

12 August 2019

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**By email:** Kevinryan@waterbrook.com.au

**Attention:** Kevin Ryan

Dear Kevin

### Application for a site compatibility certificate, Bayview Golf Club

You have asked us to address the permissibility of a development for the purposes of seniors housing on Lot A DP 339874, Lot 150 DP 1003518, Lot 300 DP 1139238, Lot 1 DP 986894, Lot 5 DP 45114, Lot 191 DP 1039481, Lot 2 DP 986894, Lot 7 DP 45114, Lot 1 DP 19161, Lot 3 DP 986894, Lot 1 DP 662920 and Lot 6 DP 45114 (**the site**). The site is the location of the Bayview Golf Club

### Summary

- The site is land that adjoins land which is zoned primarily for urban purposes.
- The site is not excluded from the operation of the Seniors Housing SEPP as 'environmentally sensitive land'.

### Background

We understand and assume the relevant facts to be as follows:

- The site is located at Cabbage Tree Road and Pittwater Road, Bayview.
- The site is zoned 'RE2 — Private Recreation' (**RE2**) by *Pittwater Local Environmental Plan 2014 (the LEP)*.
- The site, being Bayview Golf Course, is being used for the purposes of an existing registered club, namely Bayview Golf Club Ltd (**the club**).
- The club holds a club licence under the *Liquor Act 2007* as a consequence of previously holding of a certificate of registration under the *Registered Clubs Act 1976* (as per clause 93 of Schedule 2 of the *Registered Clubs Act 1976*).

### Detail

#### 1. The permissibility of a development for the purposes of seniors housing on the site

##### ***Permissibility under the LEP***

- 1.1 The site is zoned 'RE2 Private Recreation' (**RE2**) under the LEP.
- 1.2 Clause 2.3 of the LEP is the primary mechanism by which types of development are made either permissible or prohibited in a zone. This clause (relevantly) says:
  - (1) The Land Use Table at the end of this Part [ie Part 2] specifies for each zone: ...

- (b) development that may be carried out without development consent, and
- (c) development that may be carried out only with development consent, and
- (d) development that is prohibited. ...

(3) In the Land Use Table at the end of this Part:

- (a) a reference to a type of building or other thing is a reference to **development for the purposes** of that type of building or other thing (bold added)...

- 1.3 The Land Use Table at the end of Part 2 includes text organised under the heading 'Zone RE2 Private Recreation'. Item 2 under that heading is titled 'Permitted without consent'. No development types are listed under this heading.
- 1.4 Item 3 under that heading is titled 'Permitted with consent'. Development for the purposes of seniors housing is not included in this list.
- 1.5 Development that is prohibited in the RE2 zone (by reason of the Land Use Table) is development for the purposes listed under the heading for item 4: 'Prohibited'. The only text that appears under this heading is:

Any development not specified in item 2 or 3.

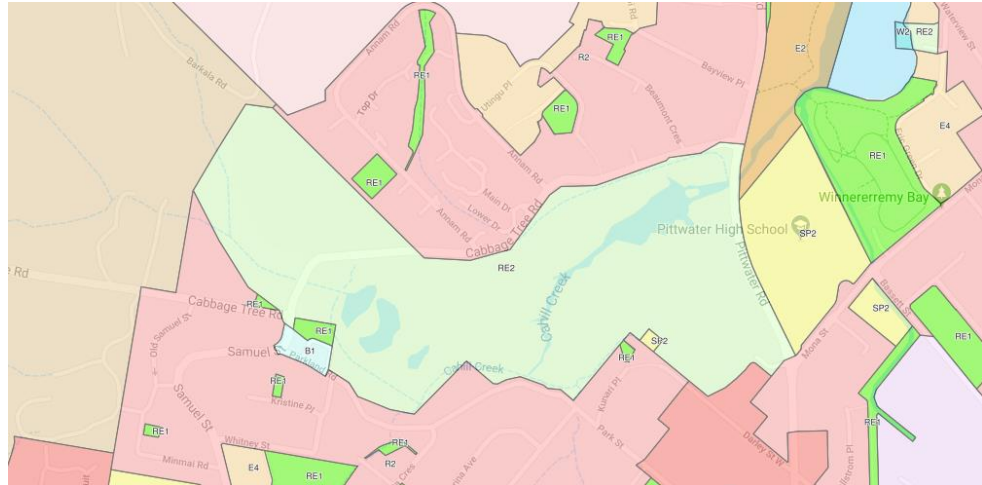
### ***Permissibility under the Seniors Housing SEPP***

