

**Consideration of SEPP 55 for Caldwell House  
PPSWES-40  
Prepared by Kim Johnston**

The Council has raised various concerns with the independent planning assessment report dated February 2021 in relation to DA 234/2018(1) for Caldwell House. The issues raised by Council include:

- The proper characterisation of the development is demolition,
- The remediation work is not category 1 under the SEPP (ground water is not a trigger), and
- Clauses 9 and 12 of SEPP 55 do not apply.

These issues are considered in further detail below.

### 1. The Proposal is for Demolition

Council has raised concerns with the characterisation of the proposal, stating that the development application should be only for demolition. The development application was received by Orange City Council ('the Council') on 3 July 2018, with the Development Application form providing the following description of the proposal (illustrated in **Figure 1**):

*"Category 1 Remediation (Asbestos); demolition of all buildings and structures; removal of all vegetation".*

The application was accompanied by various contamination reports outlining the extent of the asbestos contamination of the buildings on the site. The applicant is Health infrastructure as the site was previously used for health services.

Suburb Orange Postcode: 2800 Site area (m<sup>2</sup>): 5,200

Lot 2 DP 1230592 Strata Plan —

**APPLICANT DETAILS** - please tick one type → Individual/s ☐ OR Organisation/Company ☒

Name in Full HEALTH INFRASTRUCTURE ON BEHALF OF HEALTH ADMINISTRATION CORPORATION

C/- PETER BASHA PLANNING AND DEVELOPMENT Phone no 6361 2955

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**DESCRIPTION OF PROPOSAL**  
Please briefly describe everything requiring approval by Council.

CATEGORY 1 REMEDIATION (ASBESTOS); DEMOLITION OF ALL BUILDINGS AND STRUCTURES; REMOVAL OF ALL VEGETATION

Office Use Only: Demolition of a Heritage Item (All buildings, structures & vegetation to be removed)

**ESTIMATED COST OF THE DEVELOPMENT (INCLUDING GST)**  
Contracted price or estimate including labour and materials. \$1.8 million and Category 1 remediation (Asbestos removal)

NOTE: The estimated cost of the development or contract price is subject to a check by Council.

**Figure 1: DA Form lodged with Orange City Council**

The *Environmental Planning and Assessment Act 1979* ('EP&A') Act provides a definition for 'development' which states:

**"Section 1.5      Meaning of "development"**

- (1) *For the purposes of this Act, development is any of the following—*
- (a) *the use of land,*
  - (b) *the subdivision of land,*
  - (c) *the erection of a building,*
  - (d) *the carrying out of a work,*
  - (e) *the demolition of a building or work,*
  - (f) *any other act, matter or thing that may be controlled by an environmental planning instrument.*
- (2) ..... "

The following relevant definition is contained in Section 1.4 (Definitions) of the EP&A Act:

**work** *includes any physical activity in relation to land that is specified by a regulation to be a work for the purposes of this Act, but does not include a reference to any activity that is specified by a regulation not to be a work for the purposes of this Act.*

*The carrying out of a work includes—*

- (a) *the renewal of, the making of alterations to, or the enlargement or extension of, a work, or*
- (b) *enclosing a public place in connection with the carrying out of a work.*

It is noted that the *Environmental Planning and Assessment Regulation 2000* ('the Regulation') (Clause 3B) includes matters included as a *work* (including the deposit of material on a beach or land within a beach fluctuation zone) but not what is specifically excluded.

The EP&A Act provides that a person may apply for consent to carry out *development*, stating (emphasis added):

**"Section 4.12 Application**

- (1) *A person may, subject to the regulations, apply to a consent authority for consent to carry out development.*
- (2) ***A single application may be made in respect of one or more of the types of development referred to in paragraphs (a)–(f) of the definition of development in section 1.5(1).***
- (3) ..... "

Accordingly, the applicant is able to apply for more than one type of development. In this case, the applicant has applied for the following 'development':

- Category 1 Remediation (Asbestos) – considered to be *any other act, matter or thing that may be controlled by an environmental planning instrument* provided in s1.5(1)(f) of the EP&A Act (SEPP 55 – further considered below);
- Demolition of all buildings and structures - considered to be *the demolition of a building or work* provided in s1.5(1)(e) of the EP&A Act; and
- Removal of all vegetation - considered to be *the carrying out of a work* provided in S1.5(1)(d) of the EP&A Act.

