the development was initially refused by the Sydney North Planning Panel and the trigger for planning panel determination was due to the Capital Investment Value of the development of more than \$30 million. Regional panels are also responsible for determining applications to modify a consent under Section 4.56 for regionally significant development.

The Section 4.56 modification application seeks to modify the timeframe for satisfying deferred commencement Conditions 1 and 2, which require an Integrated Bushfire and Vegetation Management Plan and a Tree Protection Plan to be submitted within 36 months, with the consent lapsing after 42 months if the applicant fails to satisfy Council as to the matters specified in the conditions.

The applicant's Statement of Environmental Effects prepared by Planning Ingenuity dated 7 May 2025 states that *'the lapsing dates are incorrect and invalid as Section 4.53(6)(b) of the EPA Act provides that where a development consent that is subject to a deferred commencement condition granted during the period of 25 March 2020 and 25 March 2022, the consent lapses if the Applicant fails to satisfy the consent authority as to the matter(s) in the condition within 5 years after the grant of consent.'*

Council agrees with the applicant's statement that the lapsing dates are incorrect and invalid. Accordingly, the lapse date of both the consent and the deferred commencement conditions should be amended to be 14 May 2026, in line with Section 4.53(6)(b).

Following consideration of the matters for consideration under Section 4.15(1) and 4.56 of the EP&A Act, it is considered that the proposed modification can be supported, subject to the conditions of consent contained at Attachment A of this report.

1 THE SITE AND LOCALITY

1.1 The Site

The site is known as 3 Quarry Road and 4 Vineys Road, Dural. The land has a legal description of Lot 2A DP 158064 and Lot 1 DP 230172, and has a total site area of 29,898m².

The site is irregular in shape, with a frontage to Quarry Road of 94m, and an 85m frontage to Vineys Road. A central, irregular area widens the site behind Lot 2 DP 230172 (fronting Vineys Road) and Lot 10 DP 870247 (fronting Quarry Road).

The site slopes down from Quarry Road and Vineys Road into a central, mapped watercourse which flows to Tunks Creek to the east.

The land is part of the Dural non-urban area which contains a mix of intensive agricultural land uses such as wholesale plant nurseries, market garden, and rural residential dwellings.

The northeastern corner of the site contains remnant vegetation which adjoins greater areas of vegetation through which the watercourse traverses.

The vegetation in the vicinity of the watercourse is mapped as being bushfire hazard.



Figure 1: Nearmap Aerial Photograph of the site (in red) as of 25 March 2024.

1.2 The Locality

The site is surrounded by rural and business zoned land, a nursery to the east and industrial/commercial precinct to the south-west. The site is located south-west of the North Q Business Centre which is zoned B2 Local Centre and comprises service and retail premises. The uses include rural supplies, fast food premises, cafés and retail stores. The land further south of the North Q Business Centre is zoned IN2 Light Industrial and R2 Low Density Residential.

To the east, 260m from the site, is the Pacific Hills Christian School. To the southwest is the business zone fronting Old Northern Road.

Vineys Road and Quarry Road are both no through roads. As a consequence, any traffic entering these roads from Old Northern Road must return to the area via Old Northern Road.

2 THE MODIFICATION AND BACKGROUND

2.1 Proposed Modification

The Section 4.56 modification application seeks to modify the timeframe for satisfying deferred commencement Conditions 1 and 2, which require an Integrated Bushfire and Vegetation Management Plan and a Tree Protection Plan to be submitted within 36 months, with the consent lapsing after 42 months if the applicant failed to satisfy Council as to the matters specified in the conditions. Conditions 1 and 2 read as follows:

