



## Land and Environment Court New South Wales

Case Name: S J Connelly CPP Pty Ltd and Kate Singleton Pty Ltd  
t/as Planners North v Northern Regional Planning  
Panel (No 2)

Medium Neutral Citation: [2019] NSWLEC 199

Hearing Date: 26 August 2019

Date of Orders: 19 December 2019

Date of Decision: 19 December 2019

Jurisdiction: Class 4

Before: Pain J

Decision: See [94] of judgment

Catchwords: JUDICIAL REVIEW – refusal by Northern Regional  
Planning Panel of site compatibility certificate under  
State Environmental Planning Policy (Housing for  
Seniors or People with a Disability) 2004 due to  
operation of State Environmental Planning Policy  
(Coastal Management) 2018 – whether State  
Environmental Planning Policy (Coastal Management)  
2018 (CM SEPP) or State Environmental Planning  
Policy No 14 – Coastal Wetlands and State  
Environmental Planning Policy No 71 – Coastal  
Protection apply due to transitional provisions –  
whether proximity area to coastal wetlands within  
coastal wetlands and littoral rainforests area for  
purposes of CM SEPP

Legislation Cited: Ballina Local Environmental Plan 1987  
Ballina Local Environmental Plan 2012 cl 1.3  
Coastal Management Act 2016 ss 3, 5, 6, 10, 11  
Coastal Protection Act 1979  
Environmental Planning and Assessment Act 1979  
ss 1.4, 3.24, 3.29, 4.12, 4.15, Sch 3  
Environmental Planning and Assessment Regulation  
2000 regs 25, 50

Interpretation Act 1987 ss 11, 30, 33, 34, 35

State Environmental Planning Policy (Coastal Management) 2018 cll 3, 4, 5, 6, 8, Pt 2 Div 1 (cll 10-11), 21

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 cll 2, 4, 17, Ch 3 Pt 1A (ss 24, 25), Ch 3 Pt 4 (ss 40-41), Ch 3 Pt 7 (ss 46-50), Sch 1

State Environmental Planning Policy No 14—Coastal Wetlands

State Environmental Planning Policy No 71—Coastal Protection

Cases Cited:

Central Coast Council v 40 Gindurra Road Somersby Pty Ltd (No 2) [2019] NSWLEC 171

Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26

Council of the City of Sydney v NFF at 410 Pitt Street Pty Ltd [2016] NSWLEC 149

Cranbrook School v Woollahra Municipal Council (2006) 66 NSWLR 379; [2006] NSWCA 155

Druitts Developments Pty Ltd v Gosford City Council (2001) 114 LGERA 61; [2001] NSWLEC 96

Lend Lease (Millers Point) Pty Limited v Council of the City of Sydney (2014) 202 LGERA 314; [2014] NSWLEC 64

Minister Administering the Crown Lands Act 1989 v New South Wales Aboriginal Land Council (2018) 231 LGERA 145; [2018] NSWLEC 26

Morton v Shoalhaven City Council [2016] NSWLEC 67

Pepperwood Ridge Pty Ltd v Newcastle City Council (2006) 145 LGERA 340; [2006] NSWCA 122

Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28

Roden v Bandora Holdings Pty Ltd (2015) 213 LGERA 103; [2015] NSWLEC 191

Rosewood Australia Pty Ltd v Ku-ring-gai Council [2019] NSWLEC 84

Warringah Shire Council v Punnett & Associates Pty Ltd (2001) 122 LGERA 1; [2001] NSWCA 480

Whittaker v Northern Beaches Council (No 3) (2018)

235 LGERA 5; [2018] NSWLEC 143

Texts Cited: Macquarie Dictionary (online)  
Oxford English Dictionary (online)

Category: Principal judgment

Parties: S J Connelly CPP Pty Ltd and Kate Singleton Pty Ltd  
t/as Planners North (ABN 56 291 496 553) (Applicant)  
Northern Regional Planning Panel (First Respondent)  
Ballina Shire Council (Second Respondent)

Representation: COUNSEL:  
S Duggan SC (Applicant)  
A Shearer (First Respondent)  
N/A (Second Respondent)

SOLICITORS:  
McCartney Young (Applicant)  
Department of Planning and Environment (First  
Respondent)  
N/A (Second Respondent)

File Number: 19/110708

## JUDGMENT

- 1 The Applicant challenges the refusal of the Northern Regional Planning Panel (the Panel) in March 2019 of a site compatibility certificate (SCC) for seniors housing under the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors Housing SEPP) in relation to land on the north coast of NSW in Skennars Head. The land is described as Lot 239 DP 1201225 at the street address 67 Skennars Head Road, Skennars Head, New South Wales (Property). The Applicant lodged a development application (DA) for a seniors living development on the Property with Ballina Shire Council (Council) in 2016. The Council was joined as a party. It has played no part in the proceedings.
  
- 2 The Property is mostly zoned "RU1 Primary Production" under the Ballina Local Environmental Plan 2012 (BLEP 2012). Part of the Property is identified as "Deferred matter" under cl 1.3(1A) of the BLEP 2012 meaning the BLEP 2012 does not apply to it and under the Ballina Local Environmental Plan 1987 (BLEP 1987) it is zoned "No 1(b) Rural (Secondary Agricultural Land)" and a small area zoned "No 7(a) Environmental Protection (Wetlands) Zone".
  
- 3 The summons filed by the Applicant seeks three declarations as follows:
  - 1 A declaration that the determination of the Respondent on or about 25 March 2019 to refuse to issue a Site Compatibility Certificate pursuant to *SEPP (Housing for Seniors or People with a Disability) 2004* with respect to the property legally described as Lot 239 DP 1201225, in accordance with the application made by the Applicant, is void and of no effect.
  
  - 2 A declaration that *SEPP (Housing for Seniors or People with a Disability) 2004* does not preclude the issue of a Site Compatibility Certificate for that part of the property legally described as Lot 239 DP 1201225 and mapped as "proximity area for coastal wetlands" pursuant to the *Coastal Wetlands and Littoral Rainforests Area Map of State Environmental Planning Policy (Coastal Management) 2018*.
  
  - 3 A declaration that Clause 21 ("Savings and transitional provisions") of *State Environmental Planning Policy (Coastal Management) 2018*, in the circumstances of the case, requires the First Respondent to consider and determine the application for a Site Compatibility Certificate with respect to the property legally described as Lot 239 DP

1201225 in accordance with the “former planning provisions” as defined by that Clause.

4 It is not clear to the Court why the second declaration ought be made in the event the Applicant is successful given the terms of prayer 1.

5 The grounds are stated to be:

- A. The Northern Regional Planning Panel (Panel) erred in law when it determined that the “proximity area”, as identified on the relevant map under *State Environmental Planning Policy (Coastal Management) 2018* (the Coastal SEPP), was an area of “environmentally sensitive land” in accordance with Schedule 1 to the *SEPP (Housing for Seniors or People with a Disability) 2004* (the Housing SEPP).
- B. The Panel erred in law when it determined that the “proximity area” is not an area of land distinct, and should be distinguished, from the area of land identified as a “coastal wetland” on the relevant map under the Coastal SEPP.
- C. The Panel erred in law when it determined that the “coastal wetland” on the relevant map under the Coastal SEPP was not the only area that satisfied the phrase “environmentally sensitive land” in accordance with Schedule 1 to the Housing SEPP.
- D. The Panel erred in law when it determined that the Application the subject of these proceedings did not have the benefit of the “Savings and Transitional Provisions” found in clause 21 of the Coastal SEPP.

6 All these contentions will be considered in the course of considering the parties’ arguments which can also be addressed as two legal issues identified by the Panel:

- 1 [CM SEPP does not apply] Whether clause 21 of the *State Environmental Planning Policy (Coastal Management) 2018 (Coastal SEPP)*, in the circumstances of this case, requires the Northern Regional Planning Panel (**Panel**) to consider and determine the application for a site compatibility certificate which is the subject of these proceedings in accordance with the “former planning provisions” as defined in that clause. [Applicant’s ground D].
- 2 [On the assumption the CM SEPP does apply] Whether the relevant part of the property comprising “proximity area for coastal wetlands” on the Coastal Wetlands and Littoral Rainforests Area Map under the *State Environmental Planning Policy (Coastal Management) 2018 (Coastal SEPP)* is environmentally sensitive land within the meaning of Schedule 1 to the *SEPP (Housing for Seniors or People with a Disability) 2004* by

reason of how that land is identified under the Coastal SEPP (whether as “proximity area for coastal wetlands” or otherwise). [Applicant’s grounds A, B, C]

- 7 At the date the DA was lodged in 2016 the *Coastal Protection Act 1979* (CP Act), State Environmental Planning Policy No 14—Coastal Wetlands (SEPP 14) and State Environmental Planning Policy No 71—Coastal Protection (SEPP 71) were in force. At the time the SCC was applied for in July 2018 the *Coastal Management Act 2016* (CM Act), the successor to the CP Act, was in force. SEPP 14 and SEPP 71 had been repealed.

### *Coastal Management Act 2016*

- 8 Relevant sections of the CM Act which came into effect on 3 April 2018 provide:

#### **Part 1 Preliminary**

#### **3 Objects of this Act**

The objects of this Act are to manage the coastal environment of New South Wales in a manner consistent with the principles of ecologically sustainable development for the social, cultural and economic well-being of the people of the State, and in particular:

- (a) to protect and enhance natural coastal processes and coastal environmental values including natural character, scenic value, biological diversity and ecosystem integrity and resilience, and

...

#### **Part 2 Coastal zone and management objectives for coastal management areas**

#### **5 Coastal zone**

In this Act, the **coastal zone** means the area of land comprised of the following coastal management areas:

- (a) the coastal wetlands and littoral rainforests area,
- (b) the coastal vulnerability area,
- (c) the coastal environment area,

- (d) the coastal use area.

## **6 Coastal wetlands and littoral rainforests area**

- (1) The ***coastal wetlands and littoral rainforests area*** means the land identified by a State environmental planning policy to be the coastal wetlands and littoral rainforests area for the purposes of this Act, being land which displays the hydrological and floristic characteristics of coastal wetlands or littoral rainforests and land adjoining those features.
- (2) The management objectives for the coastal wetlands and littoral rainforests area are as follows:
  - (a) to protect coastal wetlands and littoral rainforests in their natural state, including their biological diversity and ecosystem integrity,
  - (b) to promote the rehabilitation and restoration of degraded coastal wetlands and littoral rainforests,
  - (c) to improve the resilience of coastal wetlands and littoral rainforests to the impacts of climate change, including opportunities for migration,
  - (d) to support the social and cultural values of coastal wetlands and littoral rainforests,
  - (e) to promote the objectives of State policies and programs for wetlands or littoral rainforest management.

...

## **10 Matters relating to identification of coastal management areas**

...