- 1.6 In the present case, the prohibition under item 4 of the Land Use Table may be partially overridden by the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**the Seniors Housing SEPP**). If a site compatibility certificate is issued, the relevant effect of the Seniors Housing SEPP is (under clause 15) that development 'for the purpose of' serviced self-care housing (a type of seniors housing) is permitted with development consent (clauses 15-16).
- 1.7 Clause 15 says:
- This Chapter allows the following development **despite the provisions of any other environmental planning instrument** if the development is carried out in accordance with this Policy:
- (a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing; and
  - (b) development on land that adjoins land zoned primarily for urban purposes for the purpose of any form of seniors housing consisting of a hostel, a residential care facility or serviced self-care housing (bold added).
- 1.8 However, in order for this provision to apply to the site, various preconditions in the Seniors Housing SEPP must be satisfied. These are set out below.

### ***Land must be zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes***

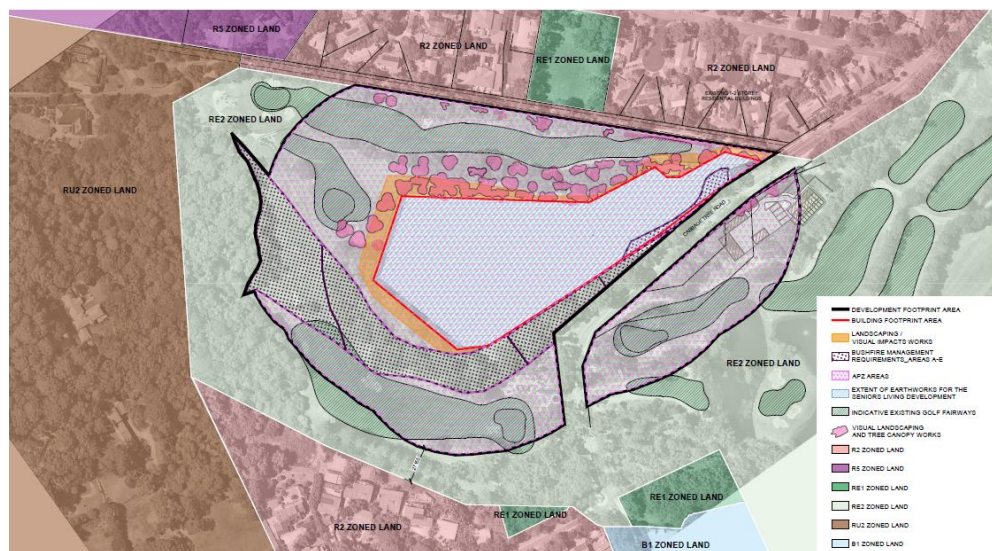
- 1.9 Clause 4(1) of the Seniors Housing SEPP says that it only applies:
- to **land** within New South Wales that is land zoned primarily for urban purposes or land that adjoins land zoned primarily for urban purposes ...

- 1.10 The site is shown as RE2 (light green) in figure 1 below:



**Figure 1:** Image taken from NSW Planning Portal, 26 October 2018

- 1.11 It is plain that the site immediately adjoins large tracts of land zoned as 'R2 Low Density Residential' (R2) land. This land is shaded light pink in figure 1. It also adjoins some land that is zoned 'B1 Neighbourhood Centre' (B1). This land is shown as light blue in figure 1. Also adjoining, at the south western corner of the site, is land zoned 'R3 Medium Density Residential' (R3). This land is shown as a dark pink in figure 1.
- 1.12 It is obvious that the R2, R3 and B1 land is zoned primarily for urban purposes. Accordingly, it is plain that the Bayview Golf Club site is land that adjoins land zoned primarily for urban purposes.
- 1.13 For completeness, it should be noted that not all of the golf course may necessarily be used for the purposes of the seniors housing development. Drawing DA6.05 — reproduced in figure 2 below — shows the anticipated **development footprint area**.