1. Integrated Bushfire and Vegetation Management Plan

- a) *An Integrated Bushfire and Vegetation Management Plan shall be prepared for the Sydney Turpentine-Ironbark Forest and Blackbutt Gully Forest areas identified on Figure 1 - 'Vegetation communities and proposed offset areas within the subject site', prepared by Cumberland Ecology and annexed to the letter from Cumberland Ecology to Zhiva Living Dural Pty Ltd dated 16 October 2020 titled 'Future Proposed Ecological Management of 3 Quarry Road and 4 Vineys Road, Dural (Lot 2A DP 158064 and Lot 1 DP 230172)', and the drainage swale running from west to east through the site identified on the plans approved by condition 3 as amended in accordance with condition 4. The IBVMP shall consolidate matters to address the following:*
 - i) *Provide a map indicating the extent of the APZ.*
 - ii) *Establishment and ongoing management of the asset protection zone.*
 - iii) *Landscape planting including planting associated with offsetting requirements.*
 - iv) *Vegetation management.*
- b) *The IBVMP shall address the APZ requirements including:*
 - i) *Permanent marking of any inner and outer protection areas to delineate areas for ongoing management.*
 - ii) *Methodology for establishing and maintaining vegetation within the APZ:*
 - a. *Prioritise removal of weed species and retention of native species.*
 - b. *Retention of native vegetation in clumps where possible as described in the NSW RFS publications Planning for Bushfire Protection 2019 (Appendix 4) and Standards for asset protection zones.*
 - c. *Use of hand tools around trees and vegetation to be retained.*
- c) *The IBVMP shall address the ongoing management of remnant vegetation and landscape planting requirements including:*
 - i) *Landscape planting as part of the offsetting requirements (including 34 Turpentine and other BGF and STIF understorey species).*
 - ii) *Landscape planting along the drainage swale.*
 - iii) *Provide a schedule of works and general specification that demonstrates ongoing management of the remnant vegetation to be retained, including:*
 - a. *the timing of landscape and vegetation management works*

- b. *protocols for planting, establishment, maintenance and replacement species, numbers, pot size and height of plants to be used; and*
 - c. *Plant stock shall be sourced from a native nursery utilising Sydney basin stock.*
- d) *The IBVMP shall be implemented from the date of the Construction Certificate and will be in place for 3 years from the date of construction certificate. The IBVMP shall be reviewed upon completion of this initial 3 year period and updated for a further 5 years with a review and update every 5 years. Monitoring shall occur at a minimum of every 3 months for the first 3 years to ensure that weed control is well managed and plantings have established. Monitoring of the site after the initial 3 years shall occur annually. Reporting on the implementation of the IBVMP shall occur annually with the annual reports provided to Council.*
- e) *The IBVMP is to be submitted to Council for review and approval within 36 months of the date of this notice.*

2. Tree Protection Plan

A Tree Protection Plan is to be prepared and shall include the following information:

- a) *Cover page*
- b) *Summary of the Specification outlining its intended purpose*
- c) *Tree Data Section Table: Each tree is to be identified by both common name and botanical name, Tree Physical Dimensions: - height, canopy spread and diameter at breast height (DBH taken at 1.3m above ground), Safe Useful Life Expectancy (SULE), Tree Protection Zone (TPZ), Structural Root Zone (SRZ).*
- d) *Tree Protection Specification (Section) addressing the following subsections:*
 - i) *Specifications for the application of required tree protection measures as prescribed in AS 4970-2009.*
 - ii) *Specification of Remedial tree works pre and post development compliant with AS 4373-2007 and AS 4970-2009.*
 - iii) *Proposed inspection schedule to assess tree health and provide certification for the various stages of development such as site establishment, construction work, hard and soft landscaping practical completion and occupancy certification.*
 - iv) *Specification and Scheduling of necessary tree care/maintenance required before, during and post construction (such as watering and fertilising trees).*
- e) *Tree Protection Plans which incorporates the relevant tree protection requirements, but not limited to the following:*
 - i) *Location of protection fencing (written distance on plan of TPZ radius)*
 - ii) *Trees identified to have trunk and canopy protection measures (i.e. colour coded)*
 - iii) *TPZ areas to be mulched (in accordance with specifications or consent)*
 - iv) *Location Building storage materials*
 - v) *Location Building waste area's*
 - vi) *Location of installations of services and methodology to be used.*

- f) *Appendices Section which contains any documents referred to within the tree protection plan.*
- g) *Credentials and Conduct Statement: All reports are to include the name of the Arborist who undertook the site inspection and carried out the assessment, their qualifications and contact details and a statement consistent with clause 3.2.1 (located in the appendices)*
- h) *Such information must be submitted to Council within 36 months of the date of this notice.*

This consent will lapse if the applicant fails to satisfy Council as to the matters specified in the conditions above within 42 months of the date of this notice. Upon Council's written satisfaction of the above information, the following conditions of development consent apply:

A summary of the proposed changes to conditions is outlined in Table 1 below.

