LANE COVE COUNCIL

266 LONGUEVILLE ROAD, LANE COVE

MEMORANDUM OF ADVICE

Lane Cove Council
c/- Montgomery Planning Solutions

Attention: Robert Montgomery

LANE COVE COUNCIL

SENIORS LIVING DEVELOPMENT

266 LONGUEVILLE ROAD LANE COVE

MEMORANDUM OF ADVICE

Instructions

1. I am instructed by Montgomery Planning Solutions (Montgomery) on behalf of Lane Cove Council in relation to the assessment of an application to modify a development for seniors living at 266 Longueville Road Lane Cove.

2. My opinion is sought on three separate matters identified as relevant to Montgomery in the assessment of the application and the Sydney North Planning Panel in the determination of the modification application.

3. The three matters are:

   (i). Whether the development as proposed to be modified by can properly be considered to be substantially the same development as that which was approved by the original consent.

   (ii). Should the gross floor area (GFA) of the development be calculated using the definition of GFA in *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (SEPP Seniors) or *Lane Cove Local Environmental Plan 2009* (LEP 2009)?

   (iii). Is the Lane Cove Development Control Plan (DCP) relevant to the calculation of the required number of car spaces for the purposes of calculating the required car parking and the consequent GFA for the development?

Background facts

4. Development consent was granted on 6 September 2021 for the development described as:

> *"Construction of a seniors housing development comprising 70 bed residential care facility, 82 independent living units/self-contained dwellings, with basement car parking for 122 vehicles, new public park and facilities and landscaped through-site link."*

5. The consent was granted pursuant to the provisions of SEPP (Seniors) then in force. While that SEPP has been repealed and replaced by *State Environmental Planning Policy (Housing) 2021*, cl 2(d) of Schedule 7A of SEPP (Housing) 2021 provides that the Policy does not apply to existing development consents granted before the commencement date. Accordingly, SEPP Seniors remains relevant for the purposes of this modification application.

6. On 30 November 2022 the consent was modified to amend certain conditions that affected the timing of the issue of construction certificates and occupation certificates. In all other respects the development remained essentially the same as that which was granted.

The modification application

7. The key physical modifications to the development proposed are described by the applicant in summary, as follows:

   (a) A change in senior housing development mix by removing the residential care units and changing the units to independent living units (ILU's) only.
   (b) The provision of an additional basement level for car parking and services.

(c) Removal of the proposed commercial tenancy (café).

(d) Reconfiguration of floor plan layouts to accommodate the change from residential care facility to ILU's.

(e) Minor adjustment to building envelopes and upgrade of materials and finishes to external elevations.

(f) Upgrade of plantings and finishes to the communal open space and landscaped areas.

(g) Provision of on-site support services to enable residents to "age in place", including provision of 3 meals per day, personal care, home nursing visits and housework and laundry services.

Advice

Question 1- Substantially the same development?

8. Section 4.55(2)(a) of the *Environmental Planning and Assessment Act 1979* (EPA Act) provides that as a jurisdictional precondition to the exercise of the power to modify a consent, the consent authority must be:

> *"satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all)."*

9. The principles for determining whether a development as proposed to be modified will remain substantially the same may be summarised as follows:

(a) The comparison to be undertaken is between the proposed development as modified and the original approved development.

(b) The question of whether a development is substantially the same as that which was originally approved is a question of fact and degree depending on the specific circumstances of each matter which will reasonably admit different conclusions: *Scrap Realty Pty Limited v Botany Bay City Council* (2008) 166 LGERA 342 at [13].

(c) The meaning of "substantially the same" is "essentially or materially having the same essence": *Vacik Pty Limited v Penrith City Council* [1992] NSWLEC 8, Stein J; supported by Mason P in *North Sydney Council v Michael Standley & Assoc Pty Ltd* (1998) 43 NSWLR 468; 97 LGERA at 440.

(d) The question of whether the development is substantially the same is not a question which is capable of scientific or mathematical precision, but rather is a judgment based on an overall quantitative and qualitative assessment: *Moto Projects No. 2 Pty Limited v North Sydney Council* (1999) 106 LGERA 298 Bignold J at [56]. This means that it must be a comparison not only of the physical changes, but an appreciation of the qualitative impacts of the development as approved.

(e) However, the exercise is to be considered in the context of a statutory modification power that has been held to be "beneficial" and "facultative": *Houlton v Woollahra MC* (1997) 95 LGERA 201; *Michael Standley & Assoc. Pty Ltd* (supra) at 482; and "free standing": *Michael Standley & Assoc. Pty Ltd* (supra) at 481.

(f) It is axiomatic that modifications to a development will result in some change. The term "modify" means "to alter without radical transformation". However, that does not mean that even quite extensive changes will result in the overall development becoming something other than substantially the same. In *Michael Standley & Assoc. Pty Ltd* the scope of the architectural change was significant, but not so as to radically alter the fundamental essence of the development.

