Attachment 2
to
Item 6.1.1

Land Environment Court Judgement

Date of meeting: 14 March 2023
Location: Council Chambers
Time: 6:30 p.m.

	**Land and Environment Court New South Wales**
Medium Neutral Citation:	**Bennett v Hawkesbury City Council [2022] NSWLEC 1630**
Hearing dates:	27-28 July and 18 August 2022
Date of orders:	15 November 2022
Decision date:	15 November 2022
Jurisdiction:	Class 1
Before:	McEwen AC
Decision:	The Court orders: (1) The appeal is upheld. (2) DA0055/21 for the construction of a seniors housing development comprising 19 self-contained dwellings with attached garages, demolition of existing structures, earthworks, tree removal, extension of a private road, the conversion of an existing barn to a men's shed and the extension of a private cemetery at Lot 6 and Lot 1 in DP 270827 and Lot 300 in DP 1184237 and known as 6/21, 1/21 and 7 Vincents Road (the land) is determined by the grant of consent subject to the conditions set out in Annexure A except for that part of the development being the proposed community title subdivision of the land which is not approved. (3) Exhibits A, B, G, H, J, L and 2 are retained. Exhibits C to F, K and 1, 3 and 4 are returned.
Catchwords:	DEVELOPMENT APPLICATION – seniors housing and subdivision – existing use and existing use rights – extent of land used for existing use – whether subdivision is a use of land – whether subdivision is an existing use – partial consent
Legislation Cited:	Biodiversity Conservation Act 2016 Environmental Planning and Assessment Act 1979, ss 1.5, 4.11, 4.16, 4.17, 4.19, 4.65, 4.66, 4.67, 4.70, 8.7, 8.10, Div 4.11 Environmental Planning and Assessment Regulation 2000, cll 39, 41, 42, 42(2)(b), Pt 5 Hawkesbury Local Environmental Plan 1989 Hawkesbury Local Environmental Plan 2012, cll 2.3, 2.6, 2.7, 4.1, 4.1A, 4.1AA, 4.3, 4.4, 4.6, 5.10, 6.1, 6.2, 6.3, 6.4, 6.7 Standard Instrument—Principal Local Environmental Plan State Environmental Planning Policy (Biodiversity

	and Conservation) 2021, ss 4.9, 9.4 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Housing for People with a Disability) 2004, cll 4B, 5, 6, 6.3, 25, 30, 31, 35, 36, 38, 50 State Environmental Planning Policy (Housing for Seniors or People with a Disability) Amendment (Metropolitan Rural Areas Exemption) 2020 State Environmental Planning Policy (Housing) 2021 State Environmental Planning Policy (Resilience and Hazards) 2021 State Environmental Planning Policy No 5 (Housing for Older People or People with a Disability)
Cases Cited:	Baulkham Hills Shire Council v O'Donnell (1990) 69 LGRA 404 Brinara Pty Limited v Gosford City Council (2010) 177 LGERA 296; [2010] NSWLEC 230 Broker Pty Limited v Shoalhaven City Council (2008) 164 LGERA 161; [2008] NSWCA 311 BYT Nominees Pty Limited v North Sydney Council (2008) 161 LGERA 77; [2008] NSWLEC 164 Cracknell & Lonergan Architects Pty Limited v Leichhardt Municipal Council (2012) 193 LGERA 151; [2012] NSWLEC 194 Eaton & Sons Pty Limited v Warringah Shire Council (1972) 129 CLR 270; [1972] HCA 33 Jojeni Investments Pty Limited v Mosman Municipal Council (2015) 89 NSWLR 760; [2015] NSWCA 147 Lemworth Pty Limited v Liverpool City Council (2001) 53 NSWLR 371; [2001] NSWCA 389 Mooliang Pty Limited v Shoalhaven City Council (2001) 114 LGERA 45; [2001] NSWLEC 83 Saffioti v Kiama Municipal Council (2017) 225 LGERA 136; [2017] NSWLEC 65 South Sydney City Council v Houlakis & Teakdale Pty Limited (1996) 92 LGERA 401 Starray Pty Limited v Sydney City Council [2002] NSWLEC 48 Steedman v Baulkham Hills Shire Council (No 1) (1991) 87 LGERA 26 Vaughan-Taylor v David Mitchell-Melcann Pty Limited (1991) 25 NSWLR 580 Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827
Texts Cited:	Hawkesbury Development Control Plan 2012
Category:	Principal judgment
Parties:	Kenneth Bennett (First Applicant) Pamela Bennett (Second Applicant) Hawkesbury City Council (Respondent)
Representation:	Counsel: M Hall SC (Applicants) M Cottom (Solicitor) (Respondent)

	Solicitors: Mills Oakley (Applicants) Pikes & Verekers Lawyers (Respondent)
File Number(s):	2021/334617
Publication restriction:	No

JUDGMENT

The nature of the proceedings

1. These proceedings are a Class 1 Appeal made pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) by the applicants against the deemed refusal of development application DA0055/21 (DA) by Hawkesbury City Council (respondent).

2. The DA was lodged with the respondent on 8 March 2021. The appeal was filed with the Court on 24 November 2021 within the applicable time limit prescribed by s 8.10 of the EPA Act.

3. In exercising the functions of the consent authority on appeal, the Court has the power to determine the DA pursuant to s 4.16 of the EPA Act.

The proposed development

4. The amended DA before the Court seeks development consent for the construction of a seniors housing development and the extension of a private cemetery. The seniors housing development involves the construction of 19 self-contained dwellings with attached garages, demolition of existing structures, earthworks, tree removal, extension of a private road and the conversion of an existing barn to a men's shed, as well as a community title subdivision of land being Lot 6 and Lot 1 in DP 270827 and Lot 300 in DP 1184237, known as 6/21, 1/21 and 7 Vincents Road, Kurrajong (the site).

5. In proximity to the private cemetery at the northern end of the site it is proposed to erect a columbarium, which is a structure or memorial wall in which cremated remains of deceased persons are able to be appropriately stored.

6. The majority of the proposed works associated with the seniors housing development and cemetery are to be located on Lot 6 in DP 270827 (Lot 6), however an existing internal access road within Lot 1 in DP 270827 will be utilised and extended to provide access to the proposed seniors

housing development within Lot 6. The site is adjacent to an established seniors housing facility approved by the respondent in 1999.

The site and its context

7. A statement of agreed facts (Ex G) describes the site and its context. Lot 6 has an area of approximately 5.389 ha and has frontage to both Vincents Road and Old Bells Line of Road, but its primary access is via Lot 1. The majority of Lot 6 is vacant, with the exception of three outbuildings and two dams. A relatively level area of the site adjoining Old Bells Line of Road is also used as a private cemetery, which is accessible from Old Bells Line of Road.

8. Lot 6 is located within the 'Tallowood Village' and is the existing seniors housing development. The existing development consists of 16 self-contained dwellings, internal access roads, community centre, private park and communal facilities.

9. Lot 6 is zoned RU1 Primary Production under Hawkesbury Local Environmental Plan 2012 (HLEP 2012). The private cemetery and columbarium are permitted in the RU1 zone with development consent. Development for the purposes of residential accommodation other than dual occupancies (attached), dwelling houses and rural workers' dwellings is prohibited in the RU1 zone. Accordingly, seniors housing is a prohibited land use pursuant to HLEP 2012.

10. Lot 6 is within an area identified as a 'metropolitan rural areas exclusion zone' on the metropolitan rural areas exclusion zone map referred to in cl 4B of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Housing for Seniors SEPP 2004).

11. The community lot of the Tallowood Village (Lot 1) has an area of approximately 1.793 ha. This community land contains the Tallowood sewerage treatment plant, communal access roads, a community centre, private park and shared facilities such as mailboxes and a waste storage area.

12. The suburb of Kurrajong is located approximately 70 km north of Sydney's central business district and approximately 10 km north of Richmond.

13. The site is located within 500 m of the Kurrajong town centre.

14. The locality is characterised by residential properties, rural residential properties, rural properties, seniors housing, agricultural properties and some remnant bushland.

History of relevant consents

15. On 15 June 1999 development consent MA0844/98 (original consent) was granted under State Environmental Planning Policy No 5—Housing for Older People or People with a Disability (SEPP 5) for the 'construction of aged/disability housing on lot 19 DP874188 (lot 19).' The original consent, subsequently modified, was acted upon and gave rise to the 'Tallowood Village' seniors housing development referred to above. As will be seen, it is this original consent and its current status as an 'existing use' or otherwise, which is a primary focus of consideration in this judgment.

16. On 6 January 2005 development consent DA1106/04 approved a private burial site on Lot 19. Its current location within the northwest corner of Lot 6 is a result of a subsequent modification and the subdivision of Lot 19.