Table 1: Proposed Changes to Conditions

No.	Condition requirements	Change Proposed	Reason for Change
DEFERRED COMMENCEMENT CONDITION			
1	Integrated Bushfire and Vegetation Management Plan	Amend the timeframe to submit the IBVMP from 36 months to 5 years	Unlawful condition
2	Tree Protection Plan	Amend the timeframe to submit the Tree Protection Plan from 36 months to 5 years and amend the timeframe in the advisory note to satisfy Council regarding the matters specified in condition Nos. 1 and 2 from 42 months to 5 years	Unlawful condition

2.2 Background

The site was previously used for silviculture and contains a dwelling and outbuildings to the Vineys Road frontage. The plantation has recently been removed, leaving the site substantially cleared.

On 18 July 2018, DA/668/2018 was lodged for a Seniors living development comprising 146 independent living units and 74 residential aged care beds.

On 5 December 2018, the Sydney North Planning Panel refused DA/668/2018 (SNPP No. 2018SNH043) for the following reasons:

The application does not comply with the maximum height in the Hornsby LEP 2013 of 10.5m. The applicant has lodged a written request under cl 4.6 of the LEP to vary the control. The Panel accepts the assessment report's conclusion that the cl4.6 variation has not satisfactorily demonstrated that:

- *the 10.5m height of buildings development standard is unreasonable or unnecessary in the circumstances of the case;*

- *there are sufficient environmental planning grounds to justify contravening the development standard; or that*
- *the development would be in the public interest as it would not be consistent with the zone or standard objectives, and thus would not be in the public interest.*

Clause 24(2) of the SEPP(HSPD) requires a development under the Policy to be compatible with the surrounding environment. Clause 24(3)(a)(ii) enables a council to refuse an application based on its own assessment of the compatibility of the proposal with the surrounding environment. Notwithstanding the Site Compatibility Certificate issued for this site, the Panel accepts the assessment report's conclusion that the proposed development is not compatible with its surroundings. The Panel accepts that seniors' housing on this site may be designed to be compatible with the surroundings; however, this particular built form is not compatible. While the site partially adjoins urban land which has urban character, its major visual connection is to land possessing rural character. The Panel also accepts that a seniors' housing development cannot have the exact appearance of rural residential development. However, the design of this particular proposal does not appear to have made any compromise to the fact that, in the main, it is surrounded by rural character.

Clause 17 of SEPP(HSPD) requires that development on land adjoining land zoned for urban purposes is to be serviced self-care housing, where meals, cleaning services, personal care and nursing care are available on site. The applicant has not provided suitable evidence that all these services will be provided.

Clause 28 of the SEPP(HSPD) states that a consent authority must not consent to a development unless it is satisfied by written evidence that the development will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage. There has not been sufficient such evidence.

As the application is integrated development, the Panel cannot grant consent without the written concurrence of the NSW Rural Fire Service. The Service has not issued this concurrence.

The Panel noted the applicant's request, made during the public meeting, that the Panel should defer the determination application. The applicant indicated that it intends to submit amended plans to the court, which would reduce the gross floor space by about one third and would reduce the height so as to comply with the control of 10.5m and further address the threshold issues of permissibility. The Panel's usual practice is to defer applications only when it can require specific nominated amendments which have a good chance to make an application acceptable. In this case, no specific amendments can be indicated due to the extent of amendments required and it is possible that an amended application is so different from the current one before the Panel that it should be treated as a new application.

Accordingly, the Panel unanimously resolved to refuse the application before it for the reasons in the Assessment Report.