In relation to Category 1 remediation work, *State Environmental Planning Policy No 55 – Remediation of Land* ('SEPP 55') aims to promote the remediation of contaminated land for the purpose of reducing the risk of harm to human health or any other aspect of the environment. SEPP 55 achieves this by, among other things, specifying when consent is required, and when it is not required, for a remediation work.

SEPP 55 provides the following relevant definition (emphasis added):

**remediation** means—

(a) **removing,** dispersing, destroying, reducing, mitigating or containing **the contamination of any land,** or

(b) eliminating or reducing any hazard arising from the contamination of any land (including by preventing the entry of persons or animals on the land).

**Note—**

*This definition of remediation corresponds to parts of the definition of remediation in the Contaminated Land Management Act 1997.*

SEPP 55 states that **contaminated land** has the same meaning as it has in Part 7A of the Act, however, there is no Part 7A in either the EP&A Act or the *Contaminated Land Management Act 1997* ('CLM Act'). However, section 5(1) of the CLM Act provides the following definition of contamination of land:

**Contamination** of land, for the purposes of this Act, means the presence in, on or under the land of a substance at a concentration above the concentration at which the substance is normally present in, on or under (respectively) land in the same locality, being a presence that presents a risk of harm to human health or any other aspect of the environment.

Following consideration of these definitions, contamination of land is considered to be the presence on land of a substance at a concentration above the concentration at which the substance is normally present which presents a risk of harm to human health or any other aspect of the environment. Remediation is considered to be the removal (among other things) of that contamination of land.

In this case, the asbestos within the site is considered to be contamination as it is present on the site above the normal concentration, and presents a risk to human health (demonstrated in the contamination consultant's reports). The removal of this asbestos is considered to be remediation.

Accordingly, it is considered that the applicant has appropriately lodged the development application for a number of different types of development to ensure that all aspects of the proposed development are included, and which is consistent with s4.12(2) of the EP&A Act. In this way, the 'remediation' is considered to be category 1 remediation work as further discussed below.

## **2. Remediation work not Category 1 under SEPP 55**

Council has stated that it does not consider that the proposal is for Category 1 Remediation Work under SEPP 55, which provides for certain work to be classified as Category 1 remediation work if it satisfies the criteria outlined in Clause 9.

Clause 9 of SEPP 55 states:

*For the purposes of this Policy, a category 1 remediation work is a remediation work*

(not being a work to which clause 14(b) applies) that is—

- (a) *designated development, or*
- (b) *carried out or to be carried out on land declared to be a critical habitat, or*
- (c) *likely to have a significant effect on a critical habitat or a threatened species, population or ecological community, or*
- (d) *development for which another State environmental planning policy or a regional environmental plan requires development consent, or*
- (e) *carried out or to be carried out in an area or zone to which any classifications to the following effect apply under an environmental planning instrument—*
  - (i) *coastal protection,*
  - (ii) *conservation or heritage conservation,*
  - (iii) *habitat area, habitat protection area, habitat or wildlife corridor,*
  - (iv) *environment protection,*
  - (v) *escarpment, escarpment protection or escarpment preservation,*
  - (vi) *floodway,*
  - (vii) *littoral rainforest,*
  - (viii) *nature reserve,*
  - (ix) *scenic area or scenic protection,*
  - (x) *wetland, or*
- (f) *carried out or to be carried out on any land in a manner that does not comply with a policy made under the contaminated land planning guidelines by the council for any local government area in which the land is situated (or if the land is within the unincorporated area, the Minister).*

It is noted that Clause 14(b) of SEPP 55 does not apply in this instance<sup>1</sup>.

