TAB 1

**RE: LLRL MANAGEMENT SERVICES PTY LIMITED:**

**SENIORS HOUSING DEVELOPMENT AT BELROSE**

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**ADVICE**

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Addisons Lawyers
DX 262 Sydney

Attention: Harshane Kahagalle

**LLRL Management Services Pty Limited:**

**Seniors Housing Development at Belrose**

## ADVICE

1. LLRL Management Services Pty Limited (**LLRL**) proposes to develop two adjoining parcels of land at Belrose. The first is the site of the present Glenaeon Retirement Village (**the Glenaeon Village**) located on land known as 207 Forest Way, Belrose. The second is an allotment of land to the south of 207, presently accommodating a single residence and ancillary facilities, and known as 199 Forest Way, Belrose. LLRL proposes that these two parcels be developed as a single site for the purpose of seniors housing. This would involve the redevelopment of the existing Glenaeon Village with the extension onto No.199 of facilities to serve the occupants of that Village.

2. My advice is sought as to whether the development proposed, at least as a seniors housing concept, is permissible under the provisions of Warringah Local Environmental Plan 2000 (**LEP 2000**) with the consent of Northern Beaches Council (**the Council**), the consent authority under that instrument.

3. The circumstance giving rise to the question posed for my consideration is unfortunate. The Council contends that the development proposed by LLRL is prohibited. The Department of Planning and Environment, from whom a Site Compatibility Certificate has been sought under cl 25(1) of *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (**the Seniors Living SEPP**), contends that the proposed development is permissible development under LEP 2000 with the

consequence that the certificate sought by LLRL cannot be issued: cl 24(1A). The position taken by the Department is understandable, not only by reason of the provisions of LEP 2000 but also by reference to the circumstance that the predecessor Council to the present Council had granted development consents to a number of applications for seniors living purposes on the present Glenaeon Village site, including consents granted after LEP 2000 became the operative local planning instrument.

**The development site**

4. The land at 199 Forest Way is separated from 207 Forest Way by Glenaeon Avenue, a road opened for the purpose of developing the latter site. That road intersects with Forest Way and serves only to provide access to the Nos 199 and 207 where it terminates. Although that road separates the two parcels, as I have indicated, those parcels will together constitute the site that will be the subject of the development application for seniors living. It is convenient to refer to the combined sites as "the development site".

**Land use controls**

5. The primary land use controls directed to the control of development on the development site are those found in LEP 2000. Although that planning instrument has, for the most part, been repealed in its application to the former Warringah Shire area by Warringah Local Environmental Plan 2011 (**LEP 2011**), the application of the latter instrument to the development site is a "Deferred matter". That has the consequence that the provisions of LEP 2000 continue to control development on those areas of land that remain "deferred" from LEP 2011.

6. LEP 2000 does not adopt a conventional zoning approach to control development on land to which it relates. Rather, it utilises "Locality Statements" as the mechanism for development control. Those

Statements differentiate areas of land that are delineated on a map. The criteria adopted for delineating a named locality is both geographical as well as identifying particular characteristics that the locality is said to possess. Each Locality Statement identifies the desired future character of land within that locality as being the foundation for development control. The development site is identified as being within "Locality B2 – Oxford Falls Valley" (**Locality B2**).

7. Land uses within each locality that are permissible with consent are given a categorisation of 1, 2 or 3, while prohibited uses are separately identified. Category 1 development is assumed to be consistent with the desired future character expressed in the particular Locality Statement. Development in categories 2 and 3, while permissible, is, by comparison with category 1, likely to be less compatible with the desired future character of the locality and thus requires the consent authority to be satisfied that the development in these categories "is consistent with the desired future character" described in the Locality Statement for the locality (cl 12(3)(b)).

8. Category 2 developments in Locality B2 include "housing for older people or people with disabilities (on land described in paragraph (c) under the heading 'Housing density' below)". Development that is described as being prohibited in Locality B2 includes "housing for older people or people with disabilities (**other than** on land described in paragraph (c) under the heading 'Housing density' in the B2 Locality Statement)" (emphasis added).

9. Paragraph (c) under the heading "Housing density" in the B2 Locality Statement (referred to in this Advice as "para (c)") relevantly describes the land to which it relates as being:

> "...land that adjoins a locality primarily used for urban purposes and on which a dwelling house is permissible, where there is no maximum housing density if the development is for the purpose of 'housing for

older people or people with a disability' and the development complies with the minimum standards set out in clause 29."

**Satisfying the "land" descriptor for permissibility**

10. For present purposes, in order to satisfy the provisions of para (c) so as to render seniors housing permissible there are two issues of relevance that must be satisfied. First, it is necessary to identify a "locality primarily used for urban purposes", if any, that the development site adjoins. Second, it is necessary that the development site is one on which a dwelling house is permissible.