17. On 28 September 2012 development consent DA0014/12 (subdivision consent) approved a 19-lot community title subdivision of Tallowood Village.

18. Lot 6 was formerly part of Lot 19, which was divided into Lot 10 and Lot 11. Lot 6 resulted from the subdivision of Lot 10, which was registered on 8 May 2014 (Ex K). It was created pursuant to a modification of the subdivision consent on 11 March 2013.

19. Lot 6 lies adjacent to the existing Tallowood Village development and is the land upon which the proposed development is to be primarily carried out.

20. Because seniors housing development is prohibited on Lot 6 pursuant to HLEP 2012, the applicants rely upon the 'existing use' provisions in Div 4.11 of the EPA Act to authorise the DA.

21. The parties are at issue as to whether Lot 6 has 'existing use' rights stemming from the original consent and, if so, whether they are sufficient to sustain the grant of development consent to the proposed development which proposes both construction of additional seniors dwellings and community title subdivision.

The planning instruments governing permissibility of the proposed use

22. On 15 June 1999 when the original consent was granted, seniors housing development was permissible development on the land pursuant to both Hawkesbury Local Environmental Plan 1989 (HLEP 1989) and SEPP 5.

The original consent was granted pursuant to SEPP 5 largely because SEPP 5 permitted subdivision of seniors housing development with no minimum lot size, whereas HLEP 1989 required a 10-ha minimum lot size. Each of the proposed lots were less than 10 ha.

23. On 31 March 2004 Housing for Seniors SEPP 2004 commenced. Clause 5 of that instrument repealed SEPP 5 subject to a 'transitional provision' in cl 6 of Housing for Seniors SEPP 2004, to which I will return in more detail later in this judgment.

24. On 21 September 2012, HLEP 1989 was repealed by HLEP 2012. Under HLEP 2012 Lot 19 (which now includes Lot 6) is zoned RU1 Primary Production. In that zone, aged persons housing or seniors housing is an innominate use of land which is prohibited. However, that use continued to be permissible on Lot 19, and therefore Lot 6, pursuant to Housing for Seniors SEPP 2004 until 29 July 2020, when Housing for Seniors SEPP 2004 was amended by State Environmental Planning Policy (Housing for Seniors or People with a Disability) Amendment (Metropolitan Rural Areas Exemption) 2020. The amending instrument added cl 4B to Housing for Seniors SEPP 2004.

25. By its terms, cl 4B excludes the application of Housing for Seniors SEPP 2004 to land identified as within a 'metropolitan rural areas exclusion zone' on a map referred to in cl 4B. The map identifies land that includes the land the subject of the original consent with the consequence that Housing for Seniors SEPP 2004 no longer applied to the former Lot 19 or the current Lot 6.

26. To complete the planning and permissibility history, it is noted that Housing for Seniors SEPP 2004 was replaced by State Environmental Planning Policy (Housing) 2021 (Housing SEPP 2021) on 26 November 2021, but a savings provision within cl 2 of Sch 7 of Housing SEPP 2021 provides that the provisions of Housing for Seniors SEPP 2004, and not Housing SEPP 2021, continue to apply to the DA the subject of these proceedings because the DA was lodged on 8 March 2021, but not finally determined before 26 November 2021. It should be noted that pursuant to s 79 of Housing SEPP 2021, seniors housing is not a permitted land use on the site because it is zone RU1 Primary Production under HLEP 2012.

27. As noted above, the applicants rely upon the 'existing use' provisions in Div 4.11 of the EPA Act and the incorporated provisions pursuant to Pt 5 of

the Environmental Planning and Assessment Regulation 2000 (Regs) to sustain the permissibility of the proposed development referenced in the DA.

The issues in dispute

28. All issues between the parties with respect to the merits of the DA were resolved prior to the commencement of the hearing. It was therefore unnecessary to receive oral expert testimony. The outstanding issues relate solely to the permissibility of the proposed development for both seniors housing and community title subdivision. This is confirmed by the amended statements of facts and contentions (Ex 2) and the statement of agreed facts (Ex G). The parties have also filed an agreed jurisdictional statement (Ex L), which addresses all jurisdictional matters save for the permissibility of the proposed use of Lot 6 for seniors housing development and the proposed community title subdivision of Lot 6. I have been assisted by written and oral submissions from both parties upon the question of permissibility.

29. The applicants' summary position is that on and from 29 July 2020 when cl 4B was inserted into Housing for Seniors SEPP 2004, any use of Lot 6 for the purpose of seniors housing based upon the original consent, became prohibited development. The applicants submit that such use of Lot 6 thereby became an 'existing use' within the meaning of s 4.65(b) of the EPA Act and that accordingly the current DA for the enlargement or expansion of the existing use remains permissible development by operation of cl 42 of the Regs and remains capable of being the subject of development consent.

30. The respondent's summary position is that no 'existing use' can be established because the development approved in 1999 by the original consent remains permissible by dint of cl 6(1)(c) of Housing for Seniors SEPP 2004, which continues the effect of SEPP 5 with respect to the carrying out of the development approved by the original consent. The respondent submits that the consequence of cl 6(1)(c) of Housing for Seniors SEPP 2004 is that the continued use for seniors housing remains permissible and accordingly, cannot provide the necessary foundation for an 'existing use' as defined in s 4.65 of the EPA Act. The respondent further submits that the DA cannot therefore rely upon the incorporated provisions in Pt 5 of the Regs to enlarge or expand the use because the incorporated provisions are only engaged upon the establishment of an 'existing use'.

31. With regard to the proposed community title subdivision, the respondent submits that because neither SEPP 5, Housing for Seniors SEPP 2004 nor Housing SEPP 2021 apply to the proposal, the only pathway for approval is via cl 2.6 of HLEP 2012. The respondent further submits that whilst HLEP 2012 permits community title subdivision of land with development consent, that consent cannot be granted in the circumstances of this DA because the proposed lot sizes each have an area less than the minimum 10 ha lot size contrary to cl 4.1AA of HLEP 2012. The respondent further submits that cl 4.6 of HLEP 2012, which can provide an exception to a development standard such as cl 4.1AA, cannot assist the applicants because it is subject to cl 4.6(6) which mandates that development consent must not be granted under cl 4.6 for a subdivision of land in zone RU1 Primary Production if the subdivision will result in two or more lots of less than the minimum area (10 ha) specified for such lots by the development standard in cl 4.1AA or will result in at least one lot that is less than 90% of the minimum area so specified. The proposed community title subdivision would have both consequences.

32. In reply, the applicants submit that the community title subdivision is ancillary to the seniors housing development and accordingly, may be ignored as an independent use. In the alternative the applicants submit that cl 4.1AA derogates from the incorporated provisions and therefore has 'no force or effect' (s 4.67(3) of the EPA Act).

Outcome of the appeal

33. For the reasons which are set out later in this judgment, I have determined pursuant to s 4.16(4)(b) of the EPA Act that the appeal should be upheld and that development consent should be granted subject to conditions for the proposed seniors housing development except for a specified aspect of the development, namely the proposed community title subdivision.

34. I am satisfied that the use of Lot 6 for seniors housing is an 'existing use' within the meaning of s 4.65(b) of the EPA Act and that as such, in conformity with cll 41 and 42 of the Regs, which are incorporated into HLEP 2012, it benefits from 'existing use' rights and may be enlarged or expanded as proposed. However, I have also determined that development consent cannot be granted for that aspect of the development which proposes the subdivision of Lot 6 by community title. This is so because, in my judgment, subdivision is not a use of land and, in any event, is not the 'enlargement,

expansion' nor 'intensification' of the 'existing use' which is for seniors housing alone and therefore the incorporated provisions are not available and no question of possible derogation can arise. Further, whilst subdivision of land is permissible with development consent via cl 2.6 of HLEP 2012, consent cannot be granted in the present case because the proposed lot sizes are each in breach of the 10-ha minimum area requirement in cl 4.1AA of HLEP 2012 and cl 4.6(6) of HLEP 2012 prevents the granting of development consent for the subdivision pursuant to cl 4.6 of HLEP 2012 in those circumstances. In my opinion, the proposed subdivision is not, of itself, a use of land but is development which is independent of seniors housing development and cannot be subsumed into that development. Finally, subdivision was not part of the development approved by the original consent and for that additional reason, cannot qualify as an 'existing use'.

Relevant statutory and planning provisions

Environmental Planning and Assessment Act 1979

Division 4.11 Existing uses

4.65 Definition of "existing use" (cf previous s 106)

In this Division, ***existing use*** means—

(a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for this Division, have the effect of prohibiting that use, and

(b) the use of a building, work or land—

(i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and

(ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.

