

30 January 2019

Amanda Harvey  
Director, Sydney Region East  
NSW Planning & Environment  
320 Pitt Street, Sydney  
NSW 2000

Our Ref: 2019/050754

Dear Ms Harvey

**Submission in relation to Amended Site Compatibility Certificate for Seniors  
Housing Development at 52 Cabbage Tree Road, Bayview (Bayview Golf Course)**

I refer to your letter dated 9 January 2019 seeking comments with respect to the application for amended Site Compatibility Certificate (SCC) under State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (HSPD) for the Bayview Golf Club Site.

Council responded to the original application by letter dated 6 May 2018 and raised significant concerns regarding the proposed development. Council's previous comments regarding compatibility of the proposed development with the character of the locality and its impact on natural environment are still relevant and should be read as an integral part of this current submission.

This submission is focused on the amendments presently sought by the applicant in relation to the SCC already issued by the Department. In summary, Council objects to the proposed amendments to the SCC as it will not result in a development that is essentially the same as that which was originally approved by the Department. Importantly, Council submits that there is no authority for the Sydney North Planning Panel (SNPP) to amend the SCC.

Council appreciates the opportunity to make this submission and trusts that the issues raised will be taken into consideration in the decision as to whether an amended certificate is issued by the Department.

Should you wish to discuss the matters raised or require any further clarification, please do not hesitate to contact Lashta Haidari, Principal Planner on 9942 2466 or email [council@northernbeaches.nsw.gov.au](mailto:council@northernbeaches.nsw.gov.au).

Yours faithfully



Ray Brownlee PSM  
Chief Executive Officer  
Northern Beaches Council

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## ATTACHMENT A

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### NORTHERN BEACHES COUNCIL SUBMISSION

#### AMENDED SITE COMPATIBILITY CERTIFICATE - BAYVIEW GOLF CLUB

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##### Background

On 27 March 2017, the Department of Planning and Environment (DPE) issued a SCC under Clause 25(4) (a) of the SEPP for the purposes of “*In-fill self-care units and ancillary services*” for specific areas on the Bayview Golf Course site. The current SCC remains valid until 27 March 2019.

Following the issue of the SCC, a Development Application (DA2017/1274) was lodged with Northern Beaches Council on 19 December 2017. The application was recommended for refusal by Council and on 8 August 2018 the DA was refused by the Sydney North Planning Panel for the following reasons:

- (a) *The permissibility of the proposal under the SCC and SEPP HSPD is not fully resolved;*
- (b) *The typology, scale, bulk and height of the proposal is not compatible with the existing and future character of the area and does not contribute to the quality and identity of the area as required by Clause 33(a) of SEPP HSPD. This fails the principles of context and neighbourhood character, build form, scale, density, landscaping, amenity and aesthetics of State Environmental Planning Policy 65;*
- (c) *The impacts on biodiversity are substantial and adverse. The proposal fails to comply with the requirements of the PLEP and PDCP in this regard;*
- (d) *The visual impact of the proposed buildings when viewed from neighbouring residential development and within the Golf Course is incongruous to the existing low scale residential and recreational character of the area; and*
- (e) *The building height does not comply with the PLEP and the Clause 4.6 variation is not justified or well founded.*

On 21 August 2018, the Applicant lodged a Class 1 appeal in the Land and Environment Court against the refusal of the DA. The matter is currently before the Land and Environment, having been the subject of a hearing, which is expected to conclude on 12 February 2019.

##### KEY AMENDMENTS TO THE APPLICATION

Council understands the key changes to the application are as follows:

- Change the description of the development from “In-fill self-care units with ancillary services” to “Serviced self-care housing”,
- Correct the mapping to reflect the proposed development currently before the Land and Environment Court; and
- The deletion of the requirements in the second paragraph of Schedule 2 in respect of addressing:
  - *form, height, bulk, scale, setbacks and landscaping;*
  - *flood risk management and excavation design responses;*
  - *car parking and access requirements for all existing and proposed land uses on the site; and*
  - *potential ecological impacts.*

## **AMENDMENTS TO SITE COMPATIBILITY CRITERIA**

The following submissions are made in respect of the proposed amendments to the approved SCC:

### **SNPP’s Authority to Amend the SCC**

It was never the Department’s intention that an SCC could be modified during its currency period. Planning Circular PS18-009 issued by the Department on 2 October 2018, to coincide with the commencement of the amendments to the SEPP (HSPD) which were made on 1 October 2018, provides guidance in this respect, stating that “A SCC is valid for 24 months. A valid SCC cannot be altered once it has been issued”.