The following conclusions are evident having considered the criteria in Clause 9(a) to (f) of SEPP 55 as it applies to the proposal:

- The proposal is not for designated development,
- The site is not land declared to be a critical habitat,
- The proposal will not have a significant effect on a critical habitat or a threatened species, population or ecological community,
- The proposal does not require development consent under any other State environmental planning policy (the *Orange Local Environmental Plan 2011* ('OLEP 2011') is not a SEPP, and the site is no longer used for a *health services facility* and therefore the Infrastructure SEPP does not apply),
- The site is not located in an area or zone that has the effect of a coastal protection, habitat area, habitat protection area, habitat or wildlife corridor, escarpment, escarpment protection or escarpment preservation, floodway, littoral rainforest, nature reserve, scenic area or scenic protection or wetland classifications under an environmental planning instrument,
- There is no Council policy made under the contaminated land planning guidelines that applies to the proposal,
- The site contains a heritage item, however, it is considered that this designation does not extend to the site being within an area or zone with the effect of having a *conservation* or *heritage conservation* classification under an environment planning instrument;
- The site is located within an area of groundwater vulnerability and is therefore considered to satisfy the '*environment protection*' criteria of Clause 9(e)(iv) of SEPP

<sup>1</sup> Clause 14(b) applies to remediation work required by a remediation order, without consent under another State environmental planning policy, cattle dip contamination or under the Public Land Remediation Program administered by the Broken Hill Environmental Lead Centre

55 which is considered further below.

*Environment Protection (Cl 9(e)(iv) of SEPP 55)*

Clause 9(a), (b), (c), (d) and (f) of SEPP 55 are drafted with certainty, including whether the proposal is designated development, critical habitat, contains threatened species, population or ecological community, requires consent under another environmental planning instrument or is inconsistent with a Council contaminated land DCP. These matters are addressed in direct terms in the EP&A Act or the applicable environmental planning instruments, with no interpretation required.

In contrast, Clause 9(e) of SEPP 55 is drafted differently in that it provides criteria which is to be interpreted more broadly, using the words “*carried out in an area or zone to which any classifications to the following effect apply under an environmental planning instrument*”. In this way, Clause 9(e) provides that to meet the criteria, a site can be located in a zone or an area with the effect of environment protection.

In relation to a zone with an environment protection classification, there are four (4) environment protection zones, denoted as the “E” zones, in the Standard Instrument LEP. These zones comprise the following:

- Zone E1 – National Parks and Nature Reserves,
- Zone E2 – Environment Conservation,
- Zone E3 – Environment Management, and
- Zone E4 – Environment Living.

These zones are specifically for land where the primary focus is the conservation and/or management of environmental values. In this case, the site is located within the R1 General Residential zone pursuant to Clause 2.2 of the OLEP 2011 and therefore the site is not located within a ‘zone’ for environment protection.

In relation to an area, it is also relevant that Clause 9(e) applies to an ‘*area or zone to which any classifications to the following effect apply under an environmental planning instrument*’. This wording, *to the following effect*, refers to the effect of a classification, rather than the classification itself. That is, the area doesn’t necessarily need to be an area for ‘environment protection’ but should be an area which aims for protection of the environment.

The OLEP 2011 contains numerous clauses which aim for the protection of the environment, with a primary focus on avoiding significant adverse environmental impact or if not achievable to minimise or mitigate that impact. These clauses of the OLEP 2011 include:

- Clause 7.4 – Terrestrial biodiversity;
- Clause 7.5 – Riparian land and watercourses;
- Clause 7.6 – Groundwater vulnerability; and
- Clause 7.8 – Salinity.