### **(3) Hierarchy of management objectives if overlapping**

A single parcel of land may be identified by a State environmental planning policy as being within different coastal management areas. However, in such a case, if the management objectives of the areas are inconsistent, the management objectives of the highest of the following coastal management areas (set out highest to lowest) prevail to the extent of the inconsistency:

- (a) the coastal wetlands and littoral rainforests area,
- (b) the coastal vulnerability area,

- (c) the coastal environment area,
- (d) the coastal use area.

### **Part 3 Coastal management programs and manual**

#### **Division 1 Application of Part**

##### **11 Part applies to local councils with land within coastal zone**

This Part applies to:

- (a) a local council whose local government area, or part of whose local government area, is included within the coastal zone, and
- (b) any other public authority that exercises functions in connection with the coastal zone.

#### *State Environmental Planning Policy (Coastal Management) 2018*

- 9 Relevant clauses of the State Environmental Planning Policy (Coastal Management) 2018 (CM SEPP) which came into effect on 3 April 2018 provide (notes relied on by the parties are also set out):

##### **Part 1 Preliminary**

...

##### **3 Aim of Policy**

The aim of this Policy is to promote an integrated and co-ordinated approach to land use planning in the coastal zone in a manner consistent with the objects of the *Coastal Management Act 2016*, including the management objectives for each coastal management area, by:

- (a) managing development in the coastal zone and protecting the environmental assets of the coast, and
- (b) establishing a framework for land use planning to guide decision-making in the coastal zone, and
- (c) mapping the 4 coastal management areas that comprise the NSW coastal zone for the purpose of the definitions in the *Coastal Management Act 2016*.



#### 4 Interpretation

- (1) In this Policy:

**Coastal wetlands and littoral rainforests area**—see clause 6 (2).

**Coastal Wetlands and Littoral Rainforests Area Map** means the *State Environmental Planning Policy (Coastal Management) 2018 Coastal Wetlands and Littoral Rainforests Area Map*.

...

- (2) Words and expressions used in this Policy have the same meanings as they have in the *Coastal Management Act 2016*, unless otherwise defined in this Policy.

...

- (4) Notes included in this Policy do not form part of this Policy.

#### 5 Land to which Policy applies

This Policy applies to land within the coastal zone.

#### 6 Identification of coastal management areas

**Note.** Section 5 of the *Coastal Management Act 2016* provides that the **coastal zone** means the area of land comprised of the following coastal management areas:

- (a) the coastal wetlands and littoral rainforests area,
- (b) the coastal vulnerability area,
- (c) the coastal environment area,
- (d) the coastal use area.

- (1) This clause identifies land for the purposes of the *Coastal Management Act 2016* and this Policy.

- (2) The **coastal wetlands and littoral rainforests area** is the land identified as such by the *Coastal Wetlands and Littoral Rainforests Area Map*.

**Note.** The coastal wetlands and littoral rainforests area is made up of land identified as “coastal wetlands” or as “littoral rainforests” on the Coastal Wetlands and Littoral Rainforests Area Map. The land so

identified includes land identified as "proximity area for coastal wetlands" and "proximity area for littoral rainforest".

...

## **8 Maps**

- (1) A reference in this Policy to a named map adopted by this Policy is a reference to a map by that name:
  - (a) approved by the Minister when the map is adopted, and
  - (b) as amended or replaced from time to time by maps declared by environmental planning instruments to amend or replace that map, and approved by the Minister when the instruments are made.
- (2) Any 2 or more named maps may be combined into a single map. In that case, a reference in this Policy to any such named map is a reference to the relevant part or aspect of the single map.
- (3) Any such maps are to be kept and made available for public access in accordance with arrangements approved by the Minister.
- (4) For the purposes of this Policy, a map may be in, and may be kept and made available in, electronic or paper form, or both.

**Note.** The maps adopted by this Policy are to be made available on the NSW Planning Portal.

...

## **Part 2 Development controls for coastal management areas**

### **Division 1 Coastal wetlands and littoral rainforests area**

#### **10 Development on certain land within coastal wetlands and littoral rainforests area**

- (1) The following may be carried out on land identified as "coastal wetlands" or "littoral rainforest" on the *Coastal Wetlands and Littoral Rainforests Area Map* only with development consent:
  - (a) the clearing of native vegetation within the meaning of Part 5A of the *Local Land Services Act 2013*,
  - (b) the harm of marine vegetation within the meaning of Division 4 of Part 7 of the *Fisheries Management Act 1994*,

- (c) the carrying out of any of the following:
    - (i) earthworks (including the depositing of material on land),
    - (ii) constructing a levee,
    - (iii) draining the land,
    - (iv) environmental protection works,
  - (d) any other development.
- (2) Development for which consent is required by subclause (1), other than development for the purpose of environmental protection works, is declared to be designated development for the purposes of the Act.
- ...
- (4) A consent authority must not grant consent for development referred to in subclause (1) unless the consent authority is satisfied that sufficient measures have been, or will be, taken to protect, and where possible enhance, the biophysical, hydrological and ecological integrity of the coastal wetland or littoral rainforest.
- ...

## **11 Development on land in proximity to coastal wetlands or littoral rainforest**

**Note.** The *Coastal Wetlands and Littoral Rainforests Area Map* identifies certain land that is inside the coastal wetlands and littoral rainforests area as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” or both.

- (1) Development consent must not be granted to development on land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest” on the *Coastal Wetlands and Littoral Rainforests Area Map* unless the consent authority is satisfied that the proposed development will not significantly impact on:
- (a) the biophysical, hydrological or ecological integrity of the adjacent coastal wetland or littoral rainforest, or
  - (b) the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland or littoral rainforest.
- (2) This clause does not apply to land that is identified as “coastal wetlands” or “littoral rainforest” on the *Coastal Wetlands and Littoral Rainforests Area Map*.

...

### Part 3 Miscellaneous

...

#### 21 Savings and transitional provisions

- (1) The former planning provisions continue to apply (and this Policy does not apply) to a development application lodged, but not finally determined, immediately before the commencement of this Policy in relation to land to which this Policy applies.

- ...
- (3) The former planning provisions continue to apply (and this Policy does not apply) to an application for development consent if:

(a) the application is made within 12 months after the commencement of this Policy, and

(b) an environmental impact statement is to be submitted in connection with the application, and

(c) the Secretary issued, before the commencement of this Policy, environmental assessment requirements for the preparation of the statement, and

(d) those environmental assessment requirements require the preparation of the statement to have regard to:

(i) *State Environmental Planning Policy No 14—Coastal Wetlands*, or

(ii) *State Environmental Planning Policy No 26—Littoral Rainforests*.

- (4) In this clause:

...

**former planning provisions** means:

- (a) the provisions of each of the following Policies as in force immediately before the Policy's repeal:

- (i) *State Environmental Planning Policy No 14—Coastal Wetlands,*
  - (ii) *State Environmental Planning Policy No 26—Littoral Rainforests,*
  - (iii) *State Environmental Planning Policy No 71—Coastal Protection, and*
- (b) the provisions of *State Environmental Planning Policy (Infrastructure) 2007* that would be in force if that Policy had not been amended by this Policy.

*Environmental Planning and Assessment Act 1979*

10 Relevant provisions of the *Environmental Planning and Assessment Act 1979* (EPA Act) include:

**Part 1 Preliminary**

**1.4 Definitions**

***NSW planning portal*** means the website with the URL of [www.planningportal.nsw.gov.au](http://www.planningportal.nsw.gov.au), or any other website, used by the Planning Secretary to provide public access to documents or other information in the NSW planning database.

...

(14) A reference in this Act to an original document, map or plan includes a reference to a document, map or plan created, or a copy of which is kept, in electronic form.

...

**Part 3 Planning instruments**

...

**Division 3.2 Environmental planning instruments—general**

...

### **3.24 Publication, amendment and repeal of environmental planning instruments**

...

- (5) An environmental planning instrument shall—
  - (a) be published on the NSW legislation website, and
  - (b) commence on and from the date of publication or a later date specified in the instrument.

...

- (9) An environmental planning instrument shall be deemed to have been published on the NSW legislation website notwithstanding that any planning map or other instrument or material referred to, embodied or incorporated in the environmental planning instrument is not so published.

...

### **Schedule 3 NSW planning portal and online delivery of planning services and information**

#### **1 Establishment, content and maintenance of NSW planning database**

- (1) The NSW planning database is established for the purposes of this Act.
- (2) The NSW planning database is an electronic repository of:
  - (a) documents that are required by or under this Act to be published on the NSW planning portal, and
  - (b) environmental planning instruments, plans or other documents that are required by or under this Act to be published on the NSW legislation website, and
  - (c) spatial datasets or other maps that are adopted or incorporated by way of reference by those instruments, plans or documents, and
  - (d) other documents or information relating to the administration of this Act required to be published on the NSW planning portal by the regulations or by the Planning Secretary.
- (3) The NSW planning database is to maintain historical as well as current versions of documents and other material required to be published on the NSW planning portal.

- (4) The NSW planning database is to be compiled and maintained as determined by the Planning Secretary.
- (5) The NSW planning database may comprise separate databases for different material. Any such separate databases may be compiled and maintained by other agencies, including the legislation database compiled and maintained by the Parliamentary Counsel for publication of environmental planning instruments or other material on the NSW legislation website.

## **2 Public access to documents and information on NSW planning portal**

- (1) The Planning Secretary is to make arrangements for documents or other information in the NSW planning database to be published on the NSW planning portal and such other websites as are determined by the Planning Secretary.
- (2) The Planning Secretary may certify the form of such documents or other information that is correct.
- (3) Environmental planning instruments, plans or other documents and information need not be published on the NSW planning portal if they are published on the NSW legislation website (or the website of another agency) and can be readily accessed from the NSW planning portal.
- (4) If the NSW planning portal is not available to publish a document or other information for technical or other reasons, the document or other information may be published on the NSW legislation website.

## **3 Regulations and other provisions relating to online planning services and information**

- (1) The regulations may make provision for or with respect to the online delivery of planning services and information, including—
  - (a) the NSW planning portal and other specialised planning portals (including the status of services and information delivered online), and

...

### *Environmental Planning and Assessment Regulation 2000*

11 Clause 50 of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation) provides:

## **Part 6 Procedures relating to development applications**

### **Division 1 Development applications generally**

...

#### **50 How must a development application be made?**

...

- (2A) A development application that relates to development in respect of which a site compatibility certificate is required by a State Environmental Planning Policy must be accompanied by such a certificate.

*State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004*

12 Relevant clauses of the Seniors Housing SEPP provide:

#### **Chapter 1 Preliminary**

...

#### **2 Aims of Policy**

- (1) This Policy aims to encourage the provision of housing (including residential care facilities) that will—
- (a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and
  - (b) make efficient use of existing infrastructure and services, and
  - (c) be of good design.
- (2) These aims will be achieved by—
- (a) setting aside local planning controls that would prevent the development of housing for seniors or people with a disability that meets the development criteria and standards specified in this Policy, and
  - (b) setting out design principles that should be followed to achieve built form that responds to the characteristics of its site and form, and



- (c) ensuring that applicants provide support services for seniors or people with a disability for developments on land adjoining land zoned primarily for urban purposes.