On 14 May 2021, the Land and Environment Court (LEC 2018/0022092) upheld the appeal and granted consent to DA/668/2018 for the demolition of existing structures, earthworks, tree and vegetation removal and construction of a seniors housing development comprising:

- Seven, two storey (with attics) Independent Living Unit (ILUs) buildings containing 91 self-care housing units.
- A two storey (with attic) Residential Aged Care Facility (RACF) with a capacity of 66 beds
- A central facilities building fronting Quarry Road; and

- A total of 225 car parking spaces.

No staging was approved under the original consent. The gross floor area was significantly reduced, as was the height of all buildings to comply with the 10.5 metre height limit for the area.

On 15 July 2024, the Sydney North Planning Panel approved DAM/668/2018/A (PPSSNH-429) to enable the works to progress in a staged manner. In addition, the modification approved changes to some of the design elements of the ILU's including associated landscape and civil works.

The proposed development was amended to enable the works to progress in a staged manner, outlined as follows:

- Stage 1: Demolition of any structures and required civil works including the addition of emergency access roads between Quarry Road and Vineys Road along the western boundary.
- Stage 2A: Construction of Buildings A, B, D and E and associated landscape works.
- Stage 2B: Construction of Buildings C, F and G and associated landscape works.
- Stage 3: Construction of Residential Aged Care Facility and associated landscape works.

In addition, the modification approved changes to some of the design elements of the ILU's including associated landscape and civil works, summarised as follows:

- Modifications to the basement arrangement, parking and vehicular access within the site including paving of the approved turf track (to the south) to allow for emergency and heavy vehicle access only, in addition to the provision of a new vehicular access bridge, new basement under Building C and F and reduced basement area under Building G
- Reduction in overall car parking spaces from 225 to 219
- Modification to the arrangement and layout of the communal open spaces
- Alterations to the internal arrangement of the ILU's
- Internal modification to the building entry and communal area, including revised floor level, removal of cinema room (relocated within basement) and main kitchen (relocated within basement) and provision of a new music room, library, reception and games room.
- Changes to the roof form and design, including increase in height due to lift overrun. Roof forms do not exceed 10.5m height limit.
- The addition of a porte cochere at the front of the site
- A number of relatively minor internal and external changes
- Modified civil works including the addition of a 4th vehicular crossing off Quarry Road for improved emergency access arrangements; and
- Modified landscaping to reflect changes.

The number of ILU's would remain unchanged.

The approved modification did not alter the approved RACF component of the development fronting Vineys Road.

This Section 4.56 modification application was lodged on 2 July 2025. A chronology of the modification application since lodgement is outlined below in Table 2 including the Panel's involvement (briefings, referrals etc) with the application:

Table 2: Chronology of the Modification Application

Date	Event
2 July 2025	Modification application lodged.
15 July 2025 to 29 July 2025	Exhibition of the application.

3 STATUTORY CONSIDERATIONS

When determining a modification application, the consent authority must take into consideration the matters outlined in Section 4.56 of the EP&A Act in relation to modification of consents provisions, Section 4.15(1) of the EP&A Act in relation to matters for consideration for applications and Part 5 of the 2021 EP&A Regulation in relation to information requirements and notification. These matters are considered below.

3.1 Section 4.56 of the EP&A Act

A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the Court and subject to and in accordance with the regulations, modify the consent if a number of matters are satisfactorily addressed pursuant to Section 4.56 of the EP&A Act. The matters include the following:

(1)(a) *it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all) (s4.56(1)(a)), and*

The modified proposal would not result in any physical changes to the approved consent. Accordingly, it is considered the proposed modification is substantially the same development as the development for which consent was originally granted.

(1)(b) *it has notified the application in accordance with—*

- (i) *the regulations, if the regulations so require, and*
- (ii) *a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent (s4.56(1)(b)), and*

(1)(c) *it has notified, or made reasonable attempts to notify, each person who made a submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person (s4.56(1)(c)), and*

(1)(d) *it has considered any submissions made concerning the proposed modification within any period prescribed by the regulations or provided by the development control plan, as the case may be (s4.56(1)(d)).*

The modification application was notified between 15 July 2025 and 29 July 2025 and four submissions were received. The issues raised in these submissions are considered in Section 4 of this report.

