Mills Oakley
ABN: 51 493 069 734

1 February 2023

Privileged and confidential

Your ref:
Our ref: AXGS/ARKS/3494162

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Attention: Simon Truong and Stephen Abolakian

Dear Simon and Stephen

Planning law advice re modification of development consent DA162/2021 for 13-19 Canberra Avenue, St Leonards

You have asked us to provide advice regarding the modification of development consent DA162/2021 for 13-19 Canberra Avenue, St Leonards NSW.

The modification application would be made under section 4.55(2) of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**).

You want to know whether your proposed modification will satisfy the 'substantially the same test'.

You would also like a legal explanation of the relevant matters for consideration under section 4.55(3) of the EP&A Act and whether (and to what extent) that is limited by the nature of the application.

Summary advice

In our opinion:

- The material constraint on the approval of any proposed modification is that the proposed modified development must be 'substantially the same' as the development as originally approved.
- The proposed modifications do not materially change any of the essential and material features of the development.
- A comparison of the consequences of carrying out the modified development (compared to the originally approved project) do not prevent the 'substantially the same' test from being satisfied.
- The development — as modified by **the proposed modification application** — will remain substantially the same development as the development originally approved by the development consent.
- The consent authority must consider the matters that are relevant to the aspects of the development to which the application relates. This requires, for example, **consideration** of:
  - provisions of any environmental planning instrument that are relevant to the aspects of the development to which the application relates;
  - the likely natural, social and economic impacts to the locality caused by the proposed modification application;

- whether the site is suitable for the proposed modified development; and
- whether the modification of the consent is in the public interest.

Background

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

- You are the developer of 13-19 Canberra Avenue, Lane Cove (**the site**). The site is also known as Lots 11, 12, 13, and 14 Sec 3 DP7259.
- The site area is 2,629.2m^2.
- The site is zoned 'R4 High Density Residential' (**R4**) under the *Lane Cove Local Environmental Plan 2009* (**the LEP**).
- On 27 June 2022 development consent was granted for DA162/2021 (**the original development consent**). The development consent was for the demolition of existing structures and construction of a mixed use development comprising:
  - 81 apartments;
  - a childcare centre for 60 children;
  - a community facility;
  - restaurant/café; and
  - basement parking for 116 vehicles, east-west public pedestrian link and stratum/strata subdivision.
- On 17 November 2022, the Council modified the development consent to combine two apartments on Level 11, that had been approved by the original development consent, into one apartment (**the existing development consent**).
- You lodged a modification application on 15 August 2022 to modify the development consent under section 4.55 of the *Environmental Planning and Assessment Act 1979* (**the EP&A Act**). This modification application was approved on 9 December 2022.
- You lodged a modification application on 7 December 2022 to modify the development consent under section 4.55 of the EP&A Act. This modification application has not been determined to date.
- You are preparing to lodge a modification application to modify the development consent under section 4.55(2) of the EP&A Act (**the proposed modification application**).
- The proposed modification application is reflected in the following drawings prepared by SJB:
  - 'Site Analysis', drawing DA-0102, revision 54, dated 13 December 2022;
  - 'Floor Plan B3', drawing DA-0202, revision 54, dated 13 December 2022;
  - 'Floor Plan L13', drawing DA-0219 revision 54, dated 13 December 2022;
  - 'Level 14', drawing DA-0220, revision 54, dated 13 December 2022;
  - 'Roof', drawing DA-0221, revision 54, dated 13 December 2022;
  - 'North Elevation', drawing DA-0501, revision 54, dated 13 December 2022;
  - 'East Elevation', drawing DA-0502, revision 54, dated 13 December 2022;
  - 'South Elevation', drawing DA-0503, revision 54, dated 13 December 2022;
  - 'West Elevation', drawing DA-0504, revision 54, dated 13 December 2022;

- ‘Building Section 1’, drawing DA-0601, revision 54, dated 13 December 2022;
- ‘Shadow Analysis’, drawing DA-2000, revision 54, dated 13 December 2022;
- ‘Shadow Analysis’, drawing DA-2001, revision 55, dated 14 December 2022;
- ‘Solar Diagram Sheet 2’, drawing DA-2102, revision 54, dated 13 December 2022;
- ‘Solar Point Perspective Sheet 1’, drawing DA-2201, revision 54, dated 13 December 2022;
- ‘East Elevation – Materials and Finishes’, drawing DA-2402, revision 54, dated 13 December 2022;
- ‘North Elevation – Materials and Finishes’, drawing DA-2403’, revision 54, dated 13 December 2022;
- ‘South Elevation – Materials and Finishes’, drawing DA-2404, revision 54, dated 13 December 2022;
- ‘West Elevation – Materials and Finishes’, drawing DA-2405, revision 54, dated 13 December 2022; and
- ‘GFA Plan Sheet 02’, drawing DA-3002, revision 54, dated 13 December 2022

(**the proposed modification plans**).