...

#### **4 Land to which Policy applies**

##### **(1) General**

This Policy applies to land within New South Wales that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes, but only if—

- (a) development for the purpose of any of the following is permitted on the land—
  - (i) dwelling-houses,
  - (ii) residential flat buildings,
  - (iii) hospitals,
  - (iv) development of a kind identified in respect of land zoned as special uses, including (but not limited to) churches, convents, educational establishments, schools and seminaries, or
- (b) the land is being used for the purposes of an existing registered club.

##### **(2) Land that is not zoned primarily for urban purposes**

For the avoidance of doubt, land that is not zoned primarily for urban purposes includes (but is not limited to) land that is within any of the following zones under another environmental planning instrument—

- (a) a zone that is identified as principally for rural uses,

...

##### **(4) Land that adjoins land zoned primarily for urban purposes**

For the purposes of this Policy, land that adjoins land that is zoned primarily for urban purposes includes (but is not limited to) land that would directly adjoin land that is zoned primarily for urban purposes but for the presence of a public road to which there is direct vehicular and pedestrian access from the adjoining land.

...

**(6) Land to which Policy does not apply**

This Policy does not apply to—

- (a) land described in Schedule 1 (Environmentally sensitive land), or

...

**(7) Nothing in subclause (6) (a) or Schedule 1 operates to preclude the application of this Policy to land only because—**

- (a) the land is identified under *State Environmental Planning Policy (Coastal Management) 2018*, or

...

**Chapter 3 Development for seniors housing**

**Part 1 General**

...

**17 Development on land adjoining land zoned primarily for urban purposes**

- (1) Subject to subclause (2), a consent authority must not consent to a development application made pursuant to this Chapter to carry out development on land that adjoins land zoned primarily for urban purposes unless the proposed development is for the purpose of any of the following—

- (a) a hostel,
- (b) a residential care facility,
- (c) serviced self-care housing.

- (2) A consent authority must not consent to a development application made pursuant to this Chapter to carry out development for the purposes of serviced self-care housing on land that adjoins land zoned primarily for urban purposes unless the consent authority is satisfied that the housing will be provided—

- (a) for people with a disability, or

- (b) in combination with a residential care facility, or
  - (c) as a retirement village (within the meaning of the *Retirement Villages Act 1999*).
- ...

## **Part 1A Site compatibility certificates**

### **24 Site compatibility certificates required for certain development applications**

- (1) This clause applies to a development application made pursuant to this Chapter in respect of development for the purposes of seniors housing (other than dual occupancy) if—
    - (a) the development is proposed to be carried out on any of the following land to which this Policy applies—
      - (i) land that adjoins land zoned primarily for urban purposes,
- ...
- (2) A consent authority must not consent to a development application to which this clause applies unless the consent authority is satisfied that the relevant panel has certified in a current site compatibility certificate that, in the relevant panel's opinion—
    - (a) the site of the proposed development is suitable for more intensive development, and
    - (b) development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding environment having regard to (at least) the criteria specified in clause 25 (5) (b).
  - (3) Nothing in this clause—
    - (a) prevents a consent authority from—
      - (i) granting consent to a development application to which this clause applies to carry out development that is on a smaller (but not larger) scale than the kind of development in respect of which a site compatibility certificate was issued, or
      - (ii) refusing to grant consent to a development application to which this clause applies by reference to the consent

authority's own assessment of the compatibility of the proposed development with the surrounding environment, or

- (b) otherwise limits the matters to which a consent authority may or must have regard (or of which a consent authority must be satisfied under another provision of this Policy) in determining a development application to which this clause applies.

...

## **25 Application for site compatibility certificate**

- (1) An application for a site compatibility certificate for the purposes of clause 24 may be lodged with the Department—

- (a) by the owner of the land on which the development is proposed to be carried out, or

- (b) by any other person, with the consent of the owner of that land.

- (2) An application—

- (a) must be—

- (i) in writing, and

- (ii) in the form (if any) approved by the Planning Secretary from time to time, and

- (iii) accompanied by such documents and information as the Planning Secretary may require, and

- (b) specify, in the manner required by the Planning Secretary, whether any site compatibility certificates have previously been issued in respect of the land (or any part of the land) to which the application relates, and

- (c) for land that is next to proximate site land—must be accompanied by a cumulative impact study that has been prepared in accordance with any guidelines issued by the Planning Secretary from time to time.

...

- (4) Subject to subclause (5), the relevant panel may determine the application by issuing a certificate or refusing to do so.

- (5) The relevant panel must not issue a site compatibility certificate unless the relevant panel—
- (a) has taken into account the written comments (if any) concerning the consistency of the proposed development with the criteria referred to in paragraph (b) that are received from the relevant General Manager within 21 days after the application for the certificate was made, and
  - (b) is of the opinion that the proposed development is compatible with the surrounding land uses having regard to (at least) the following criteria—
    - (i) the natural environment (including known significant environmental values, resources or hazards) and the existing uses and approved uses of land in the vicinity of the proposed development,
    - (ii) the impact that the proposed development is likely to have on the uses that, in the opinion of the relevant panel, are likely to be the future uses of that land,
    - (iii) the services and infrastructure that are or will be available to meet the demands arising from the proposed 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,
    - (iv) in the case of applications 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 and special uses in the vicinity of the development,
    - (v) without limiting any other criteria, the impact that the bulk, 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,
    - (vi) 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,
    - (vii) the impacts identified in any cumulative impact study provided in connection with the application for the certificate, and

- ...
- (7) A certificate may certify that the development to which it relates is compatible with the surrounding land uses only if it satisfies certain requirements specified in the certificate.

- ...
- (9) A certificate remains current for a period of 24 months after the date on which it is issued by the relevant panel.
- ...

**Schedule 1 Environmentally sensitive land (Clause 4 (6) (a))**

Land identified in another environmental planning instrument by any of the following descriptions or by like descriptions or by descriptions that incorporate any of the following words or expressions—

- (a) coastal protection,
- (b) conservation (but not land identified as a heritage conservation area in another environmental planning instrument),
- (c) critical habitat,
- (d) environment protection,
- (e) open space,
- (f) escarpment,
- (g) floodway,
- (h) high flooding hazard,
- (i) natural hazard,
- ...
- (k) scenic (but not land that is so identified if—
  - (i) the land is within a residential zone in which development of two storeys or more in height is permitted, or
  - (ii) an adjacent residential zone, also identified as scenic, permits development of two storeys or more in height),

(l) water catchment,

(m) natural wetland.

Land shown cross-hatched on the bush fire evacuation risk map.

- 13 There was no dispute that cl 4(1), (2) and (4) of the Seniors Housing SEPP apply to the Property as it adjoins land zoned primarily for urban purposes but for the presence of a public road.

#### *Ballina Local Environmental Plan 1987*

- 14 The land is zoned "Zone No 1(b) Rural (Secondary Agricultural Land) Zone" and "Zone No 7(a) Environmental Protection (Wetlands) Zone" under BLEP 1987. No development is proposed on land zoned Environmental Protection (Wetlands) Zone.

#### *Interpretation Act 1987*

- 15 Relevant sections of the *Interpretation Act 1987* provide:

##### **Part 2 Words and expressions**

...

##### **11 Words etc in instruments under an Act have same meanings as in the Act**

Words and expressions that occur in an instrument have the same meanings as they have in the Act, or in the relevant provisions of the Act, under which the instrument is made.

...

##### **Part 4 Amendments and repeals**

...

##### **30 Effect of amendment or repeal of Acts and statutory rules**

- (1) The amendment or repeal of an Act or statutory rule does not:

- ...
- (b) affect the previous operation of the Act or statutory rule or anything duly suffered, done or commenced under the Act or statutory rule, or

- ...
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability or penalty,

and any such penalty may be imposed and enforced, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, as if the Act or statutory rule had not been amended or repealed.

...

## **Part 5 Construction of Acts and instruments**

...

### **34 Use of extrinsic material in the interpretation of Acts and statutory rules**

- (1) In the interpretation of a provision of an Act or statutory rule, if any material not forming part of the Act or statutory rule is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:
  - (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), or
  - (b) to determine the meaning of the provision:
    - (i) if the provision is ambiguous or obscure, or
    - (ii) if the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made) leads to a result that is manifestly absurd or is unreasonable.



(2) Without limiting the effect of subsection (1), the material that may be considered in the interpretation of a provision of an Act, or a statutory rule made under the Act, includes:

(a) all matters not forming part of the Act that are set out in the document containing the text of the Act as printed by the Government Printer,

...

(e) any explanatory note or memorandum relating to the Bill for the Act, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister or other member of Parliament introducing the Bill before the provision was enacted or made,

...

(3) In determining whether consideration should be given to any material, or in considering the weight to be given to any material, regard shall be had, in addition to any other relevant matters, to:

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision (taking into account its context in the Act or statutory rule and the purpose or object underlying the Act or statutory rule and, in the case of a statutory rule, the purpose or object underlying the Act under which the rule was made), and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage.

...

### **35 Headings etc**

(1) Headings to provisions of an Act or instrument, being headings to:

(a) Chapters, Parts, Divisions or Subdivisions into which the Act or instrument is divided, or

(b) Schedules to the Act or instrument,

shall be taken to be part of the Act or instrument.

(2) Except as provided by subsections (3) and (4):

- (a) a heading to a provision of an Act or instrument (not being a heading referred to in subsection (1)),
  - (b) matter within a provision of an Act or instrument (being matter in parentheses that merely sets out a heading to or describes the effect of some other provision of the Act or instrument or of some other Act or instrument), or
  - (c) a marginal note, footnote or endnote in an Act or instrument,
- shall be taken not to be part of the Act or instrument.

...

- (5) This section does not limit the application of section 34 in relation to the use of any heading, marginal note, footnote or endnote in the interpretation of the provision to which the heading, marginal note, footnote or endnote relates.

## Evidence

- 16 The Applicant tendered the Panel's record of decision dated 25 March 2019 in relation to the SCC (tab 5 of the court book, Ex A), an agreed bundle (Ex B) containing inter alia the modified DA for the seniors living development lodged 25 May 2018 and the application for the SCC lodged 30 July 2018. The Respondent tendered a supplementary bundle (Ex 1) containing the SCC application dated 18 December 2014 and a document titled "Seniors Living Development Application" prepared by the Applicant Planners North dated September 2016.
- 17 The Panel read the affidavit of Ms Santina Camroux Acting Director, Resilient Places at the NSW Department of Planning, Industry and Environment (as it is now called) dated 17 October 2019. On 7 March 2018, the NSW Department of Planning and Environment (Department) provided a briefing note (annexed to Ms Camroux's affidavit) to the Minister for Planning (Minister) which sought approval for "the form and content of the proposed State Environmental Planning Policy (Coastal Management) 2018 ... the maps ([http://webmap.environment.nsw.gov.au/PlanningHtml5Viewer/?viewer=SEPP\\_CoastalManagement](http://webmap.environment.nsw.gov.au/PlanningHtml5Viewer/?viewer=SEPP_CoastalManagement)) ...".