***A dwelling house is permissible***

11. The second issue that I have identified may be succinctly addressed. Category 2 development that is permissible upon the development site also includes "housing". That term is defined in the Dictionary to LEP 2000 as development "involving the creation of one or more dwellings whether or not used as a group home". The term "dwelling" is also defined in the Dictionary in conventional terms, namely "a room or suite of rooms occupied or used or so constructed or adapted as to be capable of being occupied or used as a separate domicile".

12. Applying those definitions, there can be no doubt that a "dwelling house" is permissible on the development site.

***Adjoining a locality primarily used for urban purposes***

13. The consideration of this issue requires that two matters be addressed. The first is whether there is a "locality" primarily *used* for urban purposes in the vicinity of the development site. Second, it must be determined that the "locality" so used *adjoins* the development site.

*The "locality"*

14. The term "locality" is defined in the Dictionary to LEP 2000 to mean "a discrete area of land...listed as a locality in an Appendix to this plan and identified on the map". That is, a "locality" is a reference to an area that is identified in a separate Locality Statement found in one of the appendices to LEP 2000. However, the meaning of that term must also be considered in the context of the phrase in which it is used. Not only are the surrounding words important but the context of the phrase, relevant for present purposes, is one where there are two local environmental planning instruments that are directed to land uses in the area within which the development site is located. Those areas subject to the controls imposed by LEP 2000 are areas that are deferred matters under LEP 2011. As cl 1.3(1A) of the latter LEP provides, that instrument does not apply to land identified in the Land Application Map as a "deferred matter".

15. Broad area land use controls under LEP 2011 are implemented through a conventional zoning system. Land in the vicinity of the development site is land "zoned" under that instrument. By way of contrast, LEP 2000 does not, in terms, divide land into "zones". It is therefore necessary to consider how the provisions of the two planning instruments might interact when, by the provisions of one of them, it is necessary to determine some feature or aspect of development that is the subject of planning controls imposed by the other instrument.

16. If a given parcel of land in Locality B2, proposed for seniors housing, is surrounded by and abuts land zoned and used for residential housing under LEP 2011, it would render the provisions of LEP 2000 sterile if the residential development and zoning of that surrounding land could not be considered when determining the permissibility of development for seniors housing on the B2 land because that surrounding land was not a

"locality" within the meaning of LEP 2000. An interpretation of the provisions of the latter instrument to that effect would not reflect the context and purpose of the "adjoining locality" provisions of the latter instrument. Such an interpretation would be inconsistent with modern principles of statutory construction (*CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408; [1997] HCA 2; *Commissioner of Taxation v Consolidated Media Holdings Limited* [2012] HCA 55 at [39]). Application of those principles would require that both instruments be considered together to determine how, if at all, they should properly interact.

17. In substance, that was the exercise undertaken by Talbot J in *Mete v Warringah Council* [2004] NSWLEC 273 and by Preston Ch J in *Retirement by Design Pty Limited v Warringah Council* (2007) 153 LGERA 372; [2007] NSWLEC 87. In *Mete* Talbot J said at [23]:

> "Although innovative and maybe not strictly the conventional approach, on balance, in my view, it is open, and appropriate, to regard the adoption of Locality Statements in [LEP 2000] as a means of placing land in a zone and, accordingly, it establishes a system of zoning. It is, therefore, a matter of construction to determine whether land included in any Locality Statement is zoned primarily for urban purposes by reference to uses permissible in each locality. I find that SEPP (SL) applies to land within the Warringal local government area identified in that way as being effectively zoned for urban purposes or adjoining land zoned for that purpose."

18. An analysis of the manner in which land use controls were imposed under LEP 2000 and their relationship with the conventional "zoning" system of land use control was carried out by the Chief Judge in *Retirement by Design Pty Limited v Warringah Council* at [44]-[75]. At [73] his Honour said:

> "The applicant's land, for example, is identified, by means of inclusion in a locality, as being land on which development for specified purposes is permitted. In this sense, the applicant's land can be said to be 'zoned' for those specified purposes."

His Honour then embraced as correct the statement earlier quoted from the decision of Talbot J in *Mete*. As a consequence, the Chief Judge rejected at [75] the contention of the Warringah Council that LEP 2000 did not "zone land" in its local government area, with the consequence that, according to the Council's rejected contention, LEP 2000 did not interact with another planning instrument, in that case as stated in the Seniors Living SEPP. That rejected submission seems nonetheless to be repeated by the Council in its email of 7 February 2018 to LLRL.

19. Applying both the principles of interpretation that I have identified as well as the decisions to which I have referred, I am satisfied that when considering the critical phrase used in para (c) of the B2 Locality Statement, it is appropriate to read the word "locality" as equating to land "zoned" under another planning instrument. Thus, the phrase may properly be read as describing "land that adjoins a locality or zone primarily used for urban purposes".