(1A) *In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified (s4.56(1A)).*

The matters required to be considered include:

- Matters for consideration pursuant to Section 4.15(1) of the EP&A Act - these matters are considered below in Section 3.2 of this report; and
- Reasons given by the consent authority for the grant of the consent that is sought to be modified - outlined below.

Reasons for Grant of Consent

In accordance with the above, DA/688/2018 was approved on 14 May 2021 by the Land and Environmental Court (LEC) for the demolition of existing structures and the construction of a 66 bed residential care facility and 91 dwelling seniors living development, and associated works. The LEC judgement considered the following reasons for the granting of consent:

- *Fulfilment of the Site Compatibility Certificate: The proposed modifications have no effect on fulfilment of the Site Compatibility Certificate as the proposal is substantially the same as that originally approved and will not result in any considerable changes in design, arrangement or operation.*
- *Development on land adjoining land zoned primarily for urban purposes: The proposal will not alter the use and operation of the development as originally approved and will maintain the provision of Independent Living Units and a Residential Aged Care Facility, and the relevant conditions of consent imposed will not be altered.*
- *Jurisdictional issues: The various issues raised as they pertain to the SEPP (Housing for Seniors or People with a Disability) 2004 were resolved and these matters, including occupation and use, services and facilities, bushfire and the like have not been significantly altered as part of this application, and will be consistent with that originally approved.*
- *Character and design: The proposed modifications will not result in any significant changes to the architectural design of the approved development and will present to the streetscapes and neighbouring properties as originally approved, and as such, is consistent with the original consent. That is, the architectural character of the development, including landscaping, will be maintained as originally approved.*
- *Amenity of surrounding developments: In terms of privacy, solar access and views, the proposed modifications will not result in any wholesale changes to the bulk, scale or design of the development. Accordingly, and as addressed in the original SEE, the conclusions made in the original consent have not been altered.*
- *Conditions of consent: Whilst the proposal will seek to stage the development, it will not seek to remove any conditions which were deemed necessary by the Court.*
- *In accordance with the above, the proposed modifications will not alter the reasons given by the Court in granting consent for the approved development. The proposed changes, as identified in the SEE, will not result in any significant or wholesale changes which require reconsideration of the reasons for approval. As such, it is considered that Clause 4.56(1A) has been satisfied.*

In accordance with the above, the proposed modifications will not alter the reasons given by the Court in granting consent for the approved development. The proposed changes, as identified in the SEE, will not result in any physical changes which require reconsideration of the reasons for approval. As such, it is considered that Clause 4.56(1A) has been satisfied.

3.2 Section 4.15(1) of the EP&A Act

Section 4.15(1) of the EP&A Act contains matters which the consent authority must take into consideration in determining a development application and modification applications pursuant to Section 4.56(1A), which are of relevance to the application.

These matters include the following, which are considered in detail below:

- (a) the *provisions* of—
 - (i) any *environmental planning instrument*, and
 - (ii) any *proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved)*, and
 - (iii) any *development control plan*, and
 - (iiia) any *planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and*
 - (iv) the *regulations* (to the extent that they prescribe matters for the purposes of this paragraph),
that apply to the land to which the development application relates,
- (b) the *likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,*
- (c) the *suitability of the site for the development,*
- (d) any *submissions made in accordance with this Act or the regulations,*
- (e) the *public interest.*

3.3 Section 4.15(1)(a) - Provisions of Environmental Planning Instruments, Proposed Instruments, DCPs, Planning Agreements and the Regulations

The relevant provisions under s4.15(1)(a) are considered below.

3.4 Environmental planning instruments (s4.15(1)(a)(i))

The following Environmental Planning Instruments are relevant to this application:

- State Environmental Planning Policy (Biodiversity and Conservation) 2021
- State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
- State Environmental Planning Policy (Housing) 2021
- State Environmental Planning Policy No 65 Design Quality of Residential Apartment Development
- State Environmental Planning Policy (Planning Systems) 2021
- State Environmental Planning Policy (Resilience and Hazards) 2021
- State Environmental Planning Policy (Transport and Infrastructure) 2021
- Hornsby Local Environmental Plan 2013

3.4.1 Hornsby Local Environmental Plan 2013

The proposed amendment does not alter the permissibility or original assessment of the development against the Hornsby Local Environmental Plan 2013 (HLEP).