- 18 On 7 March 2018, as recorded in the briefing note, the Minister approved the form and content of the proposed CM SEPP and the maps ([http://webmap.environment.nsw.gov.au/PlanningHtml5Viewer/?viewer=SEPP\\_CoastalManagement](http://webmap.environment.nsw.gov.au/PlanningHtml5Viewer/?viewer=SEPP_CoastalManagement)) (Current Webpage) inter alia and recommended that the CM SEPP be made. A copy of the "Minute Paper for the Executive Council" dated 14 March 2018 incorporating the Minister's recommendation that the CM SEPP be made was annexed to Ms Camroux's affidavit. On 23 March 2018 the Minister published a notice in the NSW Government Gazette that the Governor had made the CM SEPP.
- 19 On 3 April 2018 the CM SEPP was published on the NSW legislation website at <https://legislation.nsw.gov.au/#/view/EPI/2018/106>, and the CM SEPP maps were published on the Department's website at [http://webmap.environment.nsw.gov.au/PlanningHtml5Viewer/?viewer=SEPP\\_CoastalManagement](http://webmap.environment.nsw.gov.au/PlanningHtml5Viewer/?viewer=SEPP_CoastalManagement) (being the same website referred to in the briefing note the subject of the Minister's approval).
- 20 At around the time the CM SEPP maps were amended on 16 December 2018, the Department created an archive version of the CM SEPP maps as they existed at the time the Minister approved the CM SEPP maps. The archive version of the maps is available at [http://webmap.environment.nsw.gov.au/Html5Viewer291/index.html?viewer=SEPP\\_CM\\_03042018\\_16122018](http://webmap.environment.nsw.gov.au/Html5Viewer291/index.html?viewer=SEPP_CM_03042018_16122018) (Archive Webpage). Except for the webpage title, the CM SEPP maps on the Archive Webpage are identical to those which existed at the time the Minister approved the proposed CM SEPP and maps.
- 21 The CM SEPP maps are interactive, allowing different maps and different areas to be displayed using the controls on the website. The Archive Webpage contains a legend titled "Coastal Viewer Legend" comprising categories for each of the approved maps available for viewing including the "Coastal Wetlands and Littoral Rainforests Area Map" (Area Map), "Coastal Vulnerability Area Map", "Coastal Environment Area Map" and "Coastal Use Area Map". Next to the "Coastal Wetlands and Littoral Rainforests Area Map" is a dash which is a click control for a drop-down menu. When the drop-down

menu is showing, the following four items appear under the heading “Coastal Wetlands and Littoral Rainforests Area Map”: “Coastal Wetlands”, “Proximity Area for Coastal Wetlands”, “Littoral Rainforests” and “Proximity Area for Littoral Rainforests”. When “Coastal Wetlands and Littoral Rainforests Area Map” is selected (by ticking the box next to it), all four of the land identifiers referred to immediately above are illuminated and activated. When the “Coastal Wetlands and Littoral Rainforests Area Map” is deselected (by unticking the box next to it), all four of the land identifiers are un-illuminated and deactivated.

22 The Current Webpage contains the same functionality as described above at [21]. The functionality of the CM SEPP maps has not changed since the approval of the maps by the Minister.

23 After the hearing I asked that the Panel provide the following:

(a) evidence that the map in [http://webmap.environment.nsw.gov.au/PlanningHtml5Viewer/?viewer=SEPP\\_Coastal\\_Management](http://webmap.environment.nsw.gov.au/PlanningHtml5Viewer/?viewer=SEPP_Coastal_Management) had been approved by the relevant Minister in accordance with cl 8(1)(a) of the CM SEPP; and

(b) evidence of the public access arrangements approved by the relevant Minister referred to in cl 8(3) of the CM SEPP.

24 At a further brief hearing the affidavit of Ms Camroux dated 17 October 2019, summarised below, was read by the Panel in relation to the matter identified at [23(a)]. In relation to [23(a)] above, I was informed that no specific public access arrangements were made pursuant to cl 8(3) of the CM SEPP. Reference was made to s 3.24(5) and (9) concerning publication of environmental planning instruments (EPI); and Sch 3 “NSW planning portal and online delivery of planning services and information” of the EPA Act as providing the statutory basis for publication of the “Coastal Wetlands and Littoral Rainforests Area Map” on the NSW Planning Portal (Planning Portal)

for the purposes of the EPA Act. Section 3.24(5) states that an EPI must be published on the NSW legislation website, and is deemed to have been so published if not so published according to subs (9).

### *Panel's record of decision and reasons*

25 The Panel's record of decision and reasons dated 25 March 2019 provides:

#### **PANEL CONSIDERATION AND DECISION**

By circulation of papers the Panel considered: the material listed at Item 1 and the matters raised and/or observed at briefings and site inspections listed at item 6 in Schedule 1.

Based on this information, the Panel determined that the application:

should not be issued with a site compatibility certificate, because the application:

- has not demonstrated that the proposed development is suitable for more intensive development

- has not demonstrated the proposed development is compatible with the surrounding environment and land uses having regard to (at least) the criteria specified in clause 25(5)(b) of SEPP (Housing for Seniors or People with a Disability) 2004.

The Panel authorises the Chair to notify the applicant, Council and the Department of Planning and Environment of the Panel's decision to refuse the application.

The decision was 3:1, against the decision was Eoin Johnston.

#### **REASONS FOR THE DECISION**

The decision for refusal of the site compatibility certificate (SCC) has not been made lightly.

The Panel notes the application for the SCC expressly excludes a component of the site comprising *environmentally sensitive land* as identified in Annexure A to the application. The Seniors Housing SEPP does not apply to environmentally sensitive land identified in Schedule 1 of the SEPP and the Panel cannot issue an SCC for land so identified.

The area identified in Annexure A to the application for the SCC includes an area marked *Coastal SEPP Wetlands*.

The Panel has considered differing views on the threshold question of whether land identified as “a proximity area for coastal wetlands” as well as land identified as “coastal wetland” under the Coastal Management SEPP fall within the definition of environmentally sensitive land in Schedule 1 of the Seniors Housing SEPP.

The Department of Planning and Environment supports the view that land identified as “a proximity area for coastal wetlands” as well as land identified as “coastal wetland” under the Coastal Management SEPP fall within the definition of environmentally sensitive land in Schedule 1 of Seniors Housing SEPP. This interpretation, if accepted, precludes the issue of a SCC for land mapped as coastal wetlands or a proximity area for coastal wetlands, which is a significantly greater area than that excluded by the terms of the application for the SCC. The Panel notes advice provided to the Applicant from Peter McEwen SC expresses a contrary view i.e. that only land identified as “coastal wetland” under the Coastal Management SEPP falls within the definition of environmentally sensitive land in Schedule 1 of Seniors Housing SEPP.

The majority of the Panel accepts the Department's view that land within the proximity area for coastal wetlands falls within the definition of environmentally sensitive land in Schedule 1 of the Seniors Housing SEPP and the Seniors Housing SEPP does not apply to that land. Therefore a significant portion of the land in the application before the Panel is environmentally sensitive land and the Panel cannot issue a SCC for that land.

The Panel has considered Clause 25(7) of the Seniors Housing SEPP which provides that a SCC may certify that the development to which it relates is compatible with the surrounding land use only if it satisfies certain requirements specified in the SCC.

The proposed development provides for dwellings and other built structures outside of the coastal wetlands, but within the proximity area for coastal wetland under the Coastal Management SEPP. Substantial redesign would be required to confine the development to the area outside the area mapped as coastal wetland and proximity area for coastal wetland in the *Coastal Management SEPP*. The applicant may be able to propose an alternate form of development for Seniors Housing on the balance of the land, and it would be appropriate for a fresh application for an SCC to be made for that application and considered on its merits at the appropriate time.

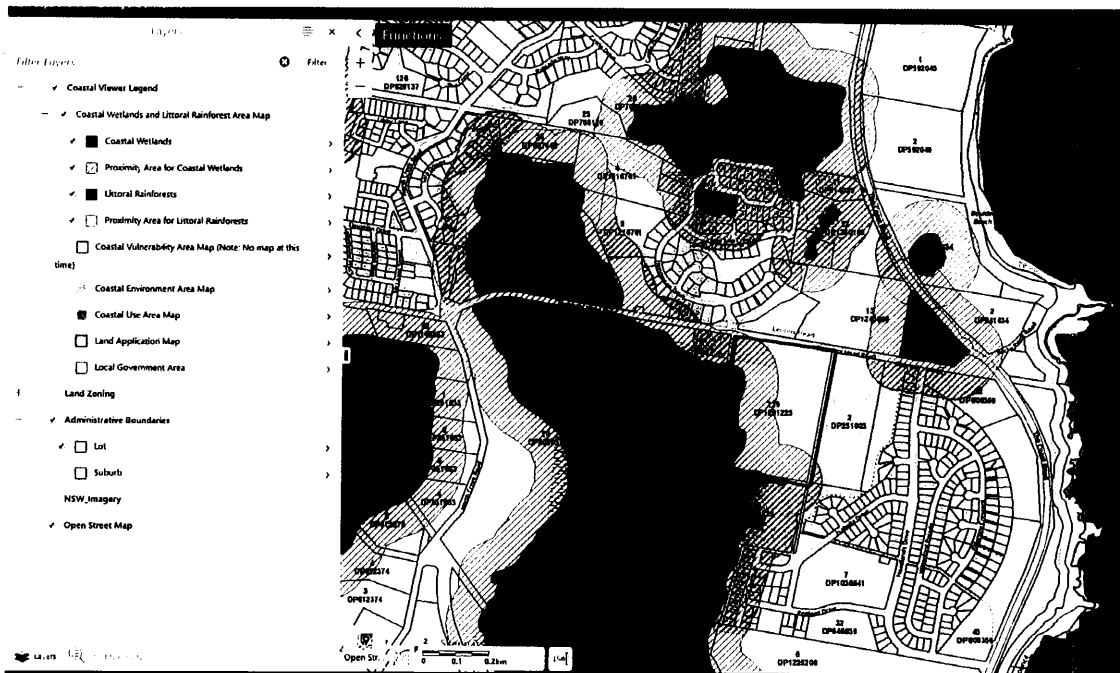
Therefore the majority of the Panel refuses the SCC under Clause 25(4) of the Seniors SEPP.

- 26 It should be noted that in the Panel’s reasoning it determined to refuse the SCC because it considered a substantial part of the Property on which development was proposed was not land to which the Seniors Housing SEPP applied, a threshold issue. While the formal reasons given by the Panel state the SCC has not demonstrated that the proposed development is suitable for

more intensive development or is compatible with the surrounding environment, it is apparent from the reasons for decision that the Panel did not analyse the matters in cl 25(5) of the Seniors Housing SEPP which are the specified matters informing the drawing of such conclusions by a panel. I infer that the expression of the Panel's findings in these terms is a reflection of the pro-forma recording of reasons, as these are the only bases on which a refusal can be issued, as stated in the boxes, a panel can tick.