20. It must also be noticed that words or phrases defined in a statute or statutory instrument apply "except insofar as the context or subject-matter otherwise indicates or requires": s 6 *Interpretation Act 1987*. On that basis, it would be equally legitimate to give "locality" its ordinary meaning as being "an area or district". So understood, the phrase would maintain its intended focus upon the manner of use of land that "adjoins" the land upon which seniors housing is contemplated.

*"Adjoining" land*

21. Before turning to the principles by which the term "adjoins" should be interpreted in its context, it is necessary to identify the land uses in the vicinity of the development site. Almost all land to the immediate north, east and south of the development site is within Locality B2 under LEP 2000. On the western side of Forest Way, the land directly opposite to the development site is also deferred from the operation of LEP 2011. It

is within Locality C8 under LEP 2000. Development for seniors housing on land within Locality C8 is prohibited, subject to an exception expressed in similar terms to that applicable for development of that kind in Locality B2. Importantly, the purposes of which the C8 land is presently used do not appear to be lands primarily used for urban purposes.

22. There are two small areas zoned RE1 – Public Recreation under LEP 2011, each sharing a section of the common boundary between them and the northern boundary of the development site. For the purpose of this advice I leave aside consideration of the use of those two areas.

23. Approximately 115m south of the southern boundary of the development site, Forest Way, which runs North/South in this vicinity, intersects with Morgan Road, a cross road that changes name to Wyatt Avenue on the western side of the intersection. The development site is separated from that intersection by two allotments of land.

24. Commencing on the south-west corner of the Forest Way/Morgan Road intersection is a large tract of land that is zoned R2 Low Density Residential under LEP 2011. Permissible land uses by reference to the land use table for land so zoned include dwelling houses, educational establishments, home businesses, places of worship and secondary dwellings. The area encompassed by the R2 zone extends southerly along Forest Way for some distance and westerly along Wyatt Avenue. Relevantly, that area is already developed and used for urban purposes, being the area that principally comprises the residential and retail area of the suburb of Belrose.

25. Those areas within the R2 zone that are adjacent to the Forest Way/Morgan Road intersection are streets lined with dwelling houses. By direct measurement from the southern boundary of the development site to the residential land at the south-west corner of the intersection, the separation distance is said to be a little under 150m.

26. The term "adjoins", as used in a phrase similarly framed to that found in para (c) of the B2 Locality Statement, has received judicial consideration over a number of years. That is because cl 11(2)(a) of State Environmental Planning Policy No.5 – Housing for Aged and Disabled Persons proscribed the grant of development consent for seniors living unless the consent authority was satisfied, among other matters, that "the land is within or adjoins land zoned for urban purposes". SEPP 5 was promulgated in the early years of the EPA Act and was the first State Planning Policy that sought to address what is now known as seniors living.

27. As Preston Ch J made clear in *ACN 115 840 509 Pty Limited v Kiama Municipal Council* (2006) 145 LGERA 147; [2006] NSWLEC 151 at [15]-[16], when considering the relevant phrase it is necessary to distinguish the proximity of land zoned or used for urban purposes to the intended site for seniors housing that renders development permissible from aspects of the land to be developed that may impinge upon ready accessibility from that land to the "urban land" identified for the purpose of satisfying the locational requirement of the clause. The determination that the land proposed to be developed meets the locational requirement is the only incident of a clause such as para (c) directed to permissibility. As his Honour observed, accessibility is generally a merit consideration, not one that determines permissibility.

28. His Honour's point of distinction is made apparent on the facts relevant to the case that he was deciding. The direct measurement between the site to be developed and the nearest point of residentially zoned land was 65m. However, the travel distance between the two was 1.15km, a fact that his Honour held at [37] was not determinative of the question as to whether the land the subject of the development application "adjoined" land zoned primarily for urban purposes.

29. For the purpose of deciding whether the land proposed for seniors housing did adjoin land zoned primarily for urban purposes, his Honour reviewed a number of decisions both of the Court of Appeal (*Hornsby Shire Council v Malcolm* (1986) 60 LGRA 429; *DEM (Australia) Pty Limited v Pittwater Council* (2004) 136 LGERA 187; [2004] NSWCA 434) and of the Land and Environment Court (*Auckland Lai v Warringah Shire Council* (1985) 58 LGRA; *Pepperwood Ridge Pty Limited v Newcastle City Council* (2005) 142 LGERA 231; [2005] NSWLEC 257; *Modog Pty Limited v Baulkham Hills Shire Council* (2000) 109 LGERA 443) in which the critical phrase had been considered. Having done so, his Honour said at [31]:

> "[31] These cases of the Court of Appeal and in this Court are consistent in holding that it is not necessary, in order for the subject land to answer the description of the land that 'adjoins' land zoned primarily for urban purposes to be conterminous with (that is, having a common boundary with) or be immediately adjoining the 2(a) Residential land. It is sufficient that the subject land is 'near to' or is 'neighbouring on' or is 'in sufficient proximity to' the 2(a) Residential land which is land zoned primarily for urban purposes."