4.66 Continuance of and limitations on existing use (cf previous s 107)

(1) Except where expressly provided in this Act, nothing in this Act or an environmental planning instrument prevents the continuance of an existing use.

(2) Nothing in subsection (1) authorises—

(a) any alteration or extension to or rebuilding of a building or work, or

(b) any increase in the area of the use made of a building, work or land from the area actually physically and lawfully used immediately before the coming into operation of the instrument therein mentioned, or

(c) without affecting paragraph (a) or (b), any enlargement or expansion or intensification of an existing use, or ...

4.67 Regulations respecting existing use (cf previous s 108)

(1) The regulations may make provision for or with respect to existing use and, in particular, for or with respect to—

(a) the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use, and

(b) the change of an existing use to another use, and

(c) the enlargement or expansion or intensification of an existing use.

(d) (Repealed)

(2) The provisions (in this section referred to as ***the incorporated provisions***) of any regulations in force for the purposes of subsection (1) are taken to be incorporated in every environmental planning instrument.

(3) An environmental planning instrument may, in accordance with this Act, contain provisions extending, expanding or supplementing the incorporated provisions, but any provisions (other than incorporated provisions) in such an instrument that, but for this subsection, would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.

4.70 Saving of effect of existing consents (cf previous s 109B)

(1) Nothing in an environmental planning instrument prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.

(2) This section—

(a) applies to consents lawfully granted before or after the commencement of this Act, and

(b) does not prevent the lapsing, revocation or modification, in accordance with this Act, of a consent, and

(c) has effect despite anything to the contrary in section 4.66 or 4.68.

(3) This section is taken to have commenced on the commencement of this Act.

Environmental Planning and Assessment Regulation 2000

Part 5 Existing uses

39 Definitions

In this Part:

relevant date means:

(a) in relation to an existing use referred to in section 4.65(a) of the Act—the date on which an environmental planning instrument having the effect of prohibiting the existing use first comes into force, or

(b) in relation to an existing use referred to in section 4.65 (b) of the Act—the date when the building, work or land being used for the existing use was first erected, carried out or so used.

40 Object of Part

The object of this Part is to regulate existing uses under section 4.67 (1) of the Act.

41 Certain development allowed (cf clause 39 of EP&A Regulation 1994)

(1) An existing use may, subject to this Division:

(a) be enlarged, expanded or intensified, or

(b) be altered or extended, or

(c) be rebuilt, or

(d) be changed to another use, but only if that other use is a use that may be carried out with or without development consent under the Act ...

42 Development consent required for enlargement, expansion and intensification of existing uses (cf clause 40 of EP&A Regulation 1994)

(1) Development consent is required for any enlargement, expansion or intensification of an existing use.

(2) The enlargement, expansion or intensification:

(a) must be for the existing use and for no other use, and

(b) must be carried out only on the land on which the existing use was carried out immediately before the relevant date.

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

5 Relationship to other environmental planning instruments

(1) This Policy repeals *State Environmental Planning Policy No 5—Housing for Older People or People with a Disability*.

…..

6 Transitional provisions relating to certain development applications and development

(1) Despite clause 5 (1), *State Environmental Planning Policy No 5—Housing for Older People or People with a Disability* as in force immediately before its repeal continues to apply to and in respect of the following as if it had not been repealed—

(a) any development application made under that Policy on or before 18 February 2004, but not finally determined before the commencement of this Policy, and

(b) any development application, whether made before or after the commencement of this Policy, that relates to development for which a development consent was granted under the Policy as referred to in section 80 (4) of the Act, and

(c) the carrying out of any development for which development consent was granted under the Policy before its repeal or that is granted under the Policy (as continued in force by this subclause).

…

(3) The provisions of *State Environmental Planning Policy No 5—Housing for Older People or People with a Disability*, as continued in force by subclause (1), do not apply so as to allow any enlargement, expansion or intensification of any development to which that subclause applies or any redevelopment.

4B Land to which Policy applies—metropolitan rural areas in Greater Sydney Region

(1) This Policy does not apply to land identified on the metropolitan rural areas exclusion zone map as a metropolitan rural area exclusion zone.

…

Hawkesbury Local Environmental Plan 2012

4.1AA Minimum subdivision lot size for community title schemes

(1) The objectives of this clause are as follows—

(a) to ensure that land to which this clause applies is not fragmented by inappropriate subdivisions that would create additional dwelling entitlements.

(2) This clause applies to a subdivision (being a subdivision that requires development consent) under the *Community Land Development Act 2021* of land in any of the following zones—

(a) Zone RU1 Primary Production,

…

(3) The size of any lot resulting from a subdivision of land to which this clause applies … is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

4.6 Exceptions to development standards

(1) The objectives of this clause are as follows—

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

...

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone C2 Environmental Conservation, Zone C3 Environmental Management or Zone C4 Environmental Living if—

(a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or

(b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

The use of Lot 6 for seniors housing is an 'existing use' as defined by s 4.65(b) of the EPA Act unless cl 6(1)(c) of Housing for Seniors SEPP 2004 negates that outcome

35. The definition of 'existing use' is contained in s 4.65 of the EPA Act. Because the 'existing use' is claimed to be based upon the original consent approved in 1999, it is s 4.65(b) which is applicable: *Jojeni Investments Pty Limited v Mosman Municipal Council* (2015) 89 NSWLR 760; [2015] NSWCA 147 (*Jojeni*) at [11]; *Saffioti v Kiama Municipal Council* (2017) 225 LGERA 136; [2017] NSWLEC 65 (*Saffioti*) at [73].

36. As noted above, s 4.65 of the EPA Act defines an 'existing use'. The section is definitional only. It has no operation by itself, but it allows substantive provisions in s 4.66 and s 4.67 to operate: *BYT Nominees Pty Limited v North Sydney Council* (2008) 161 LGERA 77; [2008] NSWLEC 164 at [23]; *Cracknell & Lonergan Architects Pty Limited v Leichhardt Municipal Council* (2012) 193 LGERA 151; [2012] NSWLEC 194 (*Cracknell & Lonergan Architects*) at [39].

37. Section 4.65(b) of the EPA Act defines an 'existing use' to mean:

(b) the use of a building, work or land –

> (i) for which development consent was granted before the commencement of a provision of an environmental planning instrument having the effect of prohibiting the use, and
>
> (ii) that has been carried out, within one year after the date on which that provision commenced, in accordance with the terms of the consent and to such an extent as to ensure (apart from that provision) that the development consent would not lapse.

38. The original consent was granted pursuant to SEPP 5 and approved the use of Lot 19 for the 'construction of aged/disability housing' in the form of individual dwellings and other ancillary structures. I take the expression 'aged/disability housing' to be synonymous with 'seniors housing'. It is agreed between the parties that the development was substantially carried out by about 2014 when the dwellings were located on separate lots, such that the original consent was unquestionably preserved from lapse.

39. It is further agreed that seniors housing became a prohibited land use on Lot 19 because it was land identified as within a metropolitan rural area exclusion zone upon the insertion of cl 4B into Housing for Seniors SEPP 2004 (the successor to SEPP 5) on 29 July 2020. By that date, Lot 19 had been subdivided into smaller lots, including Lot 6. The parties disagree with respect

to the effect of the prohibition upon the land the subject of the original consent. This disagreement centres upon the proper interpretation of cl 6 of Housing for Seniors SEPP 2004 and the area of land which should be regarded as having been the subject of the original consent.

40. There is no suggestion by the respondent that any of the works carried out on Lot 6 prior to 29 July 2020 were unlawful. I will summarise those works in due course. It is sufficient at this point to note that I am satisfied they were all done to either facilitate the approved dwellings sanctioned by the original consent or were works done in anticipation of the future establishment of dwellings on that part of Lot 19 which is now Lot 6.

41. To determine whether the use of Lot 6 could qualify as an existing use, it is necessary to determine what was the extent of the 'land' for which development consent was granted under the original consent. In other words, what was the scope of the consent.

42. The proper construction of the word 'land' was considered in some detail by the Court of Appeal in *Lemworth Pty Limited v Liverpool City Council* (2001) 53 NSWLR 371; [2001] NSWCA 389 (*Lemworth*) and helpfully summarised in *Starray Pty Limited v Sydney City Council* [2002] NSWLEC 48 at [22]-[23]. The starting point for that enquiry is plainly the development consent itself.

43. Where the 'existing use' is founded upon a development consent, the land which the consent is expressed to relate to will usually determine the unit of land upon which the 'existing use' is carried out: *Brinara Pty Limited v Gosford City Council* (2010) 177 LGERA 296; [2010] NSWLEC 230 (*Brinara*) at [47]; *Eaton & Sons Pty Limited v Warringah Shire Council* (1972) 129 CLR 270 at 279; [1972] HCA 33 (*Eaton*); *Lemworth* at [40]. If the land is rightly regarded as a unit and it is found that part of its area was physically used for the purpose in question, it follows that the land was used for that purpose: *Steedman v Baulkham Hills Shire Council (No 1)* (1991) 87 LGERA 26.