- The calculation of the floor space ratio in the ‘Urban Design Report’ for the proposed modification prepared by SJB is correct (we have not checked this ourselves).

Please tell us if any of the above facts are not correct, as it may change our advice.

Detailed advice

1. The development consent

1.1 The original development consent, as granted, is (as per the first page) for the:

> Demolition of existing structures and construction of a **mixed-use development** (12 storeys) comprising 81 apartments, childcare centre for 60 children, community facility, restaurant/café and basement parking for 116 vehicles, east-west public pedestrian link and stratum/strata subdivision (bold added).

1.2 You intend to make an application to **modify** the development consent under section 4.55(2) of the EP&A Act.

2. The ‘substantially the same test’

2.1 A power to modify a development application (and the development consent) is found in section 4.55(2) of the EP&A Act. Section 4.55 relevantly says:

> (2) **Other modifications** A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—
>
> (a) it is 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) (some bold added) …

2.2 This means that a modification of the original development consent cannot be approved unless the consent authority (or the Land and Environment Court on appeal) is satisfied that it meets the ‘substantially the same’ test.

2.3 The ‘substantially the same’ test is a threshold legal test that must be met before the modification can be dealt with on its merits.

2.4 In applying the 'substantially the same' test, the focus is on the 'development'. A comparison must be made between the development as modified and the development to which the development consent currently relates (cf *Scrap Realty v Botany Bay City Council* [2008] NSWLEC 333 at [16]).

2.5 To pass the test, the result of the comparison must involve a finding that the modified development is 'essentially' or 'materially' the same as the approved development (cf *Moto Developments (No 2) v North Sydney Council* [1999] NSWLEC 280 at [55]; *Vacik v Penrith City Council* [1992] NSWLEC 8).

2.6 This could support an inquiry to identify the **material and essential features** of the originally approved and modified development under the development consent in order to undertake the comparative assessment, but it does not demand such an inquiry (cf *Arrage v Inner West Council* [2019] NSWLEC 85 at [27]).

2.7 In most cases this will be the most instructive way to identify whether the modified development is substantially the same development as the originally approved development. However, as an alternative, a comparison could be made of the consequences, such as the environmental impacts, of carrying out the modified development compared to the originally approved project (cf *Arrage* at [28]).

2.8 Where essential elements are identified, they are to be derived from the originally approved and the modified development (**not** the circumstances of the giving of the development consent): cf *Arrage* at [24]-[25], [29].

2.9 A qualitative and quantitative comparison is required. However, differences in qualitative and quantitative effects do not necessarily mean that the character of a development is changed in a material respect (cf *Davi Development v Leichardt Council* [2007] NSWLEC 106). Even if each of the changes are significant in their own way, the proposed modified development may still be substantially the same (cf *Tyagrah Holdings v Byron Bay Shire Council* [2008] NSWLEC 1420 at [12]).

2.10 Even when the **quantitative** differences between the development as currently approved and the proposed modified development are small, it is still possible that the 'substantially the same' test might not be satisfied for **qualitative** reasons.

2.11 For example, in each of the following cases the 'substantially the same' test was held to be satisfied:

(a) The modification of a three-storey mixed use building to a four-storey mixed used building (*Bassett & Jones Architects Pty Limited v Waverley Council (No.2)* [2005] NSWLEC 530).

(b) Changes to the external appearance and layout of five residential flat buildings of 76 units, increasing the number of units to 102 units with an additional level of basement car parking (*Marana Developments Pty Limited v Botany City Council* [2011] NSWLEC 1110).

(c) A change to a number of the eight single-storey townhouses (that presented as four townhouses), to two storeys, along with the separation of a number of the dwellings and changes to the garage design and car parking layout (*Bathla Investments Pty Ltd v Blacktown City Council* [2008] NSWLEC 1506).