The Frequently Asked Questions issued by the Department also in October 2018 indicated on page 4 that one intention of the amendments was to “ensure that...A SCC is current for two years and cannot be amended in this time”.

It is understood that an applicant can seek a new SCC during the currency period of an existing one, provided that the requirements of clause 25 of SEPP (HSPD) in respect of such certificates are complied with, but mere variation of an existing certificate was not contemplated.

The provisions of clause 25 of the SEPP are solely directed towards applications for a SCC and hence do not refer to a mechanism to amend a certificate. In particular, the following sub-sections are relevant:

- Clause 25(2)(b) makes a distinction between the application for a SCC being made and SCC’s that have *“previously been issued in respect of the land”*. That is, it is not contemplated that previous SCCs will be amended by the process in clause 25, but that a new SCC is to be sought.
- Clause 25(5) contemplates the issuing of a SCC and not the amendment to an existing certificate. Therefore, any decision under clause 25 involves a

fresh certificate and there is no “*short cut*” or by-passing of the requirements of Clause 25, if what is being sought is a new certificate with similar terms to one that has already been issued.

- Clause 25(9) provides that a certificate remains current for a period of 24 months after the date on which it is issued. In this regard, there is no mechanism for an amended certificate to operate during part of this time or for a further 24 months. It is the certificate that was issued at the commencement of this period that remains valid for 24 months.

Clause 25 on its proper construction as supported by the Departments explanation of intent does not enable an amended SCC to be issued.

Clause 25(10) (a) of SEPP (HSPD), added as part of the 1 October 2018 amendments, the following clarifying text which reads:

*“To avoid doubt, a site compatibility certificate...cannot be varied during its currency to cover additional land”*

The above inclusion is intended to clarify the meaning of clause 25(5) (c) which provides the circumstances in which a new SCC may be issued for previously certified land where certification is also sought for additional land. Clause 25(10) (a) clarifies that clause 25(5) (c) applies to land the subject of a previous site compatibility statement after that SCC has expired and not during its currency.

That is, clause 25(10) (a) is intended only to clarify the meaning of clause 25(5) (c) for the avoidance of doubt and is not intended to suggest that SCCs can be varied during their currency, so long as they do not cover additional land. Therefore, clause 25(5)(c) is prohibitive, in that it will not be utilised during the currency of a SCC, and not permissive.

The only other potential source of power to amend an SCC is the general power to amend instruments under section 4(8) of the *Environmental Planning and Assessment Act 1979*, which provides:

*“A power, express or implied, to make or give an order, direction, declaration, determination or other instrument under this Act or under an instrument made under this Act includes a power to revoke or amend the order, direction, declaration, determination or other instrument.”*

This provision is typical in legislation which provides for numerous types of subordinate “instruments” to be made, being instruments of a delegated legislative nature. This is not an amendment provision that is intended to apply to mere administrative decisions like in the case of a SCC.

So much is clear by the use of the words “*or other instrument*”, which suggests that the types of “*order, direction, declaration, determination*” to which it refers are all intended to be types of “instruments”. “Instrument” is only ever used in the context of the Act to refer to types of delegated legislation.

In particular, Part 3 is headed “Planning Instruments” and one provision of that part is Section 3.34 “Gateway Determination”. The type of “determination” to which the power to amend in section 4(8) applies is intended to be determinations of this type, being a determination of a legislative type such as “instruments”.

The word “determination” was added to section 4(8) of the Act as part of the planning reforms introduced on 1 March 2018, when the previous provisions of the former Act dealt with “declarations, directions and orders” specifically (subsections 4(7A), (8) and (8A)). It is understood that it was added for no other reason than to provide for completeness given that Gateway Determinations had been in the Act for some time.

Therefore, it is submitted that Section 4(8) has no application to administrative decisions involving an individual proposal on specific land, such as is the case with development consents and SCC’s.

Further, the Director General no longer has power to issue the certification conferred by a SCC. Not only is it a fact that the Secretary can no longer issue a certificate, a certificate already issued by the Secretary cannot be amended under section 4(8) of the Act.