44. There will, in a minority of cases, be circumstances where it may be necessary to make further enquiry when the land referenced in the consent contains some areas of apparently unused land: *Lemworth* at [43] applying *Eaton* at 291. That enquiry is more likely when the existing use is said to be derived from the historical lawful use of land but is not based on a development consent (s 4.65(a) of the EPA Act).

45. When assessing whether there has been a use of the land for which development consent was granted, it will inevitably include the land actually physically used at the prohibition date, but it will also include land held in reserve for that use: *Lemworth* at [36] and [38]. Reserved land which is not actually physically used for the approved use would require consent if it was proposed to further develop it for that use (s 4.66(2)(b) of the EPA Act) but that is not a definitional question.

46. The ultimate question is whether there is some area of land including the area where the buildings are located that can fairly be regarded as part of the whole area used for the relevant purpose at the relevant time, being the prohibition date: *Lemworth* at [74]; *Brinara* at [45].

47. Further, the absence of any subsequent use of the land in dispute for a purpose other than seniors housing has the consequence that consideration of the terms of the consent, which will include its conditions, will be fundamental to, but not necessarily conclusive of, the determination of the 'use of ... land' for which development consent was granted: *Brinara* at [48-49]. This is the enquiry mandated by s 4.65(b) of the EPA Act.

48. In the present case, I am satisfied that Lot 6 is part of the land for which development consent was granted for the use of seniors housing via the original consent in 1999, and that such use was demonstrably carried on upon Lot 19, including Lot 6, as at 29 July 2020 when seniors housing otherwise became prohibited. I put to one side for the moment the disputed effect of cl 6 Housing for Seniors SEPP 2004, to which I will later return. That prohibition came about as a result of the insertion of cl 4B into Housing for Seniors SEPP 2004.

49. In the alternative, to the limited extent that it might be suggested that some parts of Lot 6 were not actually used for seniors housing as at the prohibition date (29 July 2020), I am satisfied that the whole of Lot 6 was held in reserve for that purpose and therefore satisfied the definition of 'existing use' set out in s 4.65(b) of the EPA Act. I set out my reasons below.

50. First, the DA was in respect of Lot 19, which was one cohesive unit of land at the date of the original consent. Whilst it was subsequently subdivided into smaller lots, including Lot 6, that subdivision was pursuant to a development consent for subdivision and was clearly undertaken to facilitate seniors housing approved by the original consent.

51. Second, the notice of determination of the DA specifically stated that the consent related to 'DP874188 lot 19' and further, that the consent was for 'construction of aged/disability housing'. The stamped plans issued with the original consent show that the whole of Lot 19 was land for which the development consent was granted. The stamped plans also show disposal areas and infrastructure facilities to be located within the land which subsequently became Lot 6.

52. Further, none of the conditions imposed by the original consent sought to limit the use of any part of the land for the approved purpose (Ex C tab 9) and the parties agree that the approved plans also show a sewerage treatment plant on that part of the land which subsequently became Lot 6 (Ex G p 4). Whilst it is correct to observe that subsequent modifications of the original consent relocated this infrastructure outside Lot 6, that fact, in my opinion, does not detract from the intent of the original consent.

53. Third, development consent was granted for the subdivision of Lot 9 and Lot 10 in DP 1167912 into 19 community title lots. Lot 9 and lot 10 were formerly part of Lot 19. Condition 2 of that subdivision consent required the entire property, which included Lot 6, to be managed as an inner protection area and asset protection zone for the dwellings approved pursuant to the original consent (Ex C tab 17, Ex K tab 6). Subsequent aerial photographs, including a 2021 aerial map (Ex K tab 12) show that the land, and in particular Lot 6, was in a fuel reduced mown state entirely consistent with the Rural Fire Service requirements as set out in Condition 2 (Ex K tab 12). As previously noted, the plan of subdivision creating Lot 6 was registered on 8 May 2014 (ex K tab 11).

54. Whilst it is clear that the requirement for the asset protection zone arose from the subdivision consent, that consent was granted for the purpose of placing the approved dwellings on separate allotments and it provides compelling evidence in support of the use of Lot 6 for the purpose of seniors housing as was approved by the original consent.

55. Fourth, the documentary evidence, in particular Exs C, D, K and 3 satisfies me that Lot 6 and the structures located upon it and throughout it were used to service and enhance the approved seniors housing development. The location of this infrastructure on Lot 6 is clearly shown and labelled on the aerial photograph identifying the boundaries of Lot 6 (Ex K tab 12) and includes the following:

1. Water, sewer and drainage easements containing pipes which service the Tallowood development;
2. Dams and a bore used to irrigate the Tallowood gardens surrounding the approved dwellings;
3. A maintenance barn/men's shed, a pump shed and an equipment shed used by residents or for the benefit of the approved Tallowood seniors community (Ex 3 pp 324-325);
4. A chicken enclosure tended by, or on behalf of, the senior residents;
5. The well-kept garden-like appearance of Lot 6 displaying no signage, fencing or other barrier preventing access by residents;
6. Whilst there is limited direct evidence on this point, I am of the opinion that it is reasonable to infer that the 'grounds' of Lot 6 were available for the recreational use and enjoyment by the residents of the seniors development and their guests. It is also reasonable to infer that the 'grounds' were in fact used for that purpose from time to time due to their proximity to the Tallowood development. Indeed, in all the circumstances it is difficult to envisage what other purpose they could have served, particularly since they were isolated from the established private cemetery in the upper corner of Lot 6 by dense vegetation and the very steep terrain at the bottom of the cemetery;
7. Electricity, water and NBN extension nodes have been established on Lot 6 in anticipation of the expansion of the Tallowood community by the intended future construction of seniors housing dwellings on Lot 6 (Ex D tabs 3 and 6, Ex K tabs 1 and 2).

56. All of the above items either existed at the time of the original consent in 1999 or were installed in the period 2011 to 2014 prior to, or at the time of, the construction of the approved dwellings in readiness for their separate occupation by Tallowood residents.

57. Based upon the evidence above, I am satisfied that the use of Lot 6 as at 29 July 2020 was for 'seniors housing' and that Lot 6 was part of the land for which development consent was granted in 1999 pursuant to the original consent. Accordingly, that use qualifies as an 'existing use' within the meaning of s 4.65(b) of the EPA Act unless the proper interpretation of cl 6(1)(c) of Housing for Seniors SEPP 2004 negates that outcome. It is to that question to which I now turn.

Clause 6(1)(c) of Housing for Seniors SEPP 2004 does not operate to prevent the use of Lot 6 being an 'existing use'

58. The respondent submits that the effect of cl 6(1)(c) of Housing for Seniors SEPP 2004 is that the authorised use (seniors housing) remains permissible on the land because it is an aspect of the development for which consent was granted in 1999. Accordingly, it is not prohibited and cannot qualify as an 'existing use'.

59. The applicants submits that a clear distinction must be drawn between the use of land which is the subject of s 4.65 of the EPA Act and the 'carrying out of development' which is the subject of cl 6(1)(c) of Housing for Seniors SEPP 2004. Its protection is limited and preserves only the right to carry out the specific development approved by the original consent. It does not extend to any future use of Lot 6, which would include the construction of further dwellings for use as seniors housing with development consent. So understood says the applicants, the continued use of Lot 6 is now prohibited except to the limited extent permitted by the original consent and therefore it qualifies as an 'existing use'.

60. I agree with the reasoning and the conclusion of the applicants. Clause 6(1)(c) of Housing for Seniors SEPP 2004 makes no reference to 'use'. It stands in stark contrast to s 4.65 of the EPA Act, which defines 'existing use' by reference to the use of a building, work or land.

61. Clause 6(1)(c) of Housing for Seniors SEPP 2004 can have no application to a new development application. It focuses on an existing development consent. It is concerned with the undertaking of approved development and not with the approval of future development: 'The carrying out of any development for which development consent was granted'. This limitation is confirmed by cl 6(3) of Housing for Seniors SEPP 2004, which expressly mandates that SEPP 5 as continued in force by subcl 6(1) of Housing for Seniors SEPP 2004 does not apply 'so as to allow any enlargement, expansion or intensification of any development to which that sub-clause applies or any redevelopment.' Such development was permissible pursuant to Housing for Seniors SEPP 2004 until 29 July 2020 when cl 4B was inserted into and disapplied Housing for Seniors SEPP 2004 whereupon the prohibition upon the land use of seniors housing in HLEP 2012 was enlivened with respect to the land.