(d) The incorporation of a basement level into a three-storey dual occupancy development (*Mech v Waverley Council (No.2)* [2005] NSWLEC 363).

(e) The modification of a 1970s consent for a seven-storey residential flat building with two levels for parking. The number of units was reduced from 42 to 30 and the unit mix throughout the building was different. The number of residential floors was reduced by one and the internal layout of individual rooms was changed. The height of the main parapet was increased by 400mm with an architectural element arising above that for a further 500mm. The car parking layout was entirely different. A lift overrun was removed. (*Davi Development v*

Leichardt Council [2007] NSWLEC 106).

(f) The modification of a residential flat building with:

(i) an increase in building height (at a lift overrun) of 4.1 metres; and

(ii) a 10 per cent increase in gross floor area (from a little over 4,200 square metres to a little over 4,600 square metres),

Trinvass Pty Ltd v Council of the City of Sydney [2018] NSWLEC 77 at [30]-[31] and [50].

(g) The modification of an approved seniors living facility to effect a substantial reduction in the scale and density of what had been approved. The originally granted development consent had approved 186 independent living units. This was reduced to 96 — a 48 per cent change in unit numbers (*Aveo North Shore Retirement Villages Pty Ltd v Northern Beaches Council* [2020] NSWLEC 1035 [4]; [12]-[13] and [134]).

3. Applying the 'substantially the same' test to your modification application

The material and essential features of the originally approved development

3.1 In *Arrage* the Land and Environment Court (Preston CJ) said (at [24]-[25]):

> First, the essential elements to be identified are not of the development consent itself, **but of the development that is the subject of that development consent**. The comparison required by s 4.55(2) is between two developments: the development as modified and the development as originally approved: see *Scrap Realty Pty Ltd v Botany Bay City Council* (2008) 166 LGERA 342; [2008] NSWLEC 333 at [16]. …
>
> Second, the essential elements are not to be identified "from the circumstances of the grant of the development consent"; they are to be derived from the originally approved and the modified developments**. It is the features or components of the originally approved and modified developments that are to be compared** in order to assess whether the modified development is substantially the same as the originally approved development. (bold added).

3.2 This means that in identifying 'essential elements' we must consider and compare the original and proposed developments themselves, **rather than**:

(a) the development consent as a dry legal document; or

(b) the circumstances in which the development consent was granted.

3.3 In our opinion the following are the essential and material features of the originally **approved** development:

(a) The development comprises:

(i) a mixed use development;

(ii) apartments, a childcare centre, a community facility, and a restaurant/café; and

(iii) basement parking.

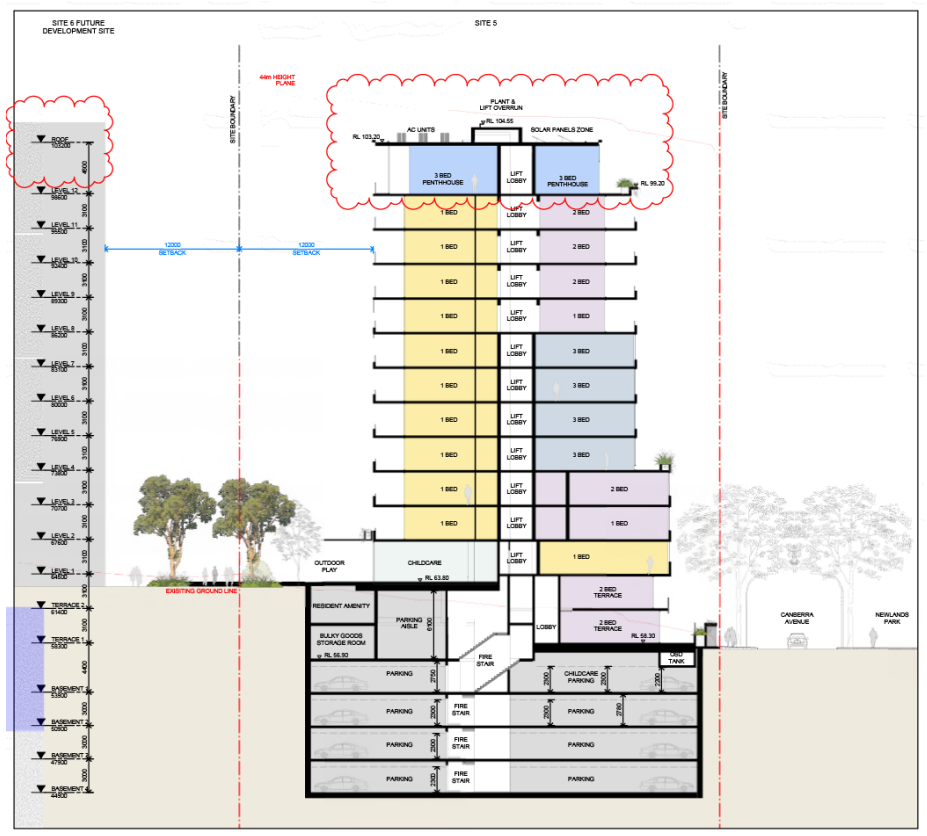
(b) The originally approved development is of a footprint, height, bulk and scale as depicted in the drawings listed in condition A1 of the original development consent, as amended by the design amendments listed in condition A2 of the original development consent.