## Map of Property

- 27 The court book contained a hard copy of the Area Map from the Planning Portal as it applies to the Property (outlined in red):



- 28 The Property contains a solid blue area denoting “Coastal Wetlands” and a hatched area denoting “Proximity Area for Coastal Wetlands” as identified on the Area Map.

## Chronology

- 29 The parties agreed the following chronology:

Date	Event
18 December 2014	Application lodged with the Department for an SCC pursuant to the Seniors Housing SEPP in relation to the Property.
30 March 2015	SCC issued in relation to the Property by the Secretary of the Department.
September 2016	DA lodged with the Council together with the document titled "Seniors Living Development Application" for the Property.
29 March 2017	SCC issued on 30 March 2015 lapsed.
3 April 2018	CM Act and CM SEPP commenced.
May 2018	DA modification for the seniors living development lodged.
30 July 2018	Application lodged with the Department pursuant to the Seniors Housing SEPP for an SCC in relation to the Property.
25 March 2019	Panel determined the application for the SCC in relation to the Property by refusing to issue the certificate.

**Did State Environmental Planning Policy (Coastal Management) 2018 apply at all to the Panel decision?**

30 Question 1 is repeated:

1 [CM SEPP does not apply]. Whether clause 21 [Transitional provisions] of the *State Environmental Planning Policy (Coastal Management) 2018 (Coastal SEPP)*, in the circumstances of this case, requires the Northern Regional Planning Panel (**Panel**) to consider and determine the application for a site compatibility certificate which is the subject of these



proceedings in accordance with the “former planning provisions” as defined in that clause. [Applicant’s ground D]

- 31 In essence the first question asks whether the CM SEPP applied at all to the Panel’s determination of the SCC under the Seniors Housing SEPP.

*Applicant’s submissions*

- 32 The DA for the seniors living development was lodged in September 2016 before the CM SEPP came into force on 3 April 2018 and remains undetermined. The CM SEPP does not apply to the DA by virtue of cl 21(1) and (3) of the CM SEPP. Accordingly the Area Map relied on by the Panel does not “notionally” exist as it relates to this DA. The DA must be determined having regard to the earlier mapping which did not include the concept of a “proximity area” as former SEPP 14 and SEPP 71 apply per cl 21(1) and (4) of the CM SEPP. Therefore the Area Map cannot be “[I]and identified in another environmental planning instrument” by the nominated descriptor “natural wetland” under Sch 1 to the Seniors Housing SEPP.
- 33 The determination of whether cl 4 of the Seniors Housing SEPP applies cannot be made without assessing in this case whether the relevant land is “[I]and identified in another environmental planning instrument” (Sch 1 to the Seniors Housing SEPP). The determination of the applicability of the Seniors Housing SEPP under cl 4 is a multi-step process. This process mandates that cl 21 of the CM SEPP be considered.
- 34 A proper construction of Sch 1 to the Seniors Housing SEPP must be that the EPI (here the CM SEPP) must be construed according to the totality of its terms (which includes the savings provision cl 21). In this case the consequence is that only SEPP 14 and SEPP 71 descriptions are relevant. According to this construction, no part of the Property to which the SCC related was relevantly “Environmentally sensitive land” under Sch 1 to the Seniors Housing SEPP.

- 35 This construction is supported by s 30(1)(b) and (c) of the *Interpretation Act*. At the date of lodgement of the DA in 2016 the Seniors Housing SEPP applied to the land to which the SCC related. The Applicant had accrued the benefit of the application of the Seniors Housing SEPP to that land. The CM Act and the repeal of the relevant map under SEPP 14 was incapable of affecting that right that had accrued. That right was in terms recognised and preserved by the making of the CM SEPP with the savings provision in cl 21.
- 36 Further, in light of the Seniors Housing SEPP the operation of cl 21 of the CM SEPP is not confined to DAs and extends to SCCs. The clear intent of the Seniors Housing SEPP is to manage development which is demonstrated by the text and structure of the policy. The aim of the policy is to encourage development (housing for seniors or people with a disability, cl 2), Ch 3 is titled “[d]evelopment for seniors housing”, SCCs are in terms linked to DAs (Ch 3, Pt 1A) and Ch 3 Pts 4 and 7 concern development standards. The issue of an SCC is a condition precedent to the grant of development consent under cl 24(2) of the Seniors Housing SEPP. If cl 21 of the CM SEPP was not interpreted to apply to both DAs and SCCs, it would have no work to do as it would require a bifurcation of preconditions for consent (the assessment of environmental effects and the determination of a certificate that allows that assessment) such that two different instruments would apply to the same land. It would produce an absurd outcome if the CM SEPP was intended not to apply to existing DAs but to the provision of SCCs which do not constitute the approval of development but rather are a pathway to permit development to be considered under s 4.15 of the EPA Act. If that was the legislative intent of the CM SEPP, cl 21 should have been more clearly worded to state that it applies to DAs excluding those for which an SCC is required.

*Panel’s submissions*

- 37 Whether the Seniors Housing SEPP applies to the Property as provided in cl 4 is a question that exists independently of any DA. Clause 4 can be contrasted with cl 24 which is expressly directed to DAs. Clause 21 of the CM SEPP has no role to play in determining the initial inquiry posed by cl 4 of

the Seniors Housing SEPP as it concerns what planning provisions apply to DAs lodged prior to the commencement of the CM SEPP. Clause 21 of the CM SEPP is tied to DAs and the question posed by cl 4(6) of what land the Seniors Housing SEPP applies to exists independently of any DA.

38 Moreover, cl 21 of the CM SEPP does not apply because it applies to “development applications” rather than SCCs. An application for an SCC may be related to a DA but is a distinct application for a distinct approval. A separate application for an SCC must be made under cl 25(1)-(2) of the Seniors Housing SEPP and the application can be determined by issuing a certificate or refusing to do so under cl 25(4). This construction of “development application” in cl 21 of the CM SEPP is supported by the limited duration of an SCC (24 months, cl 25(9)) and the need for a “current” SCC at the time of any consent to a DA (cl 24(2)).

39 The Applicant’s assertion that it had accrued the benefit of the application of the Seniors Housing SEPP to the Property under s 30 of the *Interpretation Act* by lodging the original DA is incorrect. No such accrued right was identified. Moreover the modified DA was not lodged until on or after 25 May 2018 which was after the CM Act and the CM SEPP came into force.

#### **State Environmental Planning Policy (Coastal Management) 2018 applied to the Panel’s decision**

40 When it refused the Applicant an SCC, the Panel did not consider the issue identified in this part of the Applicant’s case. The issues posed require the statutory construction of the Seniors Housing SEPP and the CM SEPP. As these are statutory instruments, the well-established principles of statutory construction apply: *Council of the City of Sydney v NFF at 410 Pitt Street Pty Ltd* [2016] NSWLEC 149 at [25] citing *Cranbrook School v Woollahra Municipal Council* (2006) 66 NSWLR 379; [2006] NSWCA 155 at [36] (McColl JA). Principles of statutory construction require the words of a statute to be considered in their context: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at [381]-[382] (McHugh, Gummow, Kirby and Hayne JJ) cited by *Minister Administering the*

*Crown Lands Act 1989 v New South Wales Aboriginal Land Council* (2018) 231 LGERA 145; [2018] NSWLEC 26. Section 33 of the *Interpretation Act* requires a construction which promotes the purpose or object of an Act over one which would not.

- 41 A general principle of statutory construction is that where words are plain and unambiguous they should be given their ordinary and grammatical meaning: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26 at 305 (Gibbs CJ) cited in *Roden v Bandora Holdings Pty Ltd* (2015) 213 LGERA 103; [2015] NSWLEC 191 at [42].
- 42 Clause 4 of the Seniors Housing SEPP sets out the land the subject of the SEPP. Land not the subject of the SEPP is identified in cl 4(6)(a) inter alia informed in this case by cl 4(7)(a) which refers to the CM SEPP. Clause 24(1) in Pt 1A “Site compatibility certificates” specifies the requirement to obtain an SCC for seniors housing proposed on certain land. Under subcl (2) a consent authority must not consent to development to which subcl (1) applies unless satisfied of matters in subcl (2)(a) and (b). This subclause is supported by cl 50(2A) of the EPA Regulation. The process for applying for an SCC is set out in cl 25(1) and (2). A panel must take into account certain matters under subcl (5)(a) and has formed an opinion having regard to matters specified in subcl 5(b)(i)-(vii) inter alia. An SCC is current for 24 months under cl 25(9).
- 43 An SCC is required by s 24(1)(a)(i) in this case because the Property adjoins land zoned primarily for urban purposes. The process of obtaining an SCC is expressed as a standalone process in cll 24 and 25 of the Seniors Housing SEPP, and is separate from the process for obtaining a development consent under s 4.12 of the EPA Act. That there is a reference in cl 25(1) to an application being for the purposes of cl 24, which requires an SCC for certain DAs, does not change the stand-alone nature of that process in cl 25.
- 44 In July 2018 when the application for an SCC was lodged and at the time of the Panel’s decision in March 2019, the CM SEPP had been made. Clause 21

“Savings and transitional provisions” of the CM SEPP specified (and currently specifies) that it applied to a DA. There is no principle of statutory construction which suggests it should be read as also referring by inference to an SCC required under the Seniors Housing SEPP as the Applicant submitted. Additional words should not be lightly read into a statutory instrument, including EPIs: *Central Coast Council v 40 Gindurra Road Somersby Pty Ltd (No 2)* [2019] NSWLEC 171 at [53] citing *Lend Lease (Millers Point) Pty Limited v Council of the City of Sydney* (2014) 202 LGERA 314; [2014] NSWLEC 64 at [54]; *Morton v Shoalhaven City Council* [2016] NSWLEC 67 at [16].

45 The Applicant has not identified in the statutory scheme any right which accrues to an applicant for a DA to have a later SCC application determined on the basis of the law in force at the time the DA was filed with a consent authority. I have found that the process of obtaining an SCC is a separate and distinct process under cl 25 of the Seniors Housing SEPP from the process of obtaining development consent under s 4.12 of the EPA Act. That separate process requires engagement with the CM SEPP where that applies. The Applicant engaged that distinct process by choosing to apply for an SCC on 30 July 2018. That the Applicant chose to lodge a DA in 2016 for seniors housing when SEPP 14 and SEPP 71 were then in force and applied for the necessary SCC in 2018, by which time the CM SEPP had been made resulting in their repeal, results in the application of the CM SEPP as in force in 2018 to the Applicant’s SCC application.

46 Given the finding in the last two paragraphs, s 30(1)(b) and (c) of the *Interpretation Act* does not assist in the construction of cl 21 of the CM SEPP. Contrary to the Applicant’s submission, there is no previous operation of the repealed provisions which can continue to operate in these circumstances (subs (1)(a)). Nor is any right or privilege acquired or accrued under the repealed instruments (subs (1)(b)).