62. In the Court's opinion, the right to continue a land use must include the right to make further applications for the use of that land, which would include the right to have an application assessed for the construction of buildings to serve that purpose. It is agreed by the parties that this is no
longer possible without reliance upon the incorporated provisions contained in the Regs because of the prohibitory effect of HLEP 2012.

63. Clause 6(1)(c) of Housing for Seniors SEPP 2004 does not operate so as to displace the prohibition on 'use' effected by cl 4B of Housing for Seniors SEPP 2004 which closed the singular pathway for consent previously open via Housing for Seniors SEPP 2004. Section 4.65(b) of the EPA Act focuses upon the provision of an environmental planning instrument 'having the effect of prohibiting the use' (emphasis added). That provision is the Land Use Table for RU1 zoned land in HLEP 2012. It prohibits the use of seniors housing upon the subject land.

64. I note that the operative wording in cl 6(1)(c) of Housing for Seniors SEPP 2004 is in similar terms, and to a similar effect as s 4.70(1) of the EPA Act (formerly s 109B):

4.70 Saving of effect of existing consents

(1) Nothing in an environmental instrument prohibits, or requires a further development consent to authorise, the carrying out of development in accordance with a consent that has been granted and is in force.

(Emphasis added)

65. The limitations of s 109B were considered by Craig J in *Cracknell & Lonergan Architects* at [48]-[51]. His Honour pointed out that s 109B does not safeguard or secure the use of land except insofar as it is detailed in the consent or authorised by s 4.19 of the EPA Act and in which case, it is limited to the use of the building itself, and then only after it has been erected for its approved purpose. It is a separate and a lesser right than the rights which pertain to an 'existing use'. It limits the entitlement to those which arise directly from the preserved consent and those rights do not extend to the making of a further development application.

66. The distinction between the effect of the wording in s 4.70 and s 4.65 of the EPA Act was also considered by Leeming JA in *Jojeni* at [103]-[104].

67. His Honour stated that s 109B of the EPA Act was subordinate to s 106 (now s 4.65) of the EPA Act and did not subtract from the class of uses which are

defined to be ‘existing uses’ by s 4.65 of the EPA Act. Section 4.70(1) (previously s 109B) of the EPA Act simply provides an additional immunity for the carrying out of development: at [103]-[106]. Based upon that reasoning, Leeming JA rejected the Council’s argument that by reason of the continuing effect of s 4.70 of the EPA Act, the land did not have the benefit of an existing use because the local environmental plan did not prohibit the use of the land for the particular purpose: at [95] and [106].

68. I adopt a similar reasoning with respect to the true meaning and effect of cl 6(1)(c) of Housing for Seniors SEPP 2004. It operates to preserve the original consent but does not prevent the use of the land being an existing use in circumstances where HLEP 2012 prohibits seniors housing and there no longer exists an alternate pathway to permissibility via Housing for Seniors SEPP 2004.

69. Accordingly, I find that Lot 6 has the benefit of existing use rights and development for the purpose of seniors housing which seeks to enlarge, expand or intensify that use is therefore permissible development pursuant to cl 42 of the Regs, which is incorporated into HLEP 2012 as mandated by s 4.67(2) of the EPA Act.

Constraints imposed on existing uses – ss 4.65, 4.66 of the EPA Act and cl 42 of the Regs

70. Before considering whether development consent can be granted for the proposed community title subdivision, I will address very briefly the parties’ submissions with respect to the relevance of the different time limits in ss 4.65(b), 4.66(2)(b) of the EPA Act and cl 42(2)(b) of the Regs and the constraints, if any, which they impose upon the further development of Lot 6. I should say at the outset that based upon the evidence and the reasonable inferences that can be drawn from it, I do not believe that the differences are of any particular relevance to my ultimate determination.

71. Section 4.65(b) of the EPA Act limits the parameters of an ‘existing use’ to the use of land for which the consent was granted immediately ‘before the commencement of a provision having the effect of prohibiting that use.’ I have earlier determined that this date was 29 July 2020. The parties agree that the development was carried out sufficiently to prevent lapse well before that date and probably as early as 2001, when approved roadworks were commenced

pursuant to the original consent. The totality of the works was carried out by 29 July 2020 and in such circumstances, it is unnecessary to consider the effect of s 4.65(b)(ii) of the EPA Act, which in other circumstances provides an additional 12 months to carry out the approved use to such an extent as to ensure that the development consent will not lapse.

72. Section 4.66(1) of the EPA Act permits the continuance of an 'existing use' without further approval, subject to the constraints contained in s 4.66(2) of the EPA Act. Section 4.66(2)(b) states that nothing in subs (1) authorises 'any increase in the area of the use made of ... land from the area actually physically and lawfully used immediately before the coming into force' of the prohibitory instrument (emphasis added).

73. It is important to recognise that this limitation is not intended to limit the area of the existing use established under s 4.65 of the EPA Act, but rather to make it clear that further development beyond the area of the land that was physically and lawfully used as at 29 July 2020 requires further development consent before it can lawfully take place: *Vaughan-Taylor v David Mitchell-Melcann Pty Limited* (1991) 25 NSWLR 580; *Lemworth* at [72].

74. By way of example, vacant land held in reserve for mining but not actually being mined or otherwise actually physically used can, nonetheless, be land 'used' for that purpose within the meaning of s 4.65 of the EPA Act, but its continued use by further development will require further consent pursuant to the incorporated provisions if at the date of prohibition of the land use, no physical use can be established on the vacant or reserved land.

75. In the present case I am satisfied that Lot 6 was actually physically put to use for the benefit of the development approved by the original consent. This is demonstrated by the installation of infrastructure to service the approved housing and the establishment of an asset protection zone within Lot 6.

76. The parties are agreed nevertheless, that the development now proposed in the DA amounts to an enlargement or expansion of the use (which I have found is an 'existing use') and that reliance must be placed upon the incorporated provisions in order to obtain development consent.

77. Clause 42(2)(b) of the Regs (an incorporated provision) relevantly limits the enlargement, expansion or intensification of the existing use to 'the land on which the existing use was carried out immediately before the relevant

date' (emphasis added). Clause 39 of the Regs defines 'relevant date' to mean 'in relation to an existing use referred to in s 4.65(b) of the Act – the date when the building, work or land being used for the existing use was first erected, carried out or so used.' This date is usually coincident with the date upon which the development is completed so as to enable the approved development or land to be occupied for that purpose. Commonly, the 'first use' date can be earlier in time than the date of prohibition.

78. Based upon the documents contained in Ex D and Ex K, I am satisfied, as submitted by the applicants, that the 'relevant date' was toward the latter end of the period 2012 to 2014. During this period, as I have previously set out in some detail, roadworks, electrical, water, sewerage and communications works were installed to prepare for the subsequent use of the approved buildings for occupation. This appears to have occurred in and after 2014, when the community title subdivision was registered. Further, it is reasonable to infer that the asset protection zone had been fully established upon Lot 6 prior to the registration of the plan of subdivision because its provision was a condition of the 2012 consent for community subdivision of the land.

79. It follows in my view that Lot 6 qualifies as land upon which the existing use was carried out immediately before a date in 2014 (the relevant date). This corresponds with the time when the buildings and land were able to be first used for the existing use. Accordingly, the DA may be lodged for the proposed seniors housing upon Lot 6 with reliance upon cl 42 of the Regs.

Development consent cannot be granted to the proposed community title subdivision of Lot 6

80. In the Court's opinion, the starting point is that, as agreed by the parties, whilst subdivision is development in accordance with the definition of development in s 1.5(1)(b) of the EPA Act, subdivision itself does not involve any use of land: *Broker Pty Limited v Shoalhaven City Council* (2008) 164 LGERA 161; [2008] NSWCA 311 at [85]-[87]; *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [28]; *Mooliang Pty Limited v Shoalhaven City Council* (2001) 114 LGERA 45; [2001] NSWLEC 83 (*Mooliang*) at [84].

81. The above finding is consistent with the fact that neither the Standard Instrument—Principal Local Environmental Plan nor HLEP 2012 list 'subdivision' as a use of land in the Land Use Tables. Instead, cl 2.6(1) of

HLEP 2012 makes separate provision for the subdivision of land with development consent.

82. The establishment of an existing use is premised, relevantly, upon there being an existing use of land: s 4.65 of the EPA Act. It must follow therefore that subdivision cannot qualify as an existing use and accordingly, cannot exercise the privileges of existing use rights such as those in the incorporated provisions and in particular the right to apply for the enlargement, expansion or intensification of an existing use by reliance upon cl 42 of the Regs: *Saffioti* at [10]. The regulation making power in s 4.67(1) of the EPA Act is limited to the making of "provision for or with respect to 'existing use'." Thus, it cannot apply to subdivision.