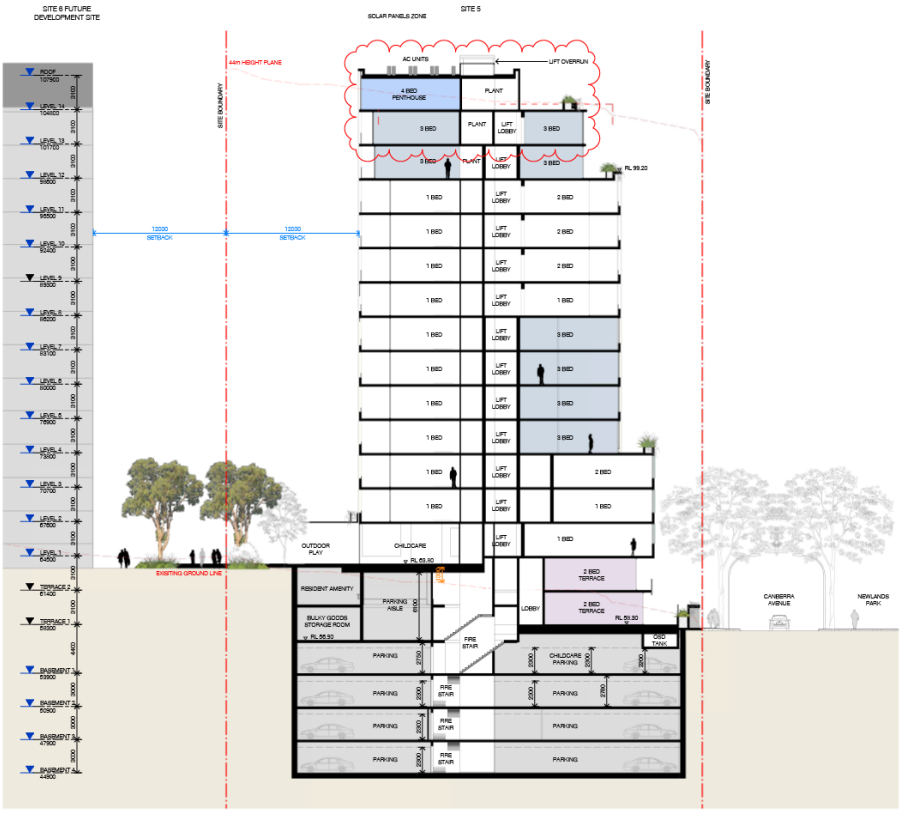
3.4 When comparing the originally approved development (i.e. the original development consent granted on 27 June 2022) with the proposed modified development we observe the following:

(a) The footprint of the proposed modified building is materially the same as the originally approved footprint (drawings DA-0501, DA-0502, DA-0503, and DA-0504 Revision 45 as originally approved and drawings DA-0501, DA-0502, DA-0503, and DA-0504 Revision 54 of the proposed modification plans).

(b) The height of the proposed modified building is RL 109.70 (at the lift overrun), compared to the originally approved height of RL 104.55 (at the lift overrun) (a 4.9 per cent increase).