47 Taking into account the whole of the Seniors Housing SEPP, as identified by the Applicant, does not alter my conclusion. That the aims of the Seniors

Housing SEPP include in cl 2 the encouragement of seniors housing can be accepted. At issue however is whether and how the CM SEPP applies in the context of the Seniors Housing SEPP. The Applicant submitted the Panel's approach results in a bifurcated process where there is an assessment of environmental effects and separately the consideration of an SCC. That is the case regardless of whether the CM SEPP applies. Clause 25(5) in the Seniors Housing SEPP requires a separate assessment process, including specifying matters to which regard must be had in forming an opinion. This process is distinct from the assessment a DA will be subject to under Pt 4 of the EPA Act.

48 The Panel was correct to consider the CM SEPP when it made its determination as the transitional provisions in cl 21 had no application to the SCC application before it. Accordingly, the Panel was not required to determine the SCC on the basis of former planning provisions, in particular SEPP 14 and SEPP 71. As a result of my findings above I will not be making the third declaration sought in the Applicant's summons, set out at [3] above.

49 The next issue was considered by the Panel at the time of refusal of the SCC.

**Is "proximity area for coastal wetlands" environmentally sensitive land in accordance with Sch 1 to State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004?**

50 I repeat the Applicant's identified grounds in relation to the second issue:

- A. The Northern Regional Planning Panel (Panel) erred in law when it determined that the "proximity area", as identified on the relevant map under State Environmental Planning Policy (Coastal Management) 2018 (the Coastal SEPP), was an area of "environmentally sensitive land" in accordance with Schedule 1 to the SEPP (Housing for Seniors or People with a Disability) 2004 (the Housing SEPP).
- B. The Panel erred in law when it determined that the "proximity area" is not an area of land distinct, and should be distinguished, from the area of land identified as a "coastal wetland" on the relevant map under the Coastal SEPP.
- C. The Panel erred in law when it determined that the "coastal wetland" on the relevant map under the Coastal SEPP was not the only area that

satisfied the phrase “environmentally sensitive land” in accordance with Schedule 1 to the Housing SEPP.

...

- 51 The Panel's second question identified above is also repeated:
- 2 [On the assumption the CM SEPP does apply] whether the relevant part of the property comprising “proximity area for coastal wetlands” on the Coastal Wetlands and Littoral Rainforests Area Map under the *State Environmental Planning Policy (Coastal Management) 2018 (Coastal SEPP)* is environmentally sensitive land within the meaning of Schedule 1 to the SEPP (*Housing for Seniors or People with a Disability*) 2004 by reason of how that land is identified under the Coastal SEPP (whether as “proximity area for coastal wetlands” or otherwise). [Applicant's grounds A, B, C]
- 52 The questions posed by the parties essentially cover the same territory. On the assumption that the CM SEPP did apply to the Panel’s SCC determination under the Seniors Housing SEPP (as I have found above), the application of the CM SEPP in the context of Sch 1 to the Seniors Housing SEPP in the circumstances of this case now arises. The issues raised largely concern the statutory construction of these instruments. Significant in that construction according to the Panel is the Area Map made under cl 8 of the CM SEPP on the Planning Portal and how it identifies coastal wetland areas inter alia. This appears to be the first time the Court has been called on to consider whether statutory construction of a legislative instrument is informed by the functionality of an interactive electronic map.

*Applicant’s submissions*

- 53 The resolution of this issue turns on whether the CM SEPP identifies the relevant land (in this case the land mapped as “proximity area”) by a descriptor listed in or identified by Sch 1 to the Seniors Housing SEPP. The area described as “proximity area” does not fall within a relevant descriptor because it is clear in the terms of the CM SEPP that a distinction is drawn between land described as “coastal wetlands and littoral rainforests area” (which the Applicant accepts would be environmentally sensitive land pursuant to Sch 1) and the “proximity area”.

- 54 Firstly, the relevant mapping of these areas distinguishes areas by the relevant lines on the map (see map at [27] above). Secondly, cl 10 and 11 of the CM SEPP apply different assessment approval regimes for land identified as coastal wetlands or littoral rainforests and land identified as proximity area for coastal wetlands or littoral rainforests. Schedule 1 of the Seniors Housing SEPP is to be considered in the context that it is attempting to identify land that is wholly unsuitable for the use: *Whittaker v Northern Beaches Council (No 3)* (2018) 235 LGERA 5; [2018] NSWLEC 143 (*Whittaker*). The distinction in the assessment approval regimes that apply to coastal wetlands and the associated proximity area respectively make clear that the proximity area is not land wholly unsuitable for the use regulated by the Seniors Housing SEPP. Thirdly, this distinction is maintained in the note to cl 6(2) of the CM SEPP.
- 55 The Panel's reliance on the terms of the Area Map fails to recognise that the map references "areas" in total. It is necessary to consider the identification of the descriptors used on the map rather than the descriptor of the map itself.
- 56 Further the Panel's submission that all four subcategories are selected when "Coastal Wetlands and Littoral Rainforest Area Map" is selected is incorrect. The default on the Area Map is that the four subcategories are selected. When "Coastal Wetlands and Littoral Rainforest Area Map" is selected nothing changes (the four subcategories remained checked) but the boxes representing each subcategory can be selected and unselected so that only certain layers are depicted on the map. The fact that the Planning Portal has allocated ticks to the four subcategories as a default is of no significance to the construction of the CM SEPP. The underlying information technology (IT) language of the map cannot be used to construe the CM SEPP.
- 57 The phrase "like descriptions or by descriptions that incorporate any of the following words or expressions" should not be construed so flexibly that it embraces areas beyond that intended: *Whittaker* at [63] (I note that this paragraph does not support this submission and no other paragraph to this effect was found). There is a clear distinction in the description used in the



map of areas that are to be considered wetland and those that are not but are proximate to those areas. Land adjoining a coastal wetland cannot be a like description for a “natural wetland”. Accordingly “coastal wetlands and littoral rainforest area” cannot be a like description for “natural wetland” since this phrase as used on the Area Map included in the CM SEPP contains four categories: coastal wetlands, proximity area for coastal wetlands, littoral rainforests and proximity area for littoral rainforests. Only the first of these categories is a like descriptor for “natural wetland”.

- 58 The suggestion that all that is required is the identification of the land by the CM SEPP to preclude the application of the Seniors Housing SEPP to the relevant land is contrary to the clear intention of the Seniors Housing SEPP in cl 4(7)(a).

*Panel's submissions*

- 59 Two issues arise for determination. Firstly, how the Property is identified in the CM SEPP (the identification issue). Secondly, whether the ways in which the Property is identified are by way of a “like description” within the meaning of the chapeau of Sch 1 to the Seniors Housing SEPP (the likeness issue).

**The identification issue**

- 60 The relevant part of the Property is identified in the CM SEPP in two ways. Firstly, as being “coastal wetlands and littoral rainforests area” given that the Property is identified on the Area Map. Secondly, within that broader area it is identified as “proximity area for coastal wetlands” as also shown on the Area Map. Contrary to the Applicant’s submissions, these categories are not mutually exclusive.

- 61 The first way in which the Property is identified arises under cl 6 of the CM SEPP. Clause 6 makes clear that certain land is “identified as” being “coastal wetlands and littoral rainforests area”. Such land is the land “identified as such” by the Area Map. The “coastal wetlands and littoral

rainforests area” encompasses and includes the land which is also separately identified as “proximity area for coastal wetlands” for the following reasons:

- (a) when “Coastal Wetlands and Littoral Rainforest Area Map” is checked, all of the four subcategories (including “Proximity Area for Coastal Wetlands”) are shown and the relevant area includes the greater part of the Property (see map at [27] above);
- (b) the CM Act defines the “coastal wetlands and littoral rainforests area” in s 6(1) as:

the land identified by a State environmental planning policy to be the coastal wetlands and littoral rainforests area for the purposes of this Act, being land which displays the hydrological and floristic characteristics of coastal wetlands or littoral rainforests *and land adjoining those features* [emphasis added].

The phrase “land adjoining those features” embraces the “proximity area for coastal wetlands” and the “proximity area for littoral rainforests” referred to in the CM SEPP. The CM SEPP is clearly tied to the CM Act and identifies land for the purposes of that Act (CM SEPP cl 6(1)). It identifies each of the four separate coastal management areas referred to in the CM Act by reference to four separate maps (cl 6(2)-(5)).

- (c) Part 2 Div 1 of the CM SEPP is headed “Coastal wetlands and littoral rainforests area” and it is under that umbrella that the four subcategories are dealt with including cl 11 which provides the development controls for land identified as “proximity area for coastal wetlands” or “proximity area for littoral rainforest”. Headings to divisions in which an instrument is divided are taken to be part of the instrument: *Interpretation Act* s 35;
- (d) clause 11(1) of the CM SEPP states that land identified as “proximity areas for coastal wetlands” is identified on the Area

Map which maps the “coastal wetlands and littoral rainforests area”; and

- (e) the note to cl 6(2) of the CM SEPP (which defines the “coastal wetlands and littoral rainforests area”) provides that the “land so identified [as the coastal wetlands and littoral rainforests area] includes land identified as “proximity area for coastal wetlands”. The note to cl 11 similarly states the “Coastal Wetlands and Littoral Rainforests Area Map identifies certain land that is inside the coastal wetlands and littoral rainforests area as ‘proximity area for coastal wetlands’ ...”. Notes can be taken into account as extraneous material that is capable of assisting in the ascertainment of the meaning of the relevant provisions: *Interpretation Act* s 34.

62 The second way in which the relevant part of the Property is identified (which was not disputed) arises under cl 11 of the CM SEPP which refers to certain land being “identified as ‘proximity area for coastal wetlands’ ... on the Coastal Wetlands and Littoral Rainforests Area Map”.

#### **The likeness issue**

63 The first way in which the Property is identified is as “coastal wetlands and littoral rainforests area” and the relevant question is whether that is a like description for “coastal protection” and/or “natural wetland” in Sch 1 to the Seniors Housing SEPP. The Applicant accepted that such land falls within the ambit of Sch 1 to the Seniors Housing SEPP.

64 The second way in which the Property is identified is as “proximity area for coastal wetlands”. The Applicant ignored the significance of the inquiry posed in Sch 1 by reference to “like descriptions” or “descriptions that incorporate any of the [listed] words or expressions”. Pepper J held in *Whittaker* at [41]-[44] citing *Druitts Developments Pty Ltd v Gosford City Council* (2001) 114 LGRA 61; [2001] NSWLEC 96 (*Druitts*) at [14]-[15], [21] that the expression “like description” should be afforded a wide meaning and means something

more than “same” or “identical” but encompasses the concept of “similarity” and that rigidity must be eschewed in favour of a “deliberately flexible verbal formula”.