10. In addition to the requirement to be satisfied that the development is "substantially the same" as that approved, the consent authority is also required by s 4.55(3) to consider:

    (a) the matters as are referred to in s 4.15(1) of the EPA Act as are relevant to the application; and
    (b) the reasons given by the consent authority for the grant of the consent that is sought to be modified.

11. In my opinion, in this case, most of the changes can readily be seen to be modifications which do not fundamentally alter the essence of the development. However, there are two of the identified changes above which are perhaps more contentious.

12. First, the change of the use from part residential care facility and ILU's to solely ILU's is quite a significant change. However, it is important not to subvert the test from an enquiry whether the development as a whole "is substantially the same" to one of whether "the change is substantial". While I agree the change is substantial in that it modifies the proposed uses by removing one of the two elements of the use, as a whole, and in context of what was approved, in my opinion this change does not make that which is now proposed other than substantially the same development.

13. When regard is also had to the fact that both the residential care elements and the ILU element were to be carried out in a building which, to a great extent will present as substantially the same as the original, with a footprint that is substantially the same, the fact that one of two elements of the use will be carried out in a different way does not mean it is radically or fundamentally different to that which was approved.

14. In a quantitative sense, more than 50% of the habitable GFA in the original consent was dedicated to ILU's. Less than 50% of the habitable GFA was dedicated to the residential care facility. Looked at in that way, the deletion of the residential care component does not affect more than 50% of the total. Substantially, it may be said that the development is the same. Moreover, given that residential care will still be provided in the form of

home care rather than in the institutionalised form of single rooms, an element of residential care will continue in the modified consent.

15. This case bears some similarities to the decision in *Aveo North Shore Retirement Villages Pty Limited v Northern Beaches Council* [2020] NSWLEC 1035 where the second stage of the development originally approved was sought to be modified. That second stage constituted just under 50% of the total approved development and the second stage was reduced in density compared with the original consent. Commissioner Smithson held that despite the fairly significant change to the layout of the second stage, the development remained substantially the same.

16. The second major change comprises the additional basement excavation for provision of car parking and services. This is also a change of some magnitude, but when looked at in the context of the whole development can it still be said to be substantially the same development? In my opinion, the answer to this question is yes. Additional car parking is presumably necessary to service the additional ILU's, but it will not mean that the development operates in a materially different way. This aspect of the application is not dissimilar to the type of change approved in *Michael Standley & Assoc* where an additional two levels were added to the residential flat building. The addition of an additional half level in the basement seems to me to be a change of a similar type, with potentially less environmental impact, given that the change will not be perceived above the ground level. The external impacts of the additional car parking are modest in that it may have some impact on the total traffic entering and leaving the basement, but the additional movements can be a matter of merit assessment.

17. In my opinion, the changes to the development fall within the scope of changes that will result in a development that remains "substantially the same" as that approved. Fundamentally, the development will continue to be for seniors housing and the footprint of the overall development will be contained largely within that which was approved.

18. In addition, for the qualitative assessment, this is an unusual case where the changes to the development will, on one view, make it less intense than that which was approved. In particular, change to ILU's means that the total population on the site is likely to be less than the approved consent because it can be expected in ILU's that not all bedrooms will be occupied. In contrast in the residential care facility it can be assumed that the rooms would be fully occupied and serviced by the staff necessary for such a purpose. Staffing levels for ILU's will probably be lesser than anticipated in the original consent. This has the effect of reducing the density.

19. In addition, there may be other beneficial effects in terms of overlooking from apartments being lessened by occupancy levels being lower compared with care rooms which would be extensively used. The beneficial effects of a modification are important not only in an assessment of the impacts under s 4.15 of the EPA Act, but also in considering the qualitative assessment under s 4.55(3): *Trinvass Pty Limited v Council of the City of Sydney* [2018] NSWLEC 77 at [32].

20. It follows from the above, that although two of the changes are of considerable magnitude, they do not result in a development that is not substantially the same as that which was approved. I accept this is a matter on which minds may differ, but in my opinion, considering the beneficial and facultative effect of s 4.55 and the nature of the changes to the built form being within the scope of the modification power, the qualitative and quantitative changes are not so great as to take the matter outside the scope of the power to modify.

Question 2: Which definition of GFA applies?

21. Advice provided by Maddocks Lawyers on behalf of the applicant when the consent was first granted contended that in calculating the FSR for a vertical village for the purposes of cl 45(2) of SEPP Seniors the definition of GFA in SEPP Seniors did not apply, but rather the definition of GFA from LEP 2009 applied. The Council's solicitors also agreed with that

advice. The applicant's current lawyers, Mills Oakley have also provided advice that comes to the same conclusion.