No later decision of either the Court of Appeal or the Land and Environment Court has sought to limit or qualify the statement there made as to the meaning attributed to the word "adjoins" when used in a phrase similar to that found in para (c) of the B2 Locality Statement. Importantly, no decision has sought to qualify the word "adjoins" by prescribing a maximum distance beyond which land proposed for seniors housing will not qualify as land adjoining land primarily zoned or used for urban purposes.

30. Applying the principles that I have identified to the present case, it seems to me that the planning body exercising the decision-making role under the EPA Act for seniors housing upon the development site could lawfully conclude that the site "adjoins" the R2 zoned land I have identified, being land primarily used for urban purposes, that is, land primarily used for

residential housing and the services that are ancillary to that use. The latter land is "near to" or is "in sufficient proximity to" the development site such as to engage the provisions of para (c). The separation of the development site from the R2 land by the frontage of two intermediate allotments of land and the width of a road intersection, measuring in all a distance of less than 150m, seems to me to satisfy either of those descriptors. Geographical proximity is sufficient to satisfy the permissibility requirement of para (c).

31. Moreover, the conclusion I have reached is not antithetical to the apparent purpose of the provisions of para (c), understood in their context. That purpose, so it seems to me, is that seniors housing should not be isolated from urban areas, enabling residents of that housing to live in proximity to the services and facilities ordinarily present and available in areas being used for urban purposes. It cannot rationally be said that the purpose or purposes I have identified are defeated or compromised by the distance that, in fact, separates the development site from the existing urban development of suburban Belrose.

**Conclusion**

32. For these reasons, I conclude that the development of the development site for seniors housing is, in concept, a permissible form of development under the provisions of LEP 2000. As would be appreciated, in expressing that opinion as to permissibility, I am not in a position to express any opinion as to the merits of such an application, no particular form of seniors housing having been presented for my consideration.

**Chambers**
**23 April 2018**

**MALCOLM CRAIQ QC**

TAB 2

Lendlease Prime Life –
The Seniors Housing Permissibility at 199 Forest Way, Belrose

MEMORANDUM OF ADVICE

DibbsBarker
Lawyers
DX 101 Sydney

Attention: Ms Penny Murray

## 1 THE FACTS

1. Lendlease is considering the use of land at 199 Forest Way, Belrose for the purposes of *housing for older people or people with disabilities* pursuant to Warringah LEP 2000. Notwithstanding the making of Warringah LEP 2011, LEP 2000 continues to apply to the land.

2. LEP 2000 takes a "locality" based approach to the control of development. The land is within locality B2 – Oxford Falls Valley.

3. Within that locality housing for older people or people with disabilities is permissible (as Category 2 development) only if the land meets the description in paragraph (c) under the heading "Housing Density" in the locality statement.

4. Ultimately, that requires that consent may only be granted to housing for older people or people with a disability under

LEP 2000 in the B2 locality on land that *adjoins* land primarily used for urban purposes.

5. The land is on the eastern side of Forest Way. All of the surrounding land on the eastern side of Forest Way is within locality B2. The land to the west, and directly opposite across Forest Way is in locality C8.

6. The land is in close proximity to the intersection between Forest Way and Wyatt Avenue (at that intersection Wyatt Avenue proceeds to the west of Forest Way, Morgan Road proceeds to the east).

7. The land to the south-west of that intersection is zoned R2 Low Density Residential under Warringah LEP 2011. A question has arisen as to whether the land does *adjoin* land primarily used for urban purposes. For the purposes of this advice I have not been asked to express a view whether the C8 locality meets that description. Similarly, I have been asked to assume that the R2 zoned land does (and that assumption is correct in any event).

8. Upon that basis the question arises as to whether the separation between the land and the R2 land nevertheless meets the necessary description of being "land that adjoins" the R2 land.

9. I have been provided with an advice to Council prepared by my instructing solicitor. That advice concludes that "*it is within Council's reasonable discretion to form the view that the C1 – middle harbour locality is "adjoining"*". I have been asked to advise whether that conclusion is correct.

10. I note that the C1 locality previously under LEP 2000 is now zoned R2 under the LEP 2011. That change – from C1 to R2 does not affect the validity of my instructing solicitor's advice.

11. For the reasons set out by me below, in my opinion it is correct. The land did previously relevantly adjoin the C1 locality and now adjoins the R2 zoned land.

## 2 ADVICE

12. For many years a strategic planning approach has been taken for the making of land available for housing for older people and people with disabilities. Decisions were made that the development would not be restricted to urban lands. The development could also be carried out on land that relevantly adjoined urban lands. That decision could be seen in the now repealed State Environmental Planning Policy No.5, it continued through the replacement State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 and is reflected in LEP 2000.

13. As a consequence, there is a long line of authority that has considered the meaning of the word "adjoin" when used to facilitate the carrying out of housing for aged persons or people with a disability. The starting point for the approach to the consideration of the meaning of "adjoin" is that the provision is beneficial and facultative. As a result the language is to be construed so as to advance those beneficial purposes, not to defeat them[1].