- 65 Adopting a flexible approach which eschews rigidity, land identified as “proximity area for coastal wetlands” is a “like description” for “coastal protection” and/or “natural wetland”. In *Druitts* it was concluded that the expression “subject to hazard from coastal erosion and storms (or both)” was a like-identifying description to “coastal protection” and “natural hazard”. The conclusion of likeness would apply *a fortiori* in this case. Considered more broadly within the CM SEPP itself, land identified as “proximity area for coastal wetlands” falls within the “coastal zone” that has been singled out for protection (cl 3(a)) and otherwise as a coastal area warranting protective development controls.

**Seniors Housing SEPP applies to “proximity area for coastal wetlands” (not environmentally sensitive land as described in Sch 1)**

- 66 The purpose of cl 4(6) and Sch 1 to the Seniors Housing SEPP is to ensure that land by reason of its environmentally sensitive nature remains subject to the land use table and permissibility controls contained in the relevant local environmental plan (LEP), as opposed to the state-wide application of the Seniors Housing SEPP.
- 67 It is necessary to further construe the Seniors Housing SEPP and the CM SEPP in accordance with the principles of statutory construction already summarised above at [41]. This requires a close reading of both the text and context of the relevant provisions. The statutory construction approach of the parties to the second question of whether land in the “proximity area for coastal wetlands” falls within Sch 1 to the Seniors Housing SEPP varied. There is no dispute that the relevant land is mapped as within the “Proximity Area for Coastal Wetlands” on the Area Map available on the Planning Portal for the purposes of cl 8 of the CM SEPP. The parties differ on the statutory construction consequence of this in the context of Sch 1 to the Seniors Housing SEPP. There is no dispute that the areas mapped on the Area Map

as “Coastal Wetlands” are a like description for “natural wetland” which appears in Sch 1(m).

68 The Applicant asked whether the words “natural wetland” (Sch 1) were a “like description” of the land identified as the “Proximity Area for Coastal Wetlands” on the Area Map. This was answered in the negative as land in the proximity area did not satisfy by like description that descriptor in Sch 1. The Panel submitted two overarching issues arose. Firstly, what it called the “identification issue” of how the Property is identified on the Area Map. It identified two ways in which the Property is identified, firstly as being part of the “coastal wetland and littoral rainforests area” as it is located on the Area Map (primary case). The second (alternative) way is that within this broader area, the Property is identified as “proximity area for coastal wetlands”, essentially reflecting the Applicant’s case.

69 Secondly, the “like description” issue whether the descriptors (“natural wetland” and “coastal protection”) in Sch 1 were a “like description” of the Property as identified on the Area Map.

70 The two issues are linked in the Panel’s primary case because if the Property identified in the proximity area is part of the coastal wetlands and littoral rainforests area as depicted in the Area Map the Panel says the relevant descriptors in Sch 1 of “natural wetland” or “coastal protection” apply to it in the same way they apply to the “coastal wetlands” area. Consequently, the Seniors Housing SEPP does not apply.

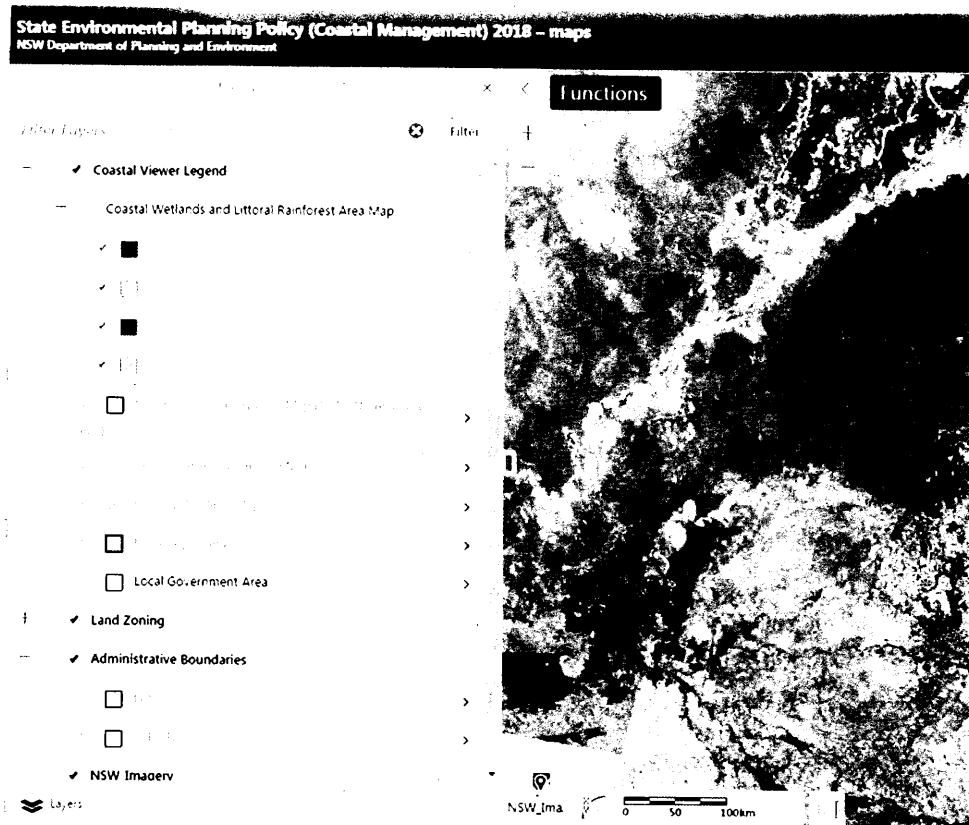
71 The Panel relied on five points to support its construction for the purpose of the identification issue in its primary case, as summarised at [61] above, (i) referring to the Area Map; (ii) the reference in s 6(1) of the CM Act to “... and land adjoining those features...”; (iii) the structure of the CM SEPP with the heading to Div 1 “Coastal wetlands and littoral rainforests area” in Pt 2 “Development controls for coastal management areas” of the CM SEPP; (iv) the note to cl 6(2) which states that land so identified on the Area Map includes proximity area for coastal wetlands inter alia; and (iv) the note to

cl 11 in similar terms. Notes within the CM SEPP can inform its construction as extrinsic material: *Interpretation Act* s 34. They are not a substitute for the actual text of the CM SEPP: CM SEPP cl 4(4) and *Interpretation Act* s 35(2)(c). Nowhere in the actual text of the CM SEPP does the content of the notes to cl 6(2) and 11 appear. Interestingly, the Applicant relied on the note to cl 6(2) as supportive of its case.

72 The CM SEPP was made under s 3.29 of the EPA Act. The construction of the CM SEPP is informed by, in particular, s 6(1) of the CM Act which states that the coastal wetlands and littoral rainforests area means the land identified by a state environmental planning policy to be that area for the purposes of the CM Act. The coastal wetlands and littoral rainforests area “displays the hydrological and floristic characteristics of coastal wetlands or littoral rainforests and land adjoining those features”. Section 6(2) of the CM SEPP specifies the management objectives for the coastal wetlands and littoral rainforests area. The aims of the CM SEPP are identified in cl 3 and include mapping the four coastal management areas that comprise the NSW coastal zone. These areas are identified in s 5 of the CM Act. Clause 4(1) defines “Coastal wetlands and littoral rainforests area” by reference to cl 6(2) and defines the “Coastal Wetlands and Littoral Rainforests Area Map” as the “State Environmental Planning Policy (Coastal Management) 2018 Coastal Wetlands and Littoral Rainforests Area Map”. Clause 4(2) of the CM SEPP states that words have the same meaning as in the CM Act. The coastal wetlands and littoral rainforests area is described in cl 6(2) as “land identified as such by the Coastal Wetlands and Littoral Rainforests Area Map”. Apart from the Area Map, the express reference to “land in proximity to coastal wetlands” within the CM SEPP is in cl 11. Clause 11 of the CM SEPP is headed “Development on land in proximity to coastal wetlands or littoral rainforest”.

73 The Area Map which appears on the Planning Portal is the same map as the Minister approved under cl 8 of the CM SEPP as identified in the affidavit of Ms Camroux summarised above at [20]. When the Planning Portal website is loaded, five boxes appear under the “Coastal Viewer Legend” – one larger

“higher level” box is labelled “Coastal Wetlands and Littoral Rainforest Area Map” (Area Map box) and four boxes underneath are labelled “Coastal Wetlands”, “Proximity Area for Coastal Wetlands”, “Littoral Rainforests” and “Proximity Area for Littoral Rainforests” respectively. The Area Map box is unticked, the four boxes underneath are ticked and the corresponding labels are not “activated” (they are grey in colour). The screenshot below shows this.



- 74 If the Area Map box is ticked, the four boxes underneath remain ticked and the corresponding labels are activated (the colour of the labels changes from grey to white). The areas corresponding to each of the four boxes are identified on the Area Map. Any of the four boxes can be unticked which removes the corresponding areas from the electronic map. The screenshot below shows all the boxes when activated.



75 The Applicant submitted that the underlying IT language which allows engagement with the map on the Planning Portal is not a recognised tool of statutory construction. According to the Applicant the overarching box denoting “Coastal Wetland and Littoral Rainforest Area Map” may or may not be ticked. Consequently what the electronic map as accessed through the Planning Portal shows interactively does not assist in answering the question of whether the proximity area is part of the coastal wetlands and littoral rainforest area.

76 I do not agree. Publication of electronic maps on the Planning Portal as part of a statutory scheme is provided for by s 3.24(5) and (9) and Sch 3 of the EPA Act, set out at [10] above. Section 1.4(14) provides expressly that a reference in the EPA Act to a map or plan includes a map or plan kept in an electronic form. The Planning Portal is defined in s 1.4 of the EPA Act. Ms Camroux’s affidavit dated 17 October 2019 identifies that the electronic map approved by the Minister on a certain date is what is located on the Planning Portal (the version of the map in issue has now been archived following amendment of the CM SEPP in 2018). The description of how the electronic map works



interactively and as depicted in the above screenshots at [73] and [74] confirms that land in “proximity for coastal wetlands” is one of the four categories of land depicted on the Area Map and therefore within the coastal wetland and littoral rainforest area as defined in s 6(1) of the CM Act and identified in cl 6(2) of the CM SEPP. It is not in dispute that “proximity for coastal wetlands” land adjoins land with the relevant characteristics as specified in s 6(1) of the CM Act.

77 The various aspects of the CM Act and the CM SEPP including the Area Map relied on by the Panel do support a construction of the CM SEPP as including in the coastal wetland and littoral rainforests area the “Proximity Area for Coastal Wetlands” land depicted on the Area Map.

78 That finding does not resolve the question of whether that is land to which Sch 1 to the Seniors Housing SEPP applies. I agree with the Applicant that whether the land is included in the coastal wetland and littoral rainforest area on the Area Map is not conclusive as it is not the only way the land is identified for the purpose of determining whether Sch 1 applies. As the Applicant submitted, the application of cl 4(7)(a) suggests that inclusion on the Area Map is insufficient on its own to exclude the operation of the Seniors Housing SEPP. Clause 7 provides:

(7) Nothing in subclause (6) (a) or Schedule 1 operates to preclude the application of this Policy to land only because—

(a) the land is identified under *State Environmental Planning Policy (Coastal Management) 2018*, or ...