(c) The approved configuration of the building is materially the same. This is illustrated by the extract from the approved 'Building Section 1' (drawing DA-0601 Revision 45) below and the extract from the 'Building Section 1' (DA-0601 Revision 54) of the proposed modification plans, also below:





(d) There are two additional levels (identified as ‘Level 13’ and ‘Level 14’ on the elevation drawings 0501-0504 Revision 54 prepared by SJB on 29 November 2022). ‘Level 13’ will contain three apartments (‘Floor Plan L13’, drawing DA-2019 Revision 54 of the proposed modification plans), and ‘Level 14’ will contain one apartment (‘Level 14’, drawing DA-0220 Revision 54 of the proposed modification plans).

(e) The number of apartments will increase from 81 to 84 (a 3.7 per cent increase).

(f) There is no change to the childcare centre for 60 children.

(g) There is no change to the community facility.

(h) There is no change to the restaurant/café.

(i) There is no change to the east-west public pedestrian link.

(j) There is no change to the site vehicle access.

(k) The extent of car parking will increase from 116 spaces to 123 spaces (a 6.0 per cent increase).

(l) The internal configuration of each existing level remains the same, except for level ‘B3’.

(m) Nineteen of the 42 storage cages on level ‘B3’ will be converted to eight car parking spaces to accommodate the addition of four apartments on levels ‘13’ and ‘14’.

(n) There is no change to the storage cages on levels ‘B1’, ‘B2’, and ‘B4’.

(o) The roof will be higher in elevation due to the addition of levels ‘13’ and ‘14’. The layout of the roof remains the same.

3.5 In our opinion these modifications do not materially change any of the essential and material features of the development. Nonetheless, it is necessary to further discuss the aspects of the development that are proposed to be changed:

(a) no change in land use;

(b) the conversion of 19 of the 42 storage cages on level 'B3' into car parking spaces;

(c) the additional levels '13' and '14';

(d) the floor space ratio of the development; and

(e) the environmental impacts of the proposed changes.

No change in land use

Qualitative assessment

3.6 There will be no change to the land use in that the development will continue to be a mixed use development comprising apartments, a childcare centre, a community facility, a restaurant/café, and basement parking.

3.7 The 'substantially the same test' will not be satisfied if the proposed modification seeks to **introduce** characterisation activities, transactions or processes which **differ in kind** from the originally approved use: *Cordina Chicken Farms Pty Ltd v Attard Racing Pty Ltd* [2015] NSWLEC 108 at [80].

3.8 A modification to alter land use may satisfy the 'substantially the same' test if it **merely changes the detailed activities, transactions or processes which will take place**: *Cordina Chicken Farms* at [80].

3.9 In the present case, the development consent is, first and foremost, a development consent for 'mixed use development' comprising apartments, a childcare centre, a community facility, and a restaurant/café, with basement parking.

3.10 This aspect of the approved development will not change. Therefore, the proposed modification will be consistent with its intended use.

Quantitative assessment

3.11 The number of apartments will increase from 81 to 84 (a 3.7 per cent increase).

3.12 The increase in levels from 12 (plus 2 part) to 14 (plus 2 part) is a 16.7 per cent increase.

3.13 This is not dissimilar to quantitative variations that have previously been approved by the Land and Environment Court under the banner of the 'substantially the same' test.

3.14 In *Trinvass* the gross floor area was varied by 10 per cent. In *Marana Developments* a 34 per cent change in unit numbers was approved. In *Davi Development* a 30 per cent change in unit numbers was approved. In *Aveo North Shore Retirement Villages* a 48 per cent change unit numbers was approved.

3.15 In our opinion, the increase in apartments from 81 apartments to 85 apartments, being 4.9 per cent, and the increase in levels from 12 (plus 2 part) to 14 (plus 2 part), being 16.7 per cent, should not, on **quantitative** grounds, cause the proposed modification to fail the 'substantially the same' test.

Conversion of 19 of the 42 storage cages on level 'B3' into car parking spaces

3.16 The proposed modification plans show a conversion of 19 of the 42 storage cages on level 'B3' into car parking spaces. In our view, there is nothing in the terms of the existing development consent to suggest that the 19 storage cages to be converted are a material or essential feature of the consent.

3.17 In our opinion, the proposed modified development should not, on **qualitative** or **quantitative** grounds, fail the 'substantially the same' test on the grounds of floor space ratio compliance.