14. Adopting that approach, it was decided many years ago, and has been consistently applied, that to "adjoin" does not mean to be "conterminous" with. As the Court of Appeal expressed it in *Malcolm*[2] the word "adjoins" "*...must take its colour from the context in which it appears. I do not find in the language of SEPP 5 any persuasive indication that land which immediately adjoins should be exempt whereas land which adjoins in the lesser sense is not.*"

15. It was that concept of adjoining in the "lesser sense" that was then expanded upon by the later authorities.

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[1] *DEM (Aust) Pty Ltd v Pittwater Council* 136 LGERA 187

16. In order to assist in the application of the test, different expressions have been used including: "near to", "neighbouring on" and "sufficient proximity to".[3]

17. Further, what is clear is that physical connectivity or proximity is irrelevant. Firstly, separation by a road, open space or a railway line does not prevent the land from adjoining. Secondly, if the land that separates (but nevertheless adjoins) prevents physical access, that does not prevent the land from satisfying the necessary requirement of adjoining[4].

18. Ultimately, what is apparent from the authorities is that physical proximity is not the relevant test[5]. Rather, adopting the beneficial and facultative approach to the instruments where the obvious intention is to provide for a form of housing on land where it would not otherwise be permissible, but where that land is in close enough proximity to other land that is likely to have the facilities and services that residents may reasonably require[6] is the better approach to the meaning of the word "adjoins".

19. It is with that understanding of the correct approach to the meaning of "adjoins" for the purposes of LEP 2000 that I turn to the specific facts. As already discussed briefly above, the only relationship being considered is that between the land and the R2 zoned land to the south-east. As the crow flies, the distance between the land and the R2 zoned land is 147m. Part of that separation includes a road. That separation is inconsequential (even though it is a large intersection). Between the land and that intersection there is a distance (south following Forest Way) in the order of 125m. Because of the nature of the land in the B2 locality (large lots) that traverses only two adjoining allotments.

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[2] *Hornsby Council v Malcolm* 60 LGERA 429
[3] See the summary in *ACN 115840509 v Kiama Council* 145 LGERA 147
[4] *Pepperwood Ridge Pty Ltd v Newcastle City Council* 142 LGERA 231, *ACN* supra
[5] See *ACN* at [37]
[6] *Australian Lifestyle Corporation Pty Ltd v Wingecarribee Shire Council* [2008] NSWLEC 284 at [42] and *Modog Pty Ltd v Baulkham Hills Shire Council* 109 LGERA 443 at page 448

20. In my opinion, that separation nevertheless adjoins in the "lesser sense". The connection can be described as one as being "is near to" or "neighbouring on" or with "sufficient proximity to".

21. Of course, the ultimate determination of whether the land relevantly adjoins is a question of fact. In my opinion, the Council is entitled to form the view that the land relevantly adjoins the R2 zoned land. As a result, the Council is entitled to conclude that the application is for development permissible under LEP 2000. As the authorities indicate, the satisfaction of that proximity test of course does not prevent consideration of other matters - even those related to location – on the merits. I make no comments on the merits of the application in this advice.

22. Finally, I note in passing, that to the immediate north of the land is the Glenaeon Village. I have been provided with a copy of an officer's report dealing with the determination of that development. The application was supported by an advice provided by Mr Giles QC. As I have said above, the line of authority dealing with the correct approach to "adjoins" is a long one. Even in his advice in 2000, Mr Giles was relying upon some of the same authority (*Malcolm* and *Auckland Lai*). Mr Giles expressed the opinion that the connection of that land to the same land being considered for the purposes of this advice, though being almost 290m distant, nevertheless "adjoined". The Council accepted that opinion in granting consent to the Glenaeon Village.

23. Although not determinative, it is further persuasive material to satisfy the Council that it lies within its discretion to conclude, as a question of fact, that the land the subject of this application relevantly adjoins.

## 3 CONCLUSION

24. A question has arisen as to whether land at 199 Forest Way, Belrose relevantly *adjoins* land and zoned R2.

25. In order to "adjoin" the land does not need to be conterminous. Rather it must be "near to", "neighbouring on" or in "sufficient proximity to". The answer to that enquiry is a question of fact.

26. In my opinion, the Council is entitled to conclude, as a question of fact, that the land at 199 Forest Way does relevantly "adjoin" the R2 zoned land. As a result, *housing for older people or people with disabilities* is permissible as Category 2 development under LEP 2000 on the land.

Dated: 16 December 2016

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14 December 2016

Ms Penny Murray
Messrs Dibbs Barker
Lawyers
DX 101 SYDNEY

Dear Penny,

**RE: LENDLEASE PRIMELIFE LTD; 199 FOREST WAY, BELROSE**

I refer to this matter and enclose herewith for your consideration my Memorandum of Opinion.

Yours faithfully,
**ADRIAN GALASSO**.