79 The Applicant’s case and the Panel’s alternative case remain for consideration. The Panel submitted that in light of the text of the CM SEPP, it would be artificial to find “coastal wetlands” to be a like description for “natural wetland” (which is accepted) and not also “proximity area for coastal wetlands” (which the Applicant does not accept).

80 Cases referred to by the parties have considered provisions in various LEPs in determining whether land identified in Sch 1 or its predecessors applied to

land: *Druitts; Warringah Shire Council v Punnett & Associates Pty Ltd* (2001) 122 LGERA 1; [2001] NSWCA 480 (*Punnett*); *Pepperwood Ridge Pty Ltd v Newcastle City Council* (2006) 145 LGERA 340; [2006] NSWCA 122 at [30] (*Pepperwood*); *Whittaker*, and *Rosewood Australia Pty Ltd v Ku-ring-gai Council* [2019] NSWLEC 84 (*Rosewood*).

- 81 In *Druitts* Bignold J stated at [14] that reference must be made to “the whole of any one of the verbal descriptions contained in the Schedule”. He identified the importance of adopting a flexible approach to construction, not a strict textual requirement of certain words having to be used for the former Seniors Housing SEPP not to apply. Bignold J found that the relevant zone objective that declared land within the zone to be “subject to hazard from coastal erosion and storms (or both)” in the relevant LEP was “like” the descriptors “coastal protection” and “natural hazard” in the predecessor to Sch 1.
- 82 In *Punnett* at issue on appeal was whether the subject land was identified in the relevant LEP as “open space” within the meaning of Sch 1 to the former Seniors Housing SEPP. It was within “Zone 6(b) (Private Recreation “B”)”. The LEP incorporated a map that included Zone 6(b) (Private Recreation “B”) as one of four zones under the heading “6. OPEN SPACE” in the index. At [35] Mason P (Beazley JA and Ipp AJA agreeing) found that Sch 1 does not require the words to operate in the sense of explicating zoning parameters. Description of land is sufficient. Mason P concluded at [37] that Sch 1 gave effect to the otherwise neutral heading “6. OPEN SPACE” as it engaged those words as one of the descriptions in the LEP that identified, inter alia, the subject land.
- 83 In *Pepperwood* the subject land was zoned “7(c) Environmental Investigation Zone” under the relevant LEP. A zone objective included conserving “other conservation values” of the land. The essential issue was whether words in this zone objective identified the land by the description “conservation” or any like description within the meaning of the former Sch 1. The Court of Appeal stated that *Punnett* was authority for the proposition that consideration was not confined to the short name given to the relevant zone. The words in the

text or map within the LEP had to be “used descriptively with reference to the subject land” in accordance with one or more of the words or expressions in Sch 1 at [36]. The Court of Appeal held at [37] that the chapeau of Sch 1 was not satisfied merely because the word “conservation” was found in the objective. It was necessary for the words in the objective to identify the land by describing it by reference to the conservation values to be conserved. The word “conservation” was not one of the descriptors used in the objective to identify the land – it was a general objective not an identifying description of that land: at [41].

84 In *Whittaker* at issue was whether part of the relevant site mapped as a “geotechnical hazard” fell within Sch 1 to the Seniors Housing SEPP as land identified by a “like description” as “natural hazard”. Citing *Druitts* at [14]-[15] and [21], Pepper J held at [44] that “rigidity must be eschewed in favour of a “deliberately flexible verbal formula” in the identification of “environmentally sensitive lands” in Sch 1 of the SEPP”. A textual approach should be adopted, following *Punnett* at [13] and *Pepperwood* at [36]-[37]. Pepper J found at [62] that the expression “geotechnical hazard” was not a “like description” in the sense of a similar description for “natural hazard” after a detailed analysis of the meaning of “geotechnical”, “natural” and “hazard” in the context of Sch 1. Equating “geotechnical hazard” with “natural hazard” was impermissibly broad and left other parts of Sch 1 with no work to do.

85 *Rosewood* considered whether the description “biodiversity” on the “Terrestrial Biodiversity Map” in the relevant LEP was a “like description” for the categories of “conservation” and “environment protection” in Sch 1. An objective of the biodiversity protection provision in the LEP, cl 6.3, was the protection inter alia of “biodiversity corridors”. “Biodiversity corridor” was defined by cl 6.3(5). No such land was depicted on the map. Applying a textual and contextual approach, Robson J held that “biodiversity” was not a like description for inter alia “conservation” or “environment protection” in Sch 1. The heading “Biodiversity protection” of cl 6.3 was not relevant to the inquiry since the heading was not used to classify a zone as in *Punnett*: at [48]. The identification of the land as “biodiversity” was not a “like description”

because the concept of environment protection is concerned with conserving and protecting, whereas biodiversity simply identifies land as having a particular or potential attribute: at [63] and [65].

86 As identified in *Pepperwood* at [43], the issue for determination is easy to state but difficult to resolve. Both *Druitts* and *Punnett* considered whether words of description applied in the relevant LEPs given that the words in issue were descriptors in Sch 1 and also appeared in the LEP. A flexible approach was endorsed. *Pepperwood*, *Whittaker* and *Rosewood* applied a detailed textual and contextual analysis to the particular instruments in each case, a brief summary of which reasoning is set out above, and required a very close reading to determine whether words of “like description” for the specified descriptors in Sch 1 appeared in the relevant LEP. These cases confirm that a wide reading of the particular instruments should be carried out, adopting a flexible approach. Adopting that approach, none of the cases found a like description of a descriptor in Sch 1 identified land in the relevant LEP so that Sch 1 did not apply to the land in issue (and the Seniors Housing SEPP therefore did).

87 The coastal wetlands and littoral rainforests area land in issue is described, and circumscribed, by the Area Map made as part of the CM SEPP. The coastal wetlands and littoral rainforests area is called up by s 6(1) of the CM Act. The proximity land is in the Area Map denoting coastal wetlands and littoral rainforests area land. As well as the Area Map parts of the CM SEPP can be considered in considering the matter of whether Sch 1 applies to land identified as “proximity area for coastal wetlands”. Clause 10 of the CM SEPP which applies to land identified as “coastal wetlands” (as distinct from land in proximity to coastal wetlands) states that a consent authority must not grant consent for development in cl 10(1) unless they are satisfied that sufficient measures have been or will be taken to protect, and where possible enhance, the biophysical, hydrological and ecological integrity of the coastal wetland or littoral rainforest.

- 88 Clause 11 identifies the purpose of the proximity area for coastal wetlands is to ensure that development consent is not granted unless the consent authority is satisfied that the proposed development will not significantly impact on the biophysical, hydrological or ecological integrity of or the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland inter alia. The level of satisfaction the consent authority has to achieve to grant development consent in a proximity area for coastal wetlands is directed to the impact of the proposed development on adjacent coastal wetlands. I agree with the Applicant that it is clear from these provisions that the “proximity area for coastal wetlands” is incorporated in the Area Map to provide a buffer to protect environmentally sensitive coastal wetlands. The objects of the CM Act include the protection of natural coastal processes inter alia. The aim of the CM SEPP includes managing development in the coastal zone, protecting the environmental assets of the coast and establishing a planning framework to guide decision-making in that zone.
- 89 Turning to Sch 1 the chapeau refers to land identified by specified descriptions, relevantly in this case, “coastal protection” and/or “natural wetland”, or land identified by like descriptions or by descriptions that incorporate those expressions. There was no argument that land identified as coastal wetland is a like description for “natural wetland” in Sch 1. The Panel relied also on the descriptor “coastal protection” as well as “natural wetland”. If the words “proximity area for coastal wetlands” alone are considered, the term is not a like descriptor for “coastal protection” or “natural wetland” in Sch 1 as the ordinary and natural meaning of “proximity” is land near or close to other land (applying the dictionary definitions of “proximity” from the *Macquarie Dictionary* (online) and the *Oxford English Dictionary* (online) is helpful on this occasion).
- 90 The purpose of such land to act as a buffer area to coastal wetlands is confirmed by cl 11 of the CM SEPP. As noted above at [88], the development of land subject to cl 11 requires its potential impact on adjacent coastal wetlands to be assessed. The limits on development specified in cl 11 are not concerned with attributes of the proximity land itself. *Pepperwood, Whittaker*

and *Rosewood* suggest that in order to determine whether Sch 1 applies close consideration of the words used to describe particular land is required. In *Pepperwood* the Court of Appeal rejected construction of words used to describe land by reference to the objectives of the applicable zone in which the land was located. In *Rosewood* Robson J highlighted the need to identify the description of an attribute of land in an LEP in determining if words of like description applied. Even applying a “flexible verbal formula” as referred to in *Whittaker* cannot overcome the absence of wording in the phrase “proximity area for coastal wetlands” as denoting land which has itself an attribute of “coastal protection” or “natural wetland”.

91 Considering all these textual and contextual matters, I do not consider that Sch 1 to the Seniors Housing SEPP applies to that part of the Applicant’s land which is identified as within the “proximity area for coastal wetlands”, as shown on the Area Map, a screenshot of which is set out above at [27]. Consequently the Seniors Housing SEPP applies to that part of Reysson’s land and an SCC can be applied for in relation to it.

92 As the Applicant has been successful I will make the two declarations relevant to this ground as identified in the summons set out above at [3].

93 Costs usually follow the event in Class 4 proceedings so that the successful party’s costs are paid by the unsuccessful party. I will make a costs order in the Applicant’s favour in 14 days unless a notice of motion seeking alternative orders is filed. The Council has played no role and would not expect to have any costs order made in relation to it. The Panel will be liable for the Applicant’s costs.

#### **Declarations and orders**

94 The Court makes the following orders and declarations:

- (1) A declaration that the determination of the First Respondent on or about 25 March 2019 to refuse to issue a site compatibility certificate pursuant to State Environmental Planning Policy (Housing for Seniors

or People with a Disability) 2004 with respect to the property legally described as Lot 239 DP 1201225, in accordance with the application made by the Applicant, is void and of no effect.

- (2) A declaration that State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 does not preclude the issue of a site compatibility certificate for that part of the property legally described as Lot 239 DP 1201225 and mapped as "proximity area for coastal wetlands" pursuant to the "Coastal Wetlands and Littoral Rainforests Area Map" of State Environmental Planning Policy (Coastal Management) 2018.
- (3) Order that the First Respondent to pay the Applicant's costs of the proceedings unless a notice of motion seeking a different costs order is filed within 14 days.
- (4) Order that the Exhibits are returned.

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I CERTIFY THAT THIS AND THE 54 PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR THE JUDGMENT OF THE HONOURABLE JUSTICE N. H. M. PAIN.



Associate

Date 19 December 2019