**Figure 2:** Extract from drawing DA6.05. The anticipated development footprint area (excluding re-vegetation work).

- 1.14 This drawing shows the part of the golf course (excluding revegetation work) that is anticipated to be developed for the purposes of the seniors housing development. In this regard, 'development' is defined by the *Environmental Planning and Assessment Act 1979 (the EP&A Act)* to include a 'use of land' (section 1.4(1)). The use of land as an asset protection zone, for example, is a type a 'development' under the EP&A Act.

- 1.15 The development footprint area accounts for the western portion of the Bayview Golf Club site.
- 1.16 However, it should be understood that, for legal purposes, the site is the whole golf club site, not just the development footprint area. This above additional analysis is merely provided to explain that there would be no relevant distinction if the site had been defined by simply reference to the **anticipated** development footprint area (excluding revegetation work).

***The land is being used for the purposes of an existing registered club***

- 1.17 Clause 4(1)(b) of the Seniors Housing SEPP requires that the land is being used for the purposes of an existing registered club. This fact is uncontroversial and the requirement is met.

***Whether most of the land that adjoins the site is zoned for urban purposes***

- 1.18 Clause 4(5) of the Seniors Housing SEPP says that:

For the purposes of this Policy (and for the avoidance of doubt), a consent authority must not treat:

- (a) land on which development for the purposes of special uses is permitted, or
- (b) land that is being used for the purposes of an existing registered club,

as being land zoned **primarily** for urban purposes unless it is satisfied that most of the land that it adjoins is land zoned for urban purposes (bold added).

- 1.19 In our view, the RE2 land is not land that is zoned **primarily** for urban purposes (cf *Wirrabara Village Pty Limited v The Hills Shire Council* [2018] NSWLEC 1187 at [56]-[60]). The permissibility of seniors housing development depends on the fact that the land **adjoins** land that is zoned primarily for urban purposes. Accordingly, clause 4(5) of the Seniors Housing SEPP does not apply.

**2. Whether the land is environmentally sensitive land**

- 2.1 Clause 4(6) of the Seniors Housing SEPP relevantly provides that:

This Policy does not apply to: ... land described in Schedule 1 (Environmentally sensitive land) ...

- 2.2 Schedule 1 of the Seniors Housing SEPP (relevantly) describes land 'identified' in another environmental planning instrument, such as the LEP

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** ...,
- (c) **critical habitat**,
- (d) **environment protection**,
- (e) **open space**,
- (f) escarpment,
- (g) floodway,
- (h) high flooding hazard,
- (i) natural hazard, ...

- (k) scenic ...
- (l) water catchment,
- (m) natural wetland (bold added).

### **Open space**

- 2.3 The site is described as 'environmentally sensitive land' in Schedule 1 of Seniors Housing SEPP if the LEP identifies the site by use of certain descriptions. In working out if, and how, a LEP identifies land, the Court of Appeal favours a very 'textual' approach (*Warringah Shire Council v Punnett and Assoc* [2001] NSWCA 480 at [25] and [31]). This requires a fairly literal analysis of the words of planning instruments. It is not relevant to consider the current use of the land. The only relevant consideration is what description, if any, **the LEP** gives to the land.
- 2.4 One of the descriptions of 'environmentally sensitive land' in Schedule 1 is 'open space'. On two occasions, Court of Appeal majority judgments have stated that 'open space' ordinarily denotes an area without buildings: *Cranbrook School v Woollahra Council* (2006) 146 LGERA 313; *Punnett & Assoc*. The buildings that might be expected to be situated within an area of open space are normally incidental to the open space nature of the land (e.g. a toilet block in a park).
- 2.5 While 'recreation' can take place in an area of open space, land set aside for recreation purposes under the LEP is not necessarily limited to outdoor recreation. For example, the list of permissible uses in the RE2 zoning under the LEP includes 'recreation facility (indoor)' which means 'a building or place used predominantly for indoor recreation'. An indoor recreation facility is clearly at odds with the notion of 'open space' as defined by the Court of Appeal.
- 2.6 'Recreation', particularly, 'private recreation' is a much broader concept than 'open space'. A wide range of private recreation activities will be indoor, not outdoor. The differences in the meaning of the two expressions are very distinct, such that neither is a 'like description' of the other.
- 2.7 The LEP's identification of the land as 'Private Recreation' land does not bring the land under Schedule 1.