TAB 3

**LENDLEASE PRIMELIFE**

**199 FOREST WAY, BELROSE**

**MEMORANDUM OF OPINION**

1. My instructing solicitor acts on behalf of Lend Lease Prime Life, which holds an interest in land located at 199 Forest Way, Belrose.

2. I am instructed that the client may propose to develop the subject land for the purpose of housing for older people or people with disabilities. In particular, the jurisdictional basis for an application for development consent in that respect is intended to be pursuant to the *Warringah Local Environmental Plan 2000*, or the *Warringah Local Environmental Plan 2011,* as applicable. I have been asked to provide my opinion as to whether, effectively as a matter of power, it is open to the Council to approve of such development on the subject land.

***The Local Environmental Plans***

3. The *Warringah Local Environmental Plan 2011* zoned much of the land within the local government area of Warringah (now Northern Beaches Council). However it deferred certain lands, including the subject land. Hence the subject land is to be considered under the provisions of the former instrument, namely *Warringah Local Environmental Plan 2000.*

4. The subject land is located within Locality B2 – Oxford Falls pursuant to LEP 2000. As described by Preston CJ in *Retirement by Design v Warringah Council* (2007) 153 LGERA 372, LEP 2000 does not proceed upon the conventional approach of zoning of land, but rather by locating lands within various Localities.

5. LEP 2000 addresses land uses via a categorisation approach (that is, ranking uses into permissible Categories of either 1, 2 or 3): clause 14. The relationship between the development type and the desired future character set out in the

various Locality Statements differs: clause 12. Generally, Category 1 is development that is assumed to be consistent with the desired future character set out in Locality Statements, and Categories 2 and 3 then proceed away from an assumed position of such consistency. LEP 2000 also prohibits certain land uses as identified in the Locality Statement: clause 10.

6. Within the B2 Locality Statement, housing for older people or people with disabilities is described as Category 2 development, but only to the extent that it is "on land described in paragraph (c) under the heading "Housing Density" below". If not so described, then housing for older people or people with disabilities is specifically prohibited.

7. In the Housing Density section of the B2 Locality Statement, paragraph (c) describes land in the following way:

> "On land that adjoins a locality primarily used for urban purposes and on which a dwelling house is permissible..."

8. Thus, for housing for older people or people with disabilities to be permissible it must be proposed to be carried out on land that adjoins a locality primarily used for urban purposes, and on which a dwelling house is permissible.

***Factual Aspects***

9. Directly across Forest Way from the subject land is Locality C8 – Belrose North. That land was also deferred from the making of LEP 2011. Dwelling houses are permissible on that land, and for the reasons set out below it would be correct to assume that such land adjoins the subject land.

10. The question then, insofar as the C8 land is concerned, is whether it is a locality "primarily used for urban purposes"?

11. The concept adopted is "used" as distinct from "zoned" (in *Modog v Baulkham Hills Shire Council*, cited below, Pearlman J made reference to that distinction at [24] for the purposes of SEPP 5, and the converse is the case in the present circumstances; see also *Retirement by Design*, cited below, at [78]). As the concept adopted is "used", it is clear from an inspection of generally available

aerial photography (e.g. Google Maps) that the C8 locality is not "used" primarily for urban purposes. In addition, and in any case, the "zoning" itself is non-urban: *Retirement by Design* at [97].

12. The only candidate for land to which the subject property may be said to "adjoin" is land to the south-west at the intersection of Forest Way and Wyatt Avenue.

13. That land was contained within Locality C1 – Middle Harbour Suburbs under LEP 2000. However on my reckoning, by reference to the Land Application Map under LEP 2011, that land was not deferred from LEP 2011, but has been zoned R2. Either way, it is appropriate to proceed upon the assumption that such land is both zoned and (by reference to an aerial photograph) used for urban purposes. In either instance (for the purpose of para (c) of the B2 Locality Statement), dwelling houses are permissible.

14. The question then becomes whether the subject land adjoins that land (which I shall refer to as the R2 land)?

15. As referred above the subject land fronts Forest Way and directly across Forest Way is the C8 land. The R2 land is diagonally across from the subject land, separated by Forest Way in a linear respect, rather than perpendicularly across it. Although there are 2 or 3 parcels of land that are contained within the same B2 zone as the subject land to its south, those parcels are on the same side of Forest Way as the subject land, and on that side, after crossing Wyatt Avenue, land continues as B2 lands.

***The meaning of "adjoin"***

16. There are a series of decisions which have considered the meaning of the word "adjoin" under other instruments. This notwithstanding in my opinion it is safe to have recourse to them in the circumstances of the present case because although with respect to different instruments they were of a similar genus of instrument dealing with seniors living, and locational aspects with respect to it. This was an approach adopted in, for example, *Pepperwood Ridge v Newcastle City Council* (2005) 142 LGERA 231 at [15]-[16] per Pain J.