3.5 Provisions of any Proposed Instruments (s4.15 (1)(a)(ii))

The relevant EPI's are outlined in Section 3.4 of this report. There are no proposed instruments that require consideration under this application.

3.6 Provisions of any Development Control Plan (s4.15(1)(a)(iii))

The application seeks approval to amend the consent conditions in regards to the deferred commencement timeframes only. The assessment of the original proposal has taken into consideration the relevant Development Control Plan. As such the proposed amendment would not require detailed assessment with regard to Council's Development Control Plan.

3.7 Provisions of any State Policies

The application seeks approval to amend the consent conditions in regards to the deferred commencement timeframes only. The assessment of the original proposal has taken into consideration all the relevant State Policies. As such the proposed amendment would not require detailed assessment with regard to the State Policies.

3.7.1 State Environmental Planning Policy (Planning Systems) 2021 ('Planning Systems SEPP')

The provisions of Chapter 2 of State Environmental Planning Policy (Planning Systems) 2021 (Planning Systems SEPP) have been considered in the assessment of the modification application. The proposal is regionally significant development pursuant to Section 2.19(1) as it satisfies the criteria in Clause 2 of Schedule 6 of the Planning Systems SEPP as the proposal is considered a modified development to General Development over \$30 million. Accordingly, the Sydney North Planning Panel is the consent authority for the application. The proposal is consistent with this Policy.

3.8 Planning agreements under Section 7.4 of the EP&A Act (s4.15(1)(a)(iiia))

There have been no planning agreements entered into and there are no draft planning agreements being proposed for the site.

3.9 Provisions of Regulations (s4.15(1)(a)(iv))

Section 61 of the 2021 EP&A Regulation contains matters that must be taken into consideration by a consent authority in determining a development application, with the following matters being relevant to the proposal:

- If demolition of a building proposed - provisions of AS2601.

Section 62 (consideration of fire safety) of the 2021 EP&A Regulation are relevant to the to the proposal.

These provisions of the 2021 EP&A Regulation have been considered and are addressed in the recommended draft conditions (where necessary).

3.10 Section 4.15(1)(b) - Likely Impacts of Development

The likely impacts of the development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality must be considered. In this regard, potential impacts related to the proposal have been considered in response to SEPPs, LEP and DCP controls outlined above and the Key Issues section below.

In the assessment of the original application, it was determined that the proposal would not have any significant adverse impacts on the locality. The proposed changes, as identified in the SEE, will not

result in any physical changes and will not alter the likely impacts of the development as originally assessed.

3.11 Section 4.15(1)(c) - Suitability of the site

Section 4.15(1)(c) of the Act requires Council to consider “*the suitability of the site for the development*”.

In this assessment of the original application, it was determined that the site’s attributes are conducive to the senior’s development. The proposed modification would not have any impact with respect to the suitability of the site for the development.

3.12 Section 4.15(1)(d) - Public Submissions

The submissions are considered in Section 4.3 of this report.

3.13 Section 4.15(1)(e) - Public interest

The public interest is an overarching requirement, which includes the consideration of the matters discussed in this report. Implicit to the public interest is the achievement of future built outcomes adequately responding to and respecting the future desired outcomes expressed in environmental planning instruments and development control plans.

The modified proposal would maintain the approval for a seniors housing development 91 ILU’s and 66 beds within the RACF. The proposal is consistent with the Housing SEPP and would increase housing supply for seniors in Hornsby Shire. The modified proposal would result in a positive impact for the community and would be in the public interest.

3.14 Part 5 of the 2021 EP&A Regulation

There are a number of matters required to be addressed in an application for modification of development consent pursuant to Division 1, 2 and 3 of Part 5 of the 2021 EP&A Regulation. These matters are considered in **Table 3** below.