### **Conservation, critical habitat and environment protection**

- 2.8 The descriptions of 'environmentally sensitive land' in Schedule 1 include 'conservation', 'critical habitat' and 'environment protection'. We have considered whether the mapping of the land as 'biodiversity' in the LEP's 'Biodiversity Map' is a 'like description' for these words/expressions.
- 2.9 The LEP defines the word 'biodiversity' to mean:
- the variety of living animal and plant life from all sources, and includes diversity within and between species and diversity of ecosystems.
- 2.10 This definition is quite different from the definition of 'conservation'. According to the *Macquarie Dictionary* online it means:
1. the **preservation** of areas which are significant, culturally or scientifically, in their natural state.
  2. the **management** of the natural environment to ensure that it is not destroyed in the process of development.
  3. the **preservation** or conserving of natural resources, such as water, coal, etc (bold added).
- 2.11 The word 'biodiversity' merely describes a state of affairs, that is, the variety/diversity of flora and fauna. It is different from the word 'conservation' which describes the process of preservation or management. 'Biodiversity' is not a like description for 'conservation' (

- 2.12 The phrase 'critical habitat' plainly describes habitat that is of 'decisive importance' or 'crucial' (as per the *Macquarie Dictionary* online). The mere identification of land as having 'biodiversity' is not synonymous with saying that it is of decisive importance or crucial. Indeed, it is likely that **all** habitat exhibits some degree of biodiversity. The phrase 'critical habitat' is plainly targeting on a subset of habitat/biodiversity. 'Biodiversity' is not a like description for 'critical habitat'.
- 2.13 Similarly, the phrase 'environment protection' suggests not just that the environment exists, but that it must be protected. The simple label of 'biodiversity' cannot be considered a like description for 'environment **protection**': *Australian Nursing Home Foundation Limited v Ku-ring-gai Council* [2019] NSWLEC 1205 at [85]-[86], [89]; *Rosewood Australia Pty Ltd v Ku-ring-gai Council* [2019] NSWLEC 84 at [67].
- 2.14 Accordingly, the LEP's identification of the land as 'Biodiversity' land does not bring the land under Schedule 1.
- 2.15 Clause 7.6 of the LEP is titled 'Biodiversity'. It relevantly says:
- (1) The objective of this clause is to maintain terrestrial, riparian and aquatic biodiversity by:
    - (a) **protecting** native fauna and flora, and
    - (b) **protecting** the ecological processes necessary for their continued existence, and
    - (c) encouraging the **conservation** and recovery of native fauna and flora and their habitats.
  - (2) This clause applies to land identified as "Biodiversity" on the Biodiversity Map.
  - (3) Before determining a development application for development on land to which this clause applies, the consent authority **must consider**:
    - (a) **whether** the development is likely to have:
      - (i) any adverse impact on the condition, ecological value and significance of the fauna and flora on the land, and
      - (ii) any adverse impact on the importance of the vegetation on the land to the habitat and survival of native fauna, and
      - (iii) any potential to fragment, disturb or diminish the biodiversity structure, function and composition of the land, and
      - (iv) any adverse impact on the habitat elements providing connectivity on the land, and
    - (b) **any appropriate** measures proposed to avoid, minimise or **mitigate** the impacts of the development.
  - (4) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that:
    - (a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or
    - (b) if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or
    - (c) **if that impact cannot be minimised**—the development will be managed to **mitigate** that impact (bold added).
- 2.16 **If:**
- (a) this clause uses words descriptively with reference to the subject land; and
  - (b) those words are like descriptions for 'conservation', 'critical habitat' or 'environment protection',

then the subject land would be excluded from the operation of the Seniors Housing SEPP: (cf: *Punnett & Assoc* at [13]; *Pepperwood Ridge v Newcastle City Council* [2006] NSWCA 122 at [36]). This requires that the words relied upon be words of description that identify the land in accordance with one of the nominated words or expressions.