22. I have a different opinion.

23. The relevant parts of clause 45 of SEPP Seniors for the purposes of this question is as follows:

> *(1) Application of clause This clause applies to land to which this Policy applies (other than the land referred to in clause 4 (9)) on which development for the purposes of residential flat buildings is permitted.*
> *(2) Granting of consent with bonus floor space Subject to subclause (6), a consent authority may consent to a development application made pursuant to this Chapter to carry out development on land to which this clause applies for the purpose of seniors housing involving buildings having a density and scale (when expressed as a floor space ratio) that exceeds the floor space ratio (however expressed) permitted under another environmental planning instrument (other than State Environmental Planning Policy No 1—Development Standards) by a bonus of 0.5 added to the gross floor area component of that floor space ratio.*
> *Note—*
> *For example, if the floor space ratio permitted under another environmental planning instrument is 1:1, a consent authority may consent to a development application for the purposes of a building having a density and scale of 1.5:1.*
> *(3) Subsection (2) applies even if the floor space ratio permitted under another environmental planning instrument is expressed in a development control plan.*
> *(4) In calculating the gross floor area for the purposes of subclause (2), the floor space used to deliver on-site support services (other than any floor space used to deliver communal or residents' living areas) is to be excluded.*
> *(5) However, if the area of the floor space referred to in subclause (4) is greater than 50% of the gross floor area, then the area that may be excluded under subclause (4) is limited to an area that does not exceed 50% of the gross floor area.*

24. The critical words are those underlined above. The starting point is the ordinary and grammatical sense of the words to be interpreted having regard to their context and legislative purpose: *Alcan (NT) Alumina Pty Limited v Commissioner of Territory Revenue* [2009] HCA 41; 239 CLR 27 at [47]. The ordinary words do not expressly adopt the definition of GFA from another environmental planning instrument (EPI). Only the

numerical FSR control of another EPI is expressly adopted. It makes reference to the GFA component of that FSR control, but not the definition.

25. GFA is defined under SEPP Seniors in cl 3 and unless expressly or by necessary implication it is excluded, it is, as a matter of statutory construction, the relevant definition for all purposes.

26. Section 6 of the *Interpretation Act 1989* says:

> *Definitions that occur in an Act or instrument apply to the construction of the Act or instrument except in so far as the context or the subject matter otherwise indicates or requires.*

Does the context or subject matter of cl 45 mean that the definition in cl 3 of SEPP Seniors should be excluded?

27. In my opinion, the purpose and context of the provision is to do no more than create an FSR standard by reference to another EPI. It is not evident that the purpose was to also adopt the LEP definition of GFA.

28. Neither is the definition of GFA under SEPP Seniors excluded by necessary implication. The fact that in order to determine an FSR it is necessary to know what the GFA is does not mean that it is necessary to know what the GFA is under that EPI or the definition of GFA from that other instrument is to be applied for that purpose.

29. It is perfectly possible to adopt the numeric expression of an FSR from LEP 2009 and add the bonus of 0.5:1 from SEPP Seniors in order to derive the applicable FSR. From the calculation of GFA according to the SEPP it is then possible to determine how much GFA is permissible under the SEPP. I do not see that the context or subject matter requires otherwise.

30. Further, the use of the parenthesised words "however expressed" tends to suggest to the contrary of that asserted by Maddocks and Mills Oakley. That is, that the provision is adopting the numerical value of FSR however that might be defined in the LEP and applying that numerical value to the task in SEPP Seniors according to the definition of GFA in SEPP Seniors. Far from suggesting that the definition of GFA is also adopted, the words, "however expressed" are really saying, regardless of how FSR may be defined under the other instrument, it is the value from that instrument that is to be adopted and a bonus of 0.5:1 is then to be applied, but when applied to the subject development, the definition of GFA from SEPP Seniors is then used.

31. There may be cases, of course, where the FSR is not expressed in the other EPI as an FSR, but as another kind of density control. For example, a floorplate control, such as that which applies in Woollahra Council's area. In that case, the term "however expressed" means not only how it is defined, but how it is named. But that type of control could still be used to derive a permissible GFA to calculate a notional FSR under that instrument which would then be used to apply a bonus and a recalculation of GFA according to the SEPP definition.

32. In their advice, the Council's lawyers, Marsdens, suggest that "it would be impossible to determine whether a proposed development exceeds the [FSR] (however expressed) permitted under another [EPI]". I do not understand why such a task is impossible. The clause does not require the FSR to be calculated under the other EPI, but it just adopts the value as a standard to be applied under the SEPP and permits an exceedance of that numerical value by 0.5. Where the FSR under the LEP is expressed as 1.1:1, the effect of cl 45(2) is to allow an FSR that exceeds 1.1:1 by 0.5:1, thus the standard becomes 1.6:1, and the FSR can then be calculated by using the GFA in accordance with SEPP Seniors. I see no reason why that is impossible nor why that is not the logical and literal interpretation of cl 45(2).