17. In *Auckland Lai v Warringah Shire Council* (1985) 58 LGRA 276, Bignold J considered that rather than its exact meaning of "is coterminous with", the word "adjoin" should be construed, in context (SEPP5), as meaning "is near to" or "is neighbouring on": p.283-4.

18. In the present case the R2 land is certainly not coterminous with the subject land, but that is not the criterion; rather, that it is "near to" or neighbouring on. Both in terms of the physical distance, and the orientation, it may be said that the subject land is "near to" the R2 land.

19. In *Hornsby Shire Council v Malcolm* (1986) 60 LGRA 429 the Court of Appeal adopted a similar approach. At page 433 Kirby P said that "adjoin" normally means "to abut", but that in context it could mean either contiguity or close physical proximity.

20. Again, in the circumstances of the present case the physical distance and orientation would enable the conclusion to be formed that the subject land is in close physical proximity to the R2 land.

21. At p.434 of *Hornsby Shire Council v Malcolm* Kirby P went on to discuss the circumstances in which the separating element between the subject land and the target land was something other than a road or roadside reserve. Although he observed that "in the present case there was no separate development between land undoubtedly zoned for urban use and the proposed development", he went on to observe:

> "...But even if there were no strict abutment, because of the lack of physical contiguity, there is still a sufficient proximity to bring the proposed development within the word "adjoins" in the context of clause 11(2)(a). Words in the English language are constantly changing their primary meanings as any dictionary demonstrates. The word "adjoins" is no exception. Whereas originally it might well have connotated immediate physical contiguity, nowadays that idea tends to require the use of the adverb "immediately", such as "immediately adjoins". That adverb would not be necessary if the word itself invariably connotated immediate physical proximity."

22. Adopting that approach to the circumstances of the present case, whilst it may well be conceded that there is no contiguity between the subject land and the R2 zoned land, to reiterate the words of Kirby P the relevant criterion is not that the subject land "immediately adjoins" the target land, but merely that it adjoin it.

23. Kirby P referred to the context of clause 11(2)(a). The instrument being considered was, as with the decision of Bignold J in *Auckland Lai*, SEPP5. At page 434, that "context" was identified by reference to a passage to the effect that:

> "That policy was said to be that homes for the aged or disabled should be constructed in urban areas both for the interests of the residents and for the saving of costs to the community. Development outside such areas was an exception. So, it was said, the word should be given a narrow meaning in the context."

24. Kirby P proceeded to say that, even accepting the general approach, he was not convinced that the separation of the proposed development site on the facts before the Court of Appeal was such a distance as properly to fall outside the description of abutment. Of course, in order to do so he focused upon the existence of the road and road reserve which he described as "a normal feature of urban development". But focusing upon the conceded matter (by Kirby P), namely the policy of proximity of the proposed development with urban lands, it is easy to see, again by reference to the physical dimension and the orientation, that the subject land may be said to be in such close proximity to the R2 land.

25. Later, still at page 434, Kirby P further addressed the circumstance in which there might be said to be a separation between land zoned for urban uses and the proposed development by land other than a road and roadside reserve. He said as follows:

> "It is not appropriate in the present facts to speculate upon what would be the case if there were a separation between land zoned for urban uses and the proposed development site other than a road and roadside reserve. The appellant called attention to the terms of s.90(1)(h). By the reference in that paragraph to "in the

> locality", it may be suggested that "adjoins" in the policy means something considerably more proximate. But that argument can be conceded, and there is still a sufficiently close proximity in the facts of the present case to uphold the conclusion that the proposed development adjoined urban land..."

26. The reference to s.90(1)(h) was to the section which preceded what is now s.79C, identifying the matters to be taken into account by the consent authority in determining a development application. Before 1997 when s.90 was replaced by s.79C, the relevant paragraph provided as follows:

> "The relationship of that development to development on adjoining land or on other land in the locality."

27. Self-evidently, the paragraph contained the concept of adjoining land, and an alternate (by reference to the disjunctive "or") of land in the locality. Thus, the submission recorded by Kirby P sought to contrast those concepts for the purposes of the narrow construction of "adjoining".

28. As referenced above, s.79C replaced s.90. It no longer uses the dual concepts of "adjoin" and "locality". It does, though, make reference to "the likely impacts of that development ... and social and economic impacts in the locality": s.79C(1)(b).

29. The removal of the two concepts in the contemporary equivalent to s.90 (s.79C) is most probably of no significance at all. This is because to the extent that Kirby P made reference to locality (in response to a submission in the case before him), it is easy to see that in the circumstances of the present case the subject land is certainly far more proximate to the R2 land than simply answering the description of being "in the locality".