2.17 In *Pepperwood Ridge*, the Court of Appeal considered this zone objective (at [9]):

To conserve the rural or bushland character, and the biodiversity values or other conservation values, of the land

2.18 The Court concluded (at [43]) that these words were **not** used as words of description to identify the relevantly zoned land for the purpose of Schedule 1 of an earlier version of the Seniors Housing SEPP. The phrases scrutinised were 'environment protection' or 'conservation' (at [8]). Accordingly, the SEPP applied.

2.19 The key reason for the Court's conclusion was that such an objective is a **general** objective to be considered through the operation of a specific provision of the LEP and not necessarily always achieved in the development of the land in the zone (at [41]). The Court emphatically said that **it was not an identifying description of that land**.

2.20 This is directly applicable to the present situation. Clause 7.6(1) uses the words 'protecting' and 'conservation' but does not purport to describe the mapped biodiversity land as 'conservation' or 'protection' land.

2.21 In clause 7.6(3) a regime of **consideration** is established, but the operation of that provision does not necessarily achieve the objective.

2.22 Clause 7.6(4) is expressed in mandatory terms, however, it is not mandatory for (a) to be applied. That is, it is not mandatory for 'any significant adverse environmental impact to be avoided. It is not mandatory for (b) to be applied. That is, it is not mandatory for the management of a development to minimise its impact.

2.23 It **is** mandatory (if (a) and (b) are not applied) for any significant adverse environmental impact of development be **mitigated**. However, in our view (given that 'mitigation' plainly does not mean 'avoid' or 'minimise') this obligation falls well short of notions of conservation and/or environmental protection. All that mitigation requires is a moderation of the severity of a significant adverse environmental impact.

2.24 The above analysis is consistent with the Land and Environment Court's approach in *Australian Nursing Home Foundation* and *Rosewood Australia*.

2.25 In short, clause 7.6 does not exclude the land from the operation of the Seniors Housing SEPP.

### **Geotechnical hazard land**

2.26 Part of the site is mapped 'geotechnical hazard land' under the LEP. 'Geotechnical hazard land' is not 'environmentally sensitive land' under the Seniors Housing SEPP: *Whittaker v Northern Beaches Council (No 3)* [2018] NSWLEC 143 at [88].

## **3. Special provisions on land adjoining land zoned primary for urban purposes**

3.1 Clause 17 of the Seniors Housing SEPP is as follows:

(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*) (bold added).

3.2 The Seniors Housing SEPP defines 'serviced self-care housing' as follows:

seniors housing that consists of self-contained dwellings where the following services are available on the site: meals, cleaning services, personal care, nursing care.

3.3 The proposed development is 'serviced self-care housing'. It satisfies clause 17 of the Seniors Housing SEPP.

#### 4. The need for a site compatibility certificate

4.1 Clause 24(1) of the Seniors Housing SEPP is as follows:

This clause applies to a development application made pursuant to this Chapter in respect of development for the purposes of seniors housing ...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, ...**
  - (ii) land that is within a zone that is identified as "special uses" under another environmental planning instrument ...
  - (iii) **land that is used for the purposes of an existing registered club ...**(bold added).

4.2 Clause 24(2) of the Seniors Housing SEPP is as follows:

- (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** (bold added)...

4.3 Accordingly, a site compatibility certificate is required before development consent can be granted.

Please do not hesitate to contact me on (02) 8035 7858 if you would like to discuss this advice.

Yours sincerely




**Aaron Gadiel**  
**Partner**

Accredited Specialist — Planning and Environment