83. Even if, contrary to my finding above, the incorporated provisions could somehow be relied upon, I am of the opinion that subdivision does not fall within the ambit of 'enlargement, expansion or intensification' as referred to in s 4.67(2) of the EPA Act or cl 42 of the Regs.

84. The proposed subdivision would not amount to an enlargement, expansion or intensification of the existing use (seniors housing) but would merely reflect a change in title. Planning controls are concerned with the use of land rather than the method of ownership, occupation or the identity of the owners: *Mooliang* at [54]. Whilst the terms 'enlargement, expansion and intensification' are not defined in the EPA Act, they are relatively common words and should be given their ordinary meaning. These concepts were considered at some length by Beazley JA in *South Sydney City Council v Houlakis & Teakdale Pty Limited* (1996) 92 LGERA 401 at 406-407. Her Honour gave consideration to the dictionary definitions of each word. These definitions support the view to which I have come, namely that subdivision is not contemplated as being within the ambit of the limiting terms in cl 42 of the Regs.

85. In an effort to overcome the above formidable barriers, the applicants submit that consent may be granted to the proposed subdivision because a proper characterisation of the existing use is 'seniors living in the form of a village cluster of subdivided individual titles' and that the proper characterisation of the use includes subdivision. The applicants further make reference to the statement of environment effects (SEE) which accompanied the DA (Ex C tab 9) and which states that 'the estate is proposed to be in the form of a

community title ...' but the applicants fairly concede that there is no incorporation of the SEE into the original consent.

86. Alternatively, the applicants submit that if the use of Lot 6 for seniors housing is an existing use, cl 4.1AA would derogate from the incorporated provisions and therefore be of no force or effect. This outcome is mandated by s 4.67(3) of the EPA Act.

87. I cannot agree with the applicants' submissions. The notice of determination of the grant of the original consent describes the approved development as 'construction of aged/disability housing' (Ex C tab 9). It makes no reference to subdivision of Lot 19. It does not incorporate the SEE which, in any event, did not request development consent for subdivision. This is highlighted by the fact that it was not until 2012 that the applicants made and were granted a separate development consent for subdivision of the land.

88. Characterisation of the original consent and the existing use must focus fundamentally upon the consent itself. The absence of any reference to subdivision and the fact that no subdivision plan was lodged with the DA confirms that the subdivision formed no part of the DA and no part of the development for which development consent was originally granted.

89. Insofar as the applicants claim that the subdivision is ancillary to the seniors housing and therefore may be ignored as a separate form of development, I am of the opinion that that submission must be rejected. It is a separate form of development which is independent from use for the purpose of seniors housing and is not deprived of that quality because it is ancillary to, or related to, or inter-dependent with, another use or development: *Baulkham Hills Shire Council v O'Donnell* (1990) 69 LGRA 404 at 409-410. This outcome is corroborated by the fact that both Housing for Seniors SEPP 2004 and HLEP 2012 provide provisions regulating the subdivision of land which are independent of, and additional to, the provisions controlling the general format of housing development. In the Court's opinion, to accede to the applicants' submission could mean that almost any application for subdivision which related to, and accompanied a development application for another type of permissible development might be subsumed into that development and its permissibility per se, or its permissibility conditional upon it complying with minimum lot sizes or other limiting conditions, could be ignored. In the Court's

opinion, such an outcome would be contrary to the intent of the EPA Act and the individual planning provisions governing subdivision of land.

Further matters for consideration under s 4.15 of the EPA Act and jurisdictional requirements

90. As previously noted, all merit issues in this appeal were resolved between the parties prior to the commencement of the hearing and they have filed 'without prejudice' agreed conditions of consent (Ex J).

91. There are further jurisdictional prerequisites that must be satisfied prior to the Court exercising the functions set out in s 4.16 of the EPA Act. These were identified by the parties in a joint jurisdictional statement (Ex L) which includes the parties' explanation as to their satisfaction as to how these prerequisites have been satisfied. The matters of relevance, which I have considered and in respect of which I am satisfied, are quoted below. I have retained the paragraph numbers used in Ex L.

"21. The following controls are relevant to the determination of the Development Application:

a. The EPA Act;

b. Environmental Planning and Assessment Regulation 2000;

c. *Biodiversity Conservation Act 2016*;

d. State Environmental Planning Policy (Resilience and Hazards) 2021;

e. State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004;

f. State Environmental Planning Policy (Biodiversity and Conservation) 2021;

g. State Environmental Planning Policy (Housing for People with a Disability) 2004; and

h. Hawkesbury LEP 2012.

22. The site the subject of the Development Application is zoned RU1 Primary Production under the Hawkesbury LEP 2012.

23. The Development Application complies with the relevant jurisdictional requirements of the controls.

State Environmental Planning Policy (Resilience and Hazards) 2021

24. Chapter 4 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (**Resilience and Hazards SEPP**) requires the consent authority to consider whether land is contaminated prior to granting consent to carrying out any development on that land and, if the land is contaminated, be satisfied that the land is suitable in its current state or will be after remediation for the purpose for which the development is proposed to be carried out.

25. On 29 April 2022, the Applicants was granted leave to rely upon a Detailed Site Investigation prepared by Martens Consulting Engineers, dated October 2021, which

confirmed that the Site is suitable for the proposed development (Tab 8, Exhibit JN-1 (Ex B)). Conditions have been prepared requiring compliance with the recommendations of the Detailed Site Investigation Report.

26. The Site is suitable for its proposed use and satisfies the requirements of the Resilience and Hazards SEPP.

State Environmental Planning Policy (Building and Sustainability Index: BASIX) 2004

27. State Environmental Planning Policy (Building and Sustainability Index: BASIX) 2004 (**BASIX SEPP**) applies to the development and aims to encourage sustainable residential development.

28. The Applicants filed a NatHERS and BASIX Assessment Report, prepared by Efficient Living, dated 12 December 2021 with the Class 1 Application (Tab 24, Class 1 Application [Ex H]). Stamped NatHERS plans were filed with the Class 1 Application (Tab 20, Class 1 Application [Ex H]).

29. On 29 April 2022, the Applicants were granted leave to rely upon an updated BASIX Commitments Plan (Drawing 945, BASIX Commitments, Rev 2, dated 5 April 2022) (Tab 1, Exhibit JN-1 (Ex B)).

30. The proposed development achieves compliance with the BASIX water, energy and thermal efficiency targets. The development complies with the requirements of the BASIX SEPP.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

31. Chapter 4 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (**Biodiversity and Conservation SEPP**) applies to the City of Hawkesbury.

32. On 29 April 2022, the Applicants were granted leave to rely upon Biodiversity Development Assessment Report prepared by Ecological Consultants Australia, dated April 2022 (**BDAR**) (Tab 6, Exhibit JN-1 (Ex B)).

33. The BDAR confirms:

a. A koala assessment has been undertaken in accordance with section 4.9 and section 9.4 of the Biodiversity and Conservation SEPP. The Site does not contain areas of optimal koala habitat. Vegetation to be retained will be maintained and will satisfy APZ requirements. Patches of retained vegetation will also ensure that connectivity within the landscape is maintained. Tree removal will occur however the development has been designed to ensure areas of native vegetation can be retained and enhanced.

34. In accordance with s 9.4 of the Biodiversity and Conservation SEPP, a Due Diligence Aboriginal Heritage Assessment Report prepared by Coast History and Heritage, dated 4 December 2020, was filed with the Class 1 Application (**AHAR**) (Tab 22, Class 1 Application (Ex H)).

a. The AHAR confirms that there are no previously recorded Aboriginal sites within the study area or close by. The potential for the presence of Aboriginal objects within the study area is low.

b. The Deerubbin Local Aboriginal Land Council have been consulted and confirmed that they have no objection to the proposed development.

35. The following documents were also filed by the Applicants in accordance with section 9.4 of the Biodiversity and Conservation SEPP:

a. A Tree Impact Assessment Report prepared by Mark Bury Consulting (Tab 16, Exhibit JN-1 (Ex B)).

b. A Fire and Vegetation Management Plan, prepared by Kingfisher Urban Ecology, dated October 2021 (Tab 10, Exhibit JN-1 (Ex B)).

c. Onsite Waste Water Management Assessment (Tab 14, Class 1 Application (Ex H)).

36. The proposed development will not exceed the environmental capacity of the Site and the proposal will not have any significant impact on the quality of water runoff from the Site. The proposed development therefore complies with the requirements of the Biodiversity and Conservation SEPP.

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

37. As the application before the Court is made pursuant to 'existing use rights', certain clauses of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (**HSPD SEPP**) are relevant to the assessment of the application.