30. In *Hornsby Shire Council v Malcolm*, Glass JA also engaged in the discussion concerning the scope of the word "adjoin". Having observed that the trial judge ruled that the word "adjoins" in the statutory phrase "adjoins land zoned for urban purposes" is used in its loose sense of "is near to" and "is neighbouring on", rather than its exact meaning "is coterminous with" (at page 443), he observed that, although the subject land which was separated from urban land

zoned for urban uses "by no more than a public road" adjoined to such land, the word "adjoins" must take its colour from the context in which it appears. By reference to the language of SEPP5 he found that there was no persuasive indication that land which immediately adjoins should be exempt, whereas land which adjoins in the lesser sense is not.

31. Similar propositions are available in the circumstances of the present case. There is no particular reason from the language of the WLEP which would indicate any criticality as between land which immediately adjoins and land which adjoins in the lesser sense. Again, by reference to the physical dimension and the orientation, in my opinion it is open to conclude that the subject land adjoins in the relevant sense the R2 land.

32. In *Modog v Baulkham Hills Shire Council* (2000) 109 LGERA 443 Pearlman J at [23] adopted a similar approach and said that "adjoin" means "near to" or "in the neighbourhood of".

33. This notwithstanding, in the circumstances of that case, Pearlman J determined at [24] that a distance of 200m was too far, especially in the circumstances that the subject lands were "separated by land which was "not zoned for urban purposes"". Whilst that dimension may be thought to be similar to the dimension in this case (albeit 50 metres or so greater), recourse to the facts in *Modog* establishes a significant distinction to the facts of the present case. The subject land in *Modog* was surrounded on three sides by non-urban land, and whilst on the remaining side there was a road, on the opposite side of the road there was additional non-urban land. The closest urban land accordingly had between it and the subject land before Perlman J not only non-urban land, but another SEPP5 development which had been erected as itself being adjacent to that urban land.

34. Those factual circumstances materially distinguish the facts of *Modog* from the circumstances of the present case. The linear element of the road in the circumstances of the present case does not merely provide a lateral delineation to other non-urban land, but rather, by reference to orientation, establishes the proximity to the R2 land. That is why, as referenced above, it is the combination

of the physical dimension and the orientation which permits of the conclusion that the subject land may be said to adjoin the R2 land.

35. In *ACN 115 840 509 v Kiama Municipal Council* (2006) 145 LGERA 147, Preston CJ adopted a similar meaning for the word "adjoining".

36. At [33] Preston CJ referenced [9] of his judgment as reasons for holding that the subject lands did, as a finding of fact, adjoin each other. Although subparagraph (f) thereof made reference to the absence of intervening land between the subject land and the urban land, subparagraph (e) is of more particular relevance to the circumstances of the present case. In this respect, although at [34] Preston CJ determined the distances between the subject and target land were not great as a function of "urban transportation services", going on to observe at [35] that the two lands were merely separated by linear features, the submission made at subparagraph [9](e) (adopted at [33]) assists in the conclusion that it is not the mere characterisation of roads as such which operates to establish sufficient proximity to engage the wording "adjoin". It was first observed in that subparagraph that separation of lands by a road may nonetheless result in a finding that the lands, in fact, abut (and a reference was then given to *Hornsby Shire Council v Malcolm*). However, it was said, further and alternatively, that:

> "...Separation by a road (whether zoned or not) dictates a finding of close physical proximity between the lands in question sufficient to bring about the necessary result that the lands relevantly "adjoin"."

37. The submission went on to note that in *Hornsby Shire Council v Malcolm* it was not just the existence of a road, but also "a zoned strip of reserved land" which was held not to preclude a finding that the land on either side adjoined. Thus, it would be wrong to say that only where the intervening land is a road can there be a finding of adjoining lands. In *ACN 115 840 509* it is to be observed that it was not merely a road but also a railway corridor that separated the subject and target land; and yet there was the finding that the subject and target land adjoin each other.

38. In *Pepperwood Ridge*, cited above, Pain J found that land which was separated by a road was nonetheless sufficient to comprise land which adjoined other land zoned for urban purposes. This, of course, is consistent with *Hornsby Shire Council v Malcolm* and *ACN 115 840 509.*

39. The analysis set out above demonstrates, almost without exception, that the concept of "adjoin" where used in WLEP should not to be regarded as having a requirement that the subject land be coterminous with a locality primarily used for urban purposes.

40. The question of "adjoin" is a question of fact and degree to be determined by the Council in its consideration of any development application. In forming such view, and on the foundation that the test for unreasonableness in administrative law which would invalidate a decision (as set out in the High Court in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [76]) is "a conclusion which may be applied to a decision which lacks an evident and intelligible justification", in my opinion it is open to the Council, on the authorities discussed above, to conclude that the subject land adjoins a locality primarily used for urban purposes by dint of the physical proximity to, and the orientation as between, the subject land and the R2 zoned land.

41. Finally, although not in any way determinative, it is to be observed that the land adjacent to the north of the subject land (the Glenaeon Retirement Village) was approved under similar enabling provisions. That land is even further separated from a locality primarily used for urban purposes than the subject land.

Chambers,
14 December 2016

**ADRIAN GALASSO SC**