Table 3: Consideration of the Requirements under the Regulation

Matter	Comment	Comply
Clause 100 Application for modification of development consent		
May be made by— (a) the owner of the land to which it relates, or (b) another person, with the consent of the owner of the land (CI 98(1))	The application has been made by Leigh Buckton from Living Choice Australia, with consent from the owner of the land being Dural Gardens Land.	Y
NSW Aboriginal Land Council consent required for land owned by a Local Aboriginal Land Council (CI 98(6)).	The land is not owned by a Local Aboriginal Land Council and consent is not required.	N/A
Form approved by Planning Secretary and on portal (CI 99).	The application has been provided in accordance with the Regulation.	Y
Applicant details (CI 100(1)(a))	Provided on the NSW Planning Portal (‘the Portal’).	Y

Description of the development (CI 100(1)(b))	Provided on the Portal and outlined in Section 2 of this Report.	Y
Address and title details (CI 100(1)(c))	Provided on the Portal and outlined in Section 1 of this Report.	Y
Description of the proposed modification (CI 100(1)(d))	Provided on the Portal and outlined in Section 2 of this Report.	Y
Whether to correct a minor error, mis-description or miscalculation, or some other effect (CI 100(1)(e))	The proposed modification is to modify the original consent under Section 4.56 to amend the timeframe to address the deferred commencement conditions to 5 years.	Y
Description of the expected impacts of the modification (CI 100(1)(f))	There are unlikely to be any significant impacts resulting from the proposed modification given there are no changes to the built form of the approved development	Y
Undertaking that modified development will remain substantially same as development originally approved (CI 100(1)(g))	The modified development will remain substantially the same development as that originally approved. Refer to Section 3.1 of this Report.	Y
If accompanied by a Biodiversity development assessment report, the biodiversity credits information (CI 100(1)(h))	BDAR not required.	N/A
Owner's consent (CI 100(1)(i))	An undertaking has been provided on the Portal.	Y
Whether the application is being made to the Court (under section 4.55) or to the consent authority (under section 4.56) (CI 100(1)(j)).	This Application is made to the consent authority pursuant to Section 4.56(1) of the EP&A Act.	Y
BASIX Certificate (CI 100(3))	The proposed modification does not alter the built form of the development and an updated BASIX Certificate is not required to be submitted.	Y
Penrith Lakes Development Corporation (CI 101)	N/A	N/A
Qualified designer statement for residential apartment development (CI 102)	Whilst the proposed modification relates to a residential apartment development an updated designer statement is not required as the approved built form has not been modified.	N

Mining and petroleum development consents (CI 102)	N/A	N/A
Notification and exhibition requirements (CI 105-112)	Refer to Section 4.3 of this report.	Y
Notification of concurrence authorities and approval bodies (CI 109) (to be undertaken by Council)	The modification application is not required to be referred to the relevant concurrence and approval bodies as outlined in Section 4.1 of this Report.	Y

4 REFERRALS AND SUBMISSIONS

4.1 Agency Referrals and Concurrence

The modification application was not required to be referred as no physical changes were proposed.

4.2 Council Referrals

The modification application was not required to be referred to Council officers for technical review.

4.3 Notification and Community Consultation

The modification application was notified in accordance with the Council's Community Engagement Plan from 15 July to 29 July 2025. The notification included the following:

- A sign placed on the site; and
- Notification letters sent to adjoining and adjacent properties (92 letters sent).

Council received a total of four unique submissions, comprising four objections to the proposal. The issues raised in these submissions are considered below.

Three submissions were in relation to the original assessment of the application, with concerns over traffic, local water pressure, bush fire, and that the development is out of character in a rural setting. These concerns were addressed under the original assessment and no further consideration is required.

One submission raised concerns regarding the proposed modification to the deferred commencement condition wording and timing of the provision of documents to Council. In response to these concerns, it is noted that it is the applicant's responsibility to ensure that the documents are submitted to Council with sufficient time for Council to complete the assessment of the documents prior to the proposed lapsing date. It is noted that the two documents required (IBVMP and TPP) have been provided to Council for review on 5 August 2025 and therefore, if the modification is approved, there is sufficient time for Council to complete the assessment prior to the proposed lapsing date of 14 May 2026.