These clauses all have objectives and preconditions to be satisfied prior to the granting of consent concerned with seeking protection of the environment. In this case, the site is identified on the ‘Groundwater Vulnerability Map’ pursuant to Clause 7.6 of the OLEP 2011 (**Figure 2**).

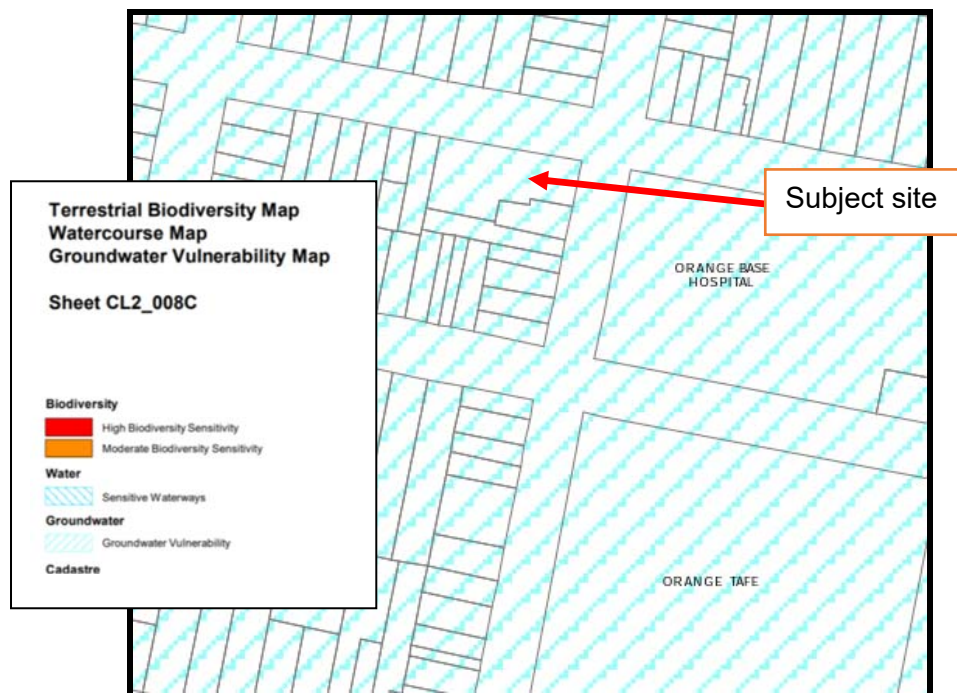


Figure 2: Environment Protection Classification under OLEP 2011 (Source: [www.legislation.nsw.gov.au](http://www.legislation.nsw.gov.au))

Clause 7.6 of the OLEP 2011 states the following (emphasis added):

- (1) The objectives of this clause are to **maintain the hydrological functions of key groundwater systems and to protect vulnerable groundwater resources from depletion and contamination** as a result of inappropriate development.
- (2) This clause applies to land identified as “Groundwater Vulnerability” on the Groundwater Vulnerability Map.
- (3) Before determining a development application for development on land to which this clause applies, the consent authority must consider—
  - (a) whether or not the development (including any on-site storage or disposal of solid or liquid waste and chemicals) is **likely to cause any groundwater contamination or have any adverse effect on groundwater dependent ecosystems**, and
  - (b) the cumulative impact (including the impact on nearby groundwater extraction for potable water supply or stock water supply) of the development and any other existing development on groundwater.
- (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**,
  - (c) if that impact cannot be minimised—the development will be managed **to mitigate that impact**.

This Clause provides that prior to determining a development application for land identified on the Groundwater Vulnerability Map, the consent authority must consider certain matters involving potential impacts on the environment, particularly, in this case, on groundwater and groundwater dependent ecosystems. This Clause requires that matters of environmental impact are to be considered and is similar in its wording and effect to other environmental

clauses in the OLEP 2011, including biodiversity protection and riparian lands and watercourses controls. The fact that groundwater is part of the environment adds weight to this argument that this is an area for environment protection.