38. The following documents have been prepared in accordance with the requirements of the HSPD SEPP:

a. Biodiversity Development Assessment Report prepared by Ecological Consultants Australia, dated April 2022 (**BDAR**) (Tab 6 and 7, Exhibit JN-1 (Ex B)).

i. As required by clause 25(5)(b), clause 30 of HSPD SEPP.

b. Bushfire Assessment Report, prepared by Building Code and Bushfire Hazard Solutions, dated 11 February 2021 (Tab 10, Class 1 Application (Ex H)) and Bushfire Assessment – Request for Review, prepared by Building Code and Bushfire Hazard Solutions, dated 25 August 2021 (Tab 9, Exhibit JN-1 (Ex B)).

i. As required by chapter 3 and clause 25(5)(b) of HSPD SEPP.

c. Due Diligence Aboriginal Heritage Assessment Report prepared by Coast History and Heritage, dated 4 December 2020 (**AHAR**)(Tab 22, Class 1 Application (Ex H)).

i. As required by clause 30 of HSPD SEPP.

d. Preliminary Historical Heritage Assessment prepared by Coast History and Heritage, dated December 2020 (Tab 16, Class 1 Application (Ex H)).

i. As required by clause 30 of HSPD SEPP.

e. Onsite Waste Water Management Assessment prepared by BCM Property, dated 10 February 2021 (Tab 14, Class 1 Application (Ex H))

i. As required by chapter 3 and clause 30 of HSPD SEPP.

f. Operation Waste Management Plan prepared by Elephants Foot, dated 14 September 2020 (Tab 14, Exhibit JN-1 (Ex B))

i. As required by clause 39 of the HSPD SEPP.

g. Access Report prepared by Vista Access Architects (Tab 5, Exhibit JN-1 (Ex B)).

i. As required by clause 38 of the HSPD SEPP.

h. Concept Stormwater Management Report prepared by Martens Consulting Engineers, dated January 2021 (Tab 11, Class 1 Application (Ex H)).

i. As required by clause 33 of the HSPD SEPP.

i. Tree Impact Assessment Report prepared by Mark Bury Consulting, dated 19 February 2022 (Tab 16, Exhibit JN-1 (Ex B)).

i. As required by clause 30 of HSPD SEPP.

j. Detailed Site Investigation prepared by Martens Consulting Engineers, dated October 2021, which confirmed that the Site is suitable for the proposed development (Tab 8, Exhibit JN-1 (Ex B)).

i. As required by clause 33 of HSPD SEPP.

k. Survey Plan prepared by McKinley Morgan and Associates (Tab 12, Class 1 Application (Ex H)))

i. As required by clause 30 of HSPD SEPP.

l. Architectural Plans prepared by Environa Studio (Tab 1, Exhibit JN-1 (Ex B)).

i. As required by clause 30, cl 35, cl 38 and cl 50 of the HSPD SEPP.

m. Landscape Plans prepared by John Lock and Associates (Tab 7, Class 1 Application (Ex H)).

i. As required by clause 30, clause 31, clause 33 and clause 38 of the HSPD SEPP.

n. Engineering Plans prepared by Martens and Associates (Tab 2, Exhibit JN-1 (Exhibit B)).

i. As required by clause 36 of the HSPD SEPP.

39. The above documents collectively demonstrate that the proposed development is consistent with the provisions, objectives and aims, as applicable, of the HSPD SEPP, including:

a. The dwellings provide appropriate accommodation for seniors or people with a disability as detailed in the Access Report prepared by Vista Access Architects (Tab 5, Exhibit JN-1 (Ex B)).

b. The siting of the dwellings relates to the contours of the site and the dwelling designs are stepped in response to the moderate fall of the land.

c. The development is setback for the site boundaries to allow for the retention of vegetation on the western side of the site, minimises the visual impact of the development from the public domain and provide adequate separation to the adjoining residential properties.

d. The development maintains the amenity of the nearby residential properties and does not result in any non-complying impacts in terms of overshadowing, loss of privacy, loss of views or visual impacts.

e. The development will not result in any unacceptable impacts on the natural environment as detailed in the Tree Impact Assessment Report prepared by Mark Bury Consulting, dated 19 February 2022 (Tab 16, Exhibit JN-1 (Ex B)) and BDAR (Tab 6 and 7, Exhibit JN-1 (Ex B)).

f. The dwellings will meet the construction requirements for buildings in bushfire prone land.

g. The development uses the existing services connections and capacity available to the Tallowood development.

40. As such the proposal is considered to be in the public interest, subject to the contested issues regarding permissibility (contentions 1 and 2).

Hawkesbury Local Environmental Plan 2012

41. Subject to permissibility, the proposal will be in the public interest because it is consistent with the objectives of the particular standards and the objectives for the development within the zone in which the development is proposed to be carried out.

Clause 2.3 Zoning and Permissibility

42. In respect of clause 2.3 of the LEP, the Site is zoned RU1 Primary Production. The consent authority, must have regard to the objectives set out in the Land Use Table in the LEP in the RU1 zone, namely:

• To encourage sustainable primary industry production by maintaining and enhancing the natural resource base.

• To encourage diversity in primary industry enterprises and systems appropriate for the area.

• To minimise the fragmentation and alienation of resource lands.

• To minimise conflict between land uses within this zone and land uses within adjoining zones.

• To encourage agricultural activities that do not rely on highly fertile land.

• To ensure that development occurs in a way that does not have a significant adverse effect on water catchments, including surface and groundwater quality and flows, land surface conditions and important ecosystems such as waterways.

• To promote the conservation and enhancement of local native vegetation including the habitat of threatened species, populations and ecological communities by encouraging development to occur in areas already cleared of vegetation.

• To ensure that development retains or enhances existing landscape values including a distinctive agricultural component.

• To ensure that development does not detract from the existing rural character or create unreasonable demands for the provision or extension of public amenities and services.

43. The consent authority can be satisfied that the Site does not support an economically viable orchard or agricultural activity. The use of the site for agricultural activities would also result in a greater impact on the natural environment.

44. The site of the proposed development for seniors housing is currently a vacant and predominately cleared area of land. The site of the proposed commemorative barn/columbarium is adjacent to the existing cemetery and would not be suitable for primary production.

45. On 29 April 2022, the Applicants were granted leave to rely upon a Biodiversity Development Assessment Report, prepared by Ecological Consultants Pty Ltd (Tab 6,

Exhibit JN-1 (Ex B)) which confirms that the proposed development will not result in any significant impact on local native vegetation, populations or ecological communities.

46. The proposed development will not result in any significant impact on local nature vegetation, populations and ecology.

47. The proposed development seeks to maintain the landscaped areas which will be managed to increase the biodiversity on the Site.

48. The proposed development is set back from the roads and side boundaries. The development will sit below the level of the roads and will be screened by existing trees, and as such, will not detract from the existing character of the local area.

49. The proposed development seeks to extend the services provided to Stage 1 Tallowood and as such will not create unreasonable demands for the provision of public amenities and services.

50. For these reasons, the proposed development is consistent with the objectives of the RU1 zone as set out in the Land Use Table in the LEP.

Clause 2.7 Demolition

51. In respect of clause 2.7 of the LEP, development consent must be granted for and prior to the demolition of a building or work. The proposal complies with clause 2.7 as it seeks consent for demolition of the structures on the Site. The structures on 7 Vincents Road have recently been demolished under a Complying Development Certificate.

Clause 4.1 – Minimum Subdivision Lot Size

52. In respect of clause 4.1, 4.1A, 4.1AA and the 'Lot Size Map' of the LEP, a minimum lot size of 10 hectares applies to the Site. While it is agreed that clauses 4.1 and 4.1A of the LEP do not apply, the applicability of clause 4.1AA of the LEP is the subject of contention 2.

Clause 4.3 – Height of Buildings

53. In respect of clause 4.3 of the LEP and the 'Height of Buildings Map', a 10-metre height limit applies to the Site. The proposed development complies with the 10-metre height limit as show on the elevations and shown on the elevations and sections prepared by Environa Studio.

Clause 4.4- Floor Space Ratio

54. In respect of clause 4.4 of the LEP, there is no specified floor space ratio for the Site. The proposed development otherwise complies with the maximum permitted floor space ratio under the HSPD SEPP.

Clause 5.10- Heritage Conservation

55. In respect of clause 5.10(1) of the LEP, the Site is not identified as a heritage item nor is the Site located in the vicinity of the area of heritage items.

56. The Applicants have prepared a Due Diligence Aboriginal Heritage Assessment Report (Tab 22, Class 1 Application (Ex H)) which confirms that there are no previously recorded Aboriginal sites within the area. The report also concludes that the potential for the presence of Aboriginal objects within the study area is low and that no further investigations are required in relation to the current proposal within the study area.