The issues raised in the community submissions have been addressed in this report and in the recommended conditions of consent in Attachment A.

5 KEY ISSUES

The following key issues are relevant to the assessment of this application having considered the relevant planning controls and the proposal in detail:

5.1 Unlawful condition

The applicant's Statement of Environmental Effects prepared by Planning Ingenuity dated 7 May 2025 states that *'the lapsing dates are incorrect and invalid as Section 4.53(6)(b) of the EPA Act provides*

that where a development consent that is subject to a deferred commencement condition granted during the period of 25 March 2020 and 25 March 2022, the consent lapses if the Applicant fails to satisfy the consent authority as to the matter(s) in the condition within 5 years after the grant of consent. These provisions were introduced in 2020 by the Covid-19 emergency measures legislation.

Section 4.53(6A) and (6B) permit the consent authority to reduce the period in which a consent will lapse, but not less than 5 years. These provisions have been considered by the Court, which has confirmed that the lapse date cannot lawfully be less than 5 years (see Norman v Central Coast Council).

Conditions 1 and 2 and the advisory note within the development consent seeks to:

- impose a period for the submission of information to Council within ‘36 months of the date of this notice’, being 14 May 2024; and*
- reduce the compliance period from 5 years as permitted under the legislation to ‘42 months of the date of this notice’, being 14 November 2024.*

Despite this, the operation of section 4.53(6)(b) of the Act means that even though the Court approved the conditions of consent sought to reduce the time period for compliance with a deferred commencement condition, it could not have lawfully done so and the Act extends the lapse date to 5 years from the date of the consent.

This view has been supported by the Court in the matter of Norman v Central Coast Council in which Pepper J found that the Council has no power to impose a condition reducing the time for compliance with the deferred commencement conditions from the 5 years as enabled under 4.53(6)(b) to 12 months - see at paragraph 68:

“A consent authority is therefore not authorised by operation of s 4.53(6B) to reduce the five year period specified in s 4.53(6)(b) for a deferred development consent to lapse. It therefore follows that the Council had no power to impose a condition in the consent purporting to reduce time for compliance with the deferred development conditions in section A of that consent to 12 months and the condition is invalid.”

Pepper J’s decision was largely based on the interpretation of the amendment made by Parliament to the legislation in response to COVID. Noting the subject consent was granted within the COVID prescribed period, we are of the view that this squarely aligns with the correct interpretation of the legislation and available time period for compliance with a deferred commencement condition, being 5 years.

As a result, the lapse date of both the consent and the deferred commencement conditions is 14 May 2026, in line with section 4.53(6)(b). This modification therefore seeks to amend the timeframes sought to be imposed in the deferred commencement conditions 1 and 2 to reflect this’.

Council agrees with the applicant’s statement that the lapsing dates are incorrect and invalid. Accordingly, the lapse date of both the consent and the deferred commencement conditions should be amended to be 14 May 2026, in line with section 4.53(6)(b).

6 CONCLUSION

This modification application has been considered in accordance with the requirements of the EP&A Act and the 2021 EP&A Regulation as outlined in this report. Following a thorough assessment of the relevant planning controls, issues raised in submissions and the key issues identified in this report, it is considered that the application for modifications to an approved seniors living development, specifically modifications to the deferred commencement conditions regarding the timeframe for submission of the information and lapsing of consent can be supported.

It is considered that the key issue as outlined in Section 5 have been resolved satisfactorily through amendments to the proposal and/or in the recommended draft conditions at Attachment A.

7 RECOMMENDATION

It is recommended:

- That the Modification Application (DA/668/2018/B) for amendments to the deferred commencement conditions for a seniors living development comprising the demolition of existing structures and the staged construction of 91 independent living units and a 66 bed residential care facility with associated works be approved pursuant to Section 4.56(1) of the *Environmental Planning and Assessment Act 1979*, subject to the draft conditions of consent attached to this report at Attachment A; and
- In accordance with Clause 118 of the Environmental Planning and Assessment Regulation 2021, a notice of determination is to be prepared by Council following the Panel's determination of this modification application.

The following attachments are provided:

- Attachment A: Modified Recommended Conditions of Consent