The language used in Clause 7.6 of the OLEP 2011 includes phrases such as ‘to avoid any significant adverse environmental impact’, “.. is likely to cause any groundwater contamination”, “... have any adverse effect on groundwater dependent ecosystems” emphasizes the importance of environment protection in this clause.

It is also relevant to look at the broader purpose of Clause 9 which is to require consent for remediation work which may impact on the environment and/or work that presents an elevated risk to the environment during or following remediation works. It is necessary in this assessment to consider the potential impact on the groundwater of the proposed remediation works, which have the potential to present an elevated risk to groundwater.

Accordingly, the proposal is considered to be category 1 remediation work pursuant to Clause 9(e)(iv) of SEPP 55 as it is to be carried out in an area which, in effect, has an *environment protection* classification under an environmental planning instrument. In this case, the site comprises an area included on the groundwater vulnerability map pursuant to Clause 7.6 of the OLEP 2011.

Council suggests that the proposed remediation work is not considered to be category 1 remediation work, although no reasons have been given. It is presumed that the Council does not consider the land to be for an environment protection classification. The Council’s position that the proposal is not category 1 remediation work is contrary to the following:

- Council accepted the DA as Category 1 remediation work via the DA form on 3 July 2018 (more than 3 years ago) and there have been no amendments to SEPP 55 in that time which would affect the proposal<sup>2</sup>;
- Council notified the proposal for 28 days in accordance with Clause 9A of Schedule 1 of the EP&A Act which requires applications for category 1 remediation work under SEPP 55 to be exhibited for 28 days;
- Council submitted an assessment report to the Planning and Development Committee meeting of Orange Council of 7 July 2020 which stated the following in relation to the characterisation of the proposal as category 1 remediation (emphasis added):

*Application has been made for a Category 1 remediation and as such SEPP 55 – Remediation of Land is applicable to the assessment of the application.*  
**The applicant has sought to treat the application as a Category 1 remediation due to the extent of asbestos material within the buildings.**

There was no further discussion or consideration of this characterisation and therefore it appeared that the Council had accepted that the proposal was for Category 1 Remediation Work.

- Council’s recommendation in the assessment report submitted to the Planning and Development Committee meeting of Orange Council of 7 July 2020 includes references to the proposal being category 1 remediation work.

Council’s position that the proposal is not for category 1 remediation work is not supported for

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<sup>2</sup> There have been 4 amendments to SEPP 55 in that time, however, such amendments do not affect Clauses 9 or 12 or the applicability of the Policy to the proposal.

the reasons outlined above.

### **3. Clauses 9 and 12 of SEPP 55 do not apply**

The Council considers that the proposal is not classified as category 1 remediation work (outlined above) and therefore considers that Clauses 9 and 12 of SEPP 55 do not apply to the development application.

As outlined above, it is considered that Clause 9(e)(iv) of SEPP 55 applies to the proposal, characterising the proposal as category 1 remediation work. Clause 12 applies to any development application which seeks consent for category 1 remediation work, stating:

#### **12 Refusal of consent to category 1 remediation work**

- (1) The consent authority must not refuse development consent for a category 1 remediation work unless the authority is satisfied that there would be a more significant risk of harm to human health or some other aspect of the environment from the carrying out of the work than there would be from the use of the land concerned (in the absence of the work) for any purpose for which it may lawfully be used.*
- (2) Nothing in this clause prevents the consent authority from refusing consent to a development application if—*
  - (a) by operation of an environmental planning instrument or section 79B(3) of the Act, the development application may not be determined by the granting of consent without the concurrence of a specified person, and*
  - (b) that concurrence is not given.*

Consideration of the proposal having regard to Clause 12 of SEPP 55 is outlined in the Independent Assessment Report dated February 2021 provided to the Panel.

Accordingly, it is considered Clause 9 and Clause 12 of SEPP 55 apply to the proposal since any development application in which Clause 9 applies must also consider Clause 12).