57. The Applicants have also prepared a Preliminary Historical Heritage Assessment prepared by Coast History and Heritage (Tab 15, Class 1 Application (Ex H)). The report concludes that the proposed development is unlikely to result in historical heritage impact as there are no listed heritage items within the study area, or the vicinity, and is of low historical

archaeological potential. The above reports address the proposed development's impact on heritage as matters for consideration as set out in clause 5.10 of the LEP.

Clause 6.1 – Acid Sulfate Soils

58. In respect of clause 6.1 of the LEP, the Site is identified on the Acid Sulfate Soils Map as being Class 5 land. The proposed development is not within 500 metres of Class 1, 2, 3 or 4 land. Accordingly, an Acid Sulfate Soils Management Plan is not required.

Clause 6.2 – Earthworks

59. In respect of clause 6.2(3) of the LEP, prior to the granting of consent, the consent authority must consider the matters set out under (3), namely:

> a. the likely disruption of, or any detrimental effect on, existing drainage patterns and soil stability in the locality,
>
> b. the effect of the development on the likely future use or redevelopment of the land,
>
> c. the quality of the fill or the soil to be excavated, or both, the effect of the development on the existing and likely amenity of adjoining properties,
>
> d. the source of any fill material and the destination of any excavated material,
>
> e. the likelihood of disturbing relics,
>
> f. the proximity to and potential for adverse impacts on any watercourse, drinking water catchment or environmentally sensitive area,
>
> g. (any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

60. On 29 April 2022, the Applicants were granted leave to rely upon amended Engineering Plans prepared by Martens & Associates dated 7 April 2022 (Tab 2, Exhibit JN-1 (Ex B)). Drawing PS03-C500 prepared by Martens & Associates shows the areas and extent of cut and fill required for the proposed development. Drawing PS03-C100, Earthworks Grading Plan (Drawing PS03-C100) has also been prepared by Martens & Associates. These plans confirm that the extent of earthworks proposed are unlikely to result in a significant or adverse disruption of drainage patterns or soil stability at the Site.

61. The Applicants have prepared a Concept Stormwater Management Report prepared by Martens & Associates, dated January 2021 (Tab 11, Class 1 Application (Ex H)). This report provides an assessment of the effects of the proposal upon the Site in relation to stormwater and includes measures to minimise adverse impacts. A drainage plan (Drawing PS02-E100, Tab 2, Exhibit JN-1 (Ex B)) has also been prepared. These items address the proposed developments impacts of earthworks and the matters for consideration under clause 6.3(3) of the LEP.

Clause 6.4 – Terrestrial Biodiversity

62. Land within the Site is identified as 'significant Vegetation' or 'connectivity between significant vegetation' on the Terrestrial Biodiversity Map, and accordingly clause 6.4 of the LEP applies.

63. On 29 April 2022, the Applicants were granted leave to rely upon a Biodiversity Development Assessment Report prepared by Ecological Consultants Australia, dated April 2022 (Tab 4, Exhibit JN-1 (Ex B)). This report addresses the proposed development's impact on the condition, ecological values and significance of the flora and fauna of the land and the matters for consideration in clause 6.4 of the LEP.

Clause 6.7 – Essential Services

64. In accordance with the requirements of clause 6.7 of the LEP, the consent authority can be satisfied that the following essential services are available or that adequate arrangements have been made to make the available when required:

a. the supply of water (available through existing connections to the Tallowood Stage 1 development);

b. the supply of electricity (available through existing connections to the Tallowood Stage 1 development);

c. the disposal and management of sewage (available through existing connections to the Tallowood Stage 1 development);

d. stormwater drainage or on-site conservation; and

e. suitable road access.

65. It is proposed that Stage 2 Tallowood dwellings (the proposed development) will connect to the existing sewage management system as detailed in the Onsite Wastewater Management Assessment prepared by Martens & Associates (Tab 14, Class 1 Application (Ex H)).

66. The Concept Stormwater Management Report and Drainage Plan prepared by Martens & Associates (Tab 11, Class 1 Application (Ex H) & Tab 2, Exhibit JN-1 (Ex B) respectively) details how stormwater will be managed on the Site.

67. In respect of suitable road access, the proposed works at the cemetery will be from Old Bells Line of Road. Lot 6 is accessed via the existing driveway within Lot 1.

Hawkesbury Development Control Plan 2012 (**DCP**)

68. The Parties are satisfied that the Development Application, as amended satisfies the following relevant controls in the DCP:

- Part C- General Guidelines;
- Part D- Specific Development;
- Chapter 3- Subdivision;
- Chapter 7- Landfill; and
- Chapter 8- Farm Buildings and Outbuildings.

69. The Parties are satisfied that the Development Application, as amended, is compliant with the relevant provisions of the DCP and, to the extent of any variation with the control, is consistent with the objectives of the control.

Impacts on natural and built environments, social and economic impacts in the locality

70. Subject to permissibility, the Parties are satisfied that the proposed development is compatible with the approved and existing use of land within the Tallowood community title subdivision as housing for seniors and people with a disability.

71. The proposed development will not result in any unreasonable impacts on the amenity of the adjoining properties and will incorporate measures sufficient to ensure there are no unreasonable impacts result from the development on the natural environment.

Site Suitability

72. Subject to permissibility:

a. Having regard to the documents forming part of the Development Application, as amended, the Site is suitable for the proposed development; and

b. The Development Application, as amended, is consistent with the existing and desired future character of the locality.

Submissions

73. The Parties are satisfied that the Development Application as amended, and the conditions of consent address the submissions made in respect of the proposal, subject to permissibility.

Public Interest

74. Subject to permissibility, the Parties are satisfied that the Development Application as amended, contributes to the diversity of housing for seniors and people with a disability in the local area and is compatible with the existing use of the Site for seniors housing with minimal impact on the natural and built environment and minimal impacts on the nearby properties. For these reasons, the Parties are satisfied that the development is in the public interest."

92. I have determined that the existing use did not, and could not, include subdivision. In such circumstances, the incorporated provisions do not apply to that part of the DA which proposes the community title subdivision and therefore the question of 'derogation' does not arise for consideration. The only pathway by which the applicants could apply for development consent after 29 July 2020 was cl 2.6(1) of HLEP 2012, which permits the subdivision of land with development consent. However, that pathway is cut off because cl 2.6(1) of HLEP 2012 is subject to the other provisions of HLEP 2012. Relevantly, cl 4.1AA applies to community title subdivision of land and imposes a minimum lot size development standard of 10 ha for each and any lot resulting from a subdivision of land to which cl 4.1AA applies. The proposal for subdivision falls well short of this standard and cannot obtain discretionary relief from compliance with cl 4.1AA of HLEP 2012 because cl 4.6(6) of HLEP 2012 mandates that 'development consent must not be granted' if the subdivision would result in two or more lots less than 10 ha. It is proposed that every lot be less than 10 ha. Thus, development consent cannot be granted to this aspect of the DA and, in fact, must be refused: s 4.16(2) of the EPA Act.

Conclusion

93. For the reasons set out in this judgment, I have determined that the use of the land for seniors housing as proposed in the DA, including Lot 6, is an 'existing use' as defined by s 4.65(b) of the EPA Act. I have further determined that development consent should be granted to the DA, except with respect to that

part of the DA which proposes community title subdivision and to which development consent cannot be granted. Section 4.16(4) of the EPA Act permits the grant of development consent 'for that development, except for a specified part or aspect of that development'.

94. The development consent is to be subject to conditions in Annexure 'A' which comprises the conditions agreed between the parties in Ex J, except that it has been amended to reflect my determination that development consent for that part of the DA which proposes subdivision is not granted. The amendments to Ex J comprise the deletion of subdivision as part of the approved development description, the deletion of the subdivision plan in Condition 1 and the deletion of Conditions 99 to 102 and the renumbering of subsequent conditions.

95. The Court orders:

    1. The appeal is upheld.
    2. DA0055/21 for the construction of a seniors housing development comprising 19 self-contained dwellings with attached garages, demolition of existing structures, earthworks, tree removal, extension of a private road, the conversion of an existing barn to a men's shed and the extension of a private cemetery at Lot 6 and Lot 1 in DP 270827 and Lot 300 in DP 1184237 and known as 6/21, 1/21 and 7 Vincents Road (the land) is determined by the grant of consent subject to the conditions set out in Annexure A except for that part of the development being the proposed community title subdivision of the land which is not approved.
    3. Exhibits A, B, G, H, J, L and 2 are retained. Exhibits C to F, K and 1, 3 and 4 are returned.

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C McEwen

Acting Commissioner of the Court

Annexure A (393983, pdf)