Question 3: Car parking to meet the requirements of SEPP Seniors or the Council

33. The definition of GFA in SEPP Seniors is as follows:

> *gross floor area means the sum of the areas of each floor of a building, where the area of each floor is taken to be the area within the outer face of the external enclosing walls (as measured at a height of 1,400 millimetres above each floor level)—*
> *(a) excluding columns, fin walls, sun control devices and any elements, projections or works outside the general lines of the outer face of the external wall, and*
> *(b) excluding cooling towers, machinery and plant rooms, ancillary storage space and vertical air conditioning ducts, and*
> *(c) excluding car parking needed to meet any requirements of this Policy or the council of the local government area concerned and any internal access to such parking, and*
> *(d) including in the case of in-fill self-care housing any car parking (other than for visitors) in excess of 1 per dwelling that is provided at ground level, and*
> *(e) excluding space for the loading and unloading of goods, and*
> *(f) in the case of a residential care facility—excluding any floor space below ground level that is used for service activities provided by the facility.*

34. The critical aspect of this definition that I am asked is whether sub-clause (c) of the definition (as underlined) can be taken to include any car parking required by a Development Control Plan (DCP). Similar terminology is also used in the LEP 2009 definition of GFA. It allows the exclusion of "any car parking to meet any requirements of the consent authority (including any access to that car parking)." In respect of that definition, Mills Oakley, on behalf of the applicant advise that all parking should be excluded as it is all car parking to meet the requirements of the consent authority.

35. In my opinion, the provision under SEPP Seniors is thoroughly ambiguous in several respects.

36. First, it allows all car parking "to meet any requirements of this Policy or the council". The use of "or" is ambiguous. If the amount required by the Policy is less than the amount required by the Council, how should such a conflict be treated? The answer to this perhaps turns on the terms of the requirement of the Council. If the requirement of the

Council is a minimum rather than a maximum, it could truly be said to be a minimum requirement and thus, might prevail over the SEPP for the following reason.

37. The second ambiguity is that given that SEPP Seniors contains a car parking standard in cl 50(h) which is expressed as a "must not refuse" standard, and thus, is a minimum rather than a maximum. In this sense it is doubtful that the amount of parking specified in cl 50(h) can be said to be "required". On one view, no amount is actually "required" because a consent authority could approve a development with no parking or with more parking than the "must not refuse" standard. This difficulty was also identified by O'Neill C in *Saha Builders Pty Limited v Ku-ring-Gai Council* [2019] NSWLEC 1497 at [42], but she concluded that the spaces over and above the standard in cl 50 should be included as GFA.

38. The third ambiguity is whether the term "requirements of the Council" could be those expressed in a DCP or any other document. In my opinion, while the DCP is not directly called up by cl 3, the provision is of such generality and sufficiently broad to encompass any requirement whether in another EPI, a DCP or some other policy. O'Neill C made a similar finding in *Saha Builders* (supra) at [39]. Accordingly, the DCP may be relevant and considered under cl 3.

39. Further support for this proposition can be found in cl 45(3) which expressly refers to the use of a DCP for determining an FSR bonus. If a DCP may be the source of an FSR control, equally it may be the source of control over car parking requirements when considered in the context of cl 3.

40. Whether the DCP would prevail over the standard in cl 50 of SEPP Seniors then turns on whether the requirement for parking in a DCP or other policy is expressed to be a minimum. If it is, and the amount in the DCP is greater than the SEPP requirement, in my opinion the DCP requirement may prevail over the "must not refuse" standard for the purposes of calculating GFA under cl 3.

41. If the DCP does not contain any provision for car parking for senior's housing developments, and there is no other policy requirement that identifies a Council requirement, the rate in cl 50 of SEPP Seniors should be treated as the rate above which additional car parking should be treated as GFA.

42. However, in the context of a DCP such as that for Lane Cove, which is entirely silent as to senior's housing as a distinct use of land, it is arguable that the provisions of the DCP that relate to multi-unit residential development apply equally to housing for seniors as for any other residential flat building. Such a construction is supported by the principles of characterisation in *Abret Pty Limited v Wingecarribee Shire Council* [2011] NSWCA 107; 180 LGERA 343. In that context it is entirely arguable that the DCP requires car parking to be provided at the rate specified in Table 1 and, thus, only parking above the rate in Table 1 of the DCP is to be treated as GFA for the purposes of cl 3.

43. I note in this respect that the DCP described the car parking rates to be neither maximums nor minimums and any departure is to be "justified". In my opinion this means that the amounts specified in Table 1 for residential flat development can be said to be "requirements of the Council" for the purposes of cl 3 of SEPP Seniors.

30 January 2023

ANDREW PICKLES SC
Chambers