Accordingly, there is no statutory authority in place that would enable the Sydney North Planning Panel to amend a certificate that has already been issued by the Secretary.

### ***Applicants Amended SCC***

The applicants amended SCC is to make the following changes:

- a. alter the existing SCC to correct a mapping error associated with the Schedule 2 development footprint requirement and
- b. change the type of development from “in-fill self-care units with ancillary facilities” to “serviced self-care housing with ancillary facilities”

This raises the issue of a fundamental change in the nature of the seniors housing proposed. Additionally, it is understood that the application also seeks to delete the specific requirements listed in the second paragraph of Schedule 2, which include:

- *form, height, bulk, scale, setbacks and landscaping;*
- *flood risk management and excavation design responses;*
- *car parking and access requirements for all existing and proposed land uses on the site; and*
- *potential ecological impacts.*

This is considered not to be a mere amendment, rather it is seeking fresh certification in respect of the proposal now put forward to the Court, removing these requirements as if they are no longer relevant or applicable or that they have been addressed to Council’s satisfaction.

These requirements have not been addressed to Council’s satisfaction and considering the proposal now before the Panel is more intensive than the proposal that was before

the Secretary of the Department (floorspace increased by 1,257.3m<sup>2</sup>), it raises additional concerns in relation to compatibility and suitability.

This cannot be viewed as a minor amendment to an existing certificate and despite our submissions that there is no authority to issue an amended certificate, is tantamount to a new proposal that should be properly made by way of fresh application for a new SCC.

#### Amended Development Type not of a kind certified in Existing SCC

The proposed development, which is the subject of the current SCC, was granted for the purposes of "In-fill self-care housing comprising 95 dwellings and ancillary facilities". The type of development proposed is clearly stated in all the documents that were submitted to the Department as part of the SCC application, including the application form where the applicant ticked the box that the SCC is seeking approval for "In-fill self-care housing".

The applicant is now seeking to change the type of development certified by the SCC to "Service Self Care Housing". This involves a fundamental change in the kind of seniors housing proposed and the applicant has not provided sufficient documents that are required under SEPP (HSPD) 2004 to meet the requirements for "serviced self-care housing" (as defined).

In this regard, the traffic report submitted with the application does not address the changes to the nature of the traffic generated by serviced self-care housing, including the number, type and frequency of service vehicle movements required to facilitate the particular requirements of this specific type of seniors housing.

The proposed change is considered to be a significant change, which will alter the nature of the development in terms of its intensity and operational characteristics.

#### Deletion of the specific requirements in Schedule 2

Council considers that the requirements in Schedule 2 are crucial to ensuring the planning outcome is suitable and appropriate for the site and locality. To delete these requirements would be a significant amendment to the certificate originally issued.

As the Department is aware, this application is currently before the Land and Environment Court and the issue of character, as it relates form, height, bulk, scale, setbacks and landscaping and the impact of the development on natural environment (ecological impacts) are unresolved contentions between the parties.

The plans submitted with the amended SCC are to increase the overall density (FSR) despite unit numbers (yield) having been reduced. The amendments have a significant bearing on the character and built form of the development and hence implications for the compatibility of the development with the surrounding low-density residential neighbourhood and recreational open space and predominant landscape character.

Therefore, Council objects to the deletion of the requirements in Schedule 2 as the proposal has not satisfactorily addressed these matters. The development of seven

apartment buildings which are 3 storeys in height would be incongruous in its context and setting and represents an overdevelopment of the land.

The removal of these requirements would diminish the importance of the site and locality specific environmental planning principles underpinning the development of this land and decreases the likelihood of a good planning outcome for the site.

## **CONCLUSION**

Having considered the amended application in accordance with the relevant background and applicable legislation, there are a number of key concerns with the proposal:

- There is no authority for the Sydney North Planning Panel to amend the existing SCC, for the reasons detailed above.
- The proposed change from “infill self-care housing” to “serviced self-care housing” is a fundamental and significant change to the development as certified and requires a different test and assessment under SEPP (HSPD), which the applicant has not satisfactorily addressed.
- The specific requirements in Schedule 2 of the approved SCC should not be deleted as they provide certainty and guidance to the environmental planning outcome for this site and locality.

For the above reasons, Council submits that the proposed amendments require a new SCC application to be lodged with the Department and not dealt with as an amended application.