Additional Levels 13 and 14

3.18 The addition levels '13' and '14' on the proposed modification plans for an additional 4 apartments.

3.19 The extract of drawing DA-0601 Revision 54 'Building Section 1' above at paragraph 3.4(c) shows the proposed additional levels '13' and '14' surrounded by a red line.

3.20 In *Aveo North Shore Retirement Villages* the Court said (at [99]) that whether the proposed development is substantially the same is not a question capable of scientific or mathematical precision, but rather a judgement based on an overall quantitative and qualitative assessment. In that matter, a 48 per cent variation in residential unit numbers was approved.

3.21 In finding that this variation satisfied the 'substantially the same' test the Court said (at [105] – [106]):

> It is axiomatic that modifications to a development will result in some change. However, this **does not** mean that even **quite extensive changes** will result in the overall development becoming something other than substantially the same. It is necessary to focus not on the extent of the changes but the overall development. …
>
> The **beneficial effects** of the 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 (bold added) …

3.22 In the present case, the originally approved development provided for 81 apartments and 116 car parking spaces in a development with a height of RL 104.55.

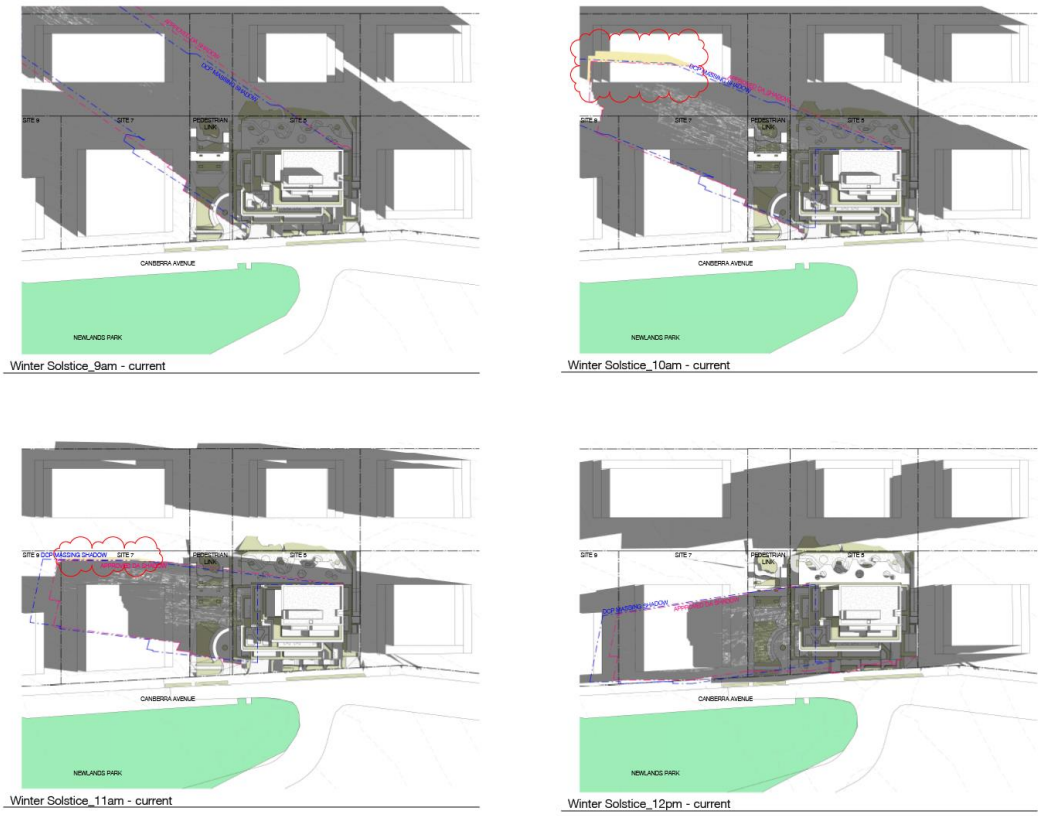
3.23 The proposed modification plans provide for 84 apartments over an additional two levels and 123 car parking spaces (with 19 of the 42 storage cages on existing level 'B3' to be converted to up to six car parking spaces).

3.24 This results in an actual difference of four apartments and six car parking spaces in a development with a total height of RL 109.70, being a percentage increase of a 3.7 per cent (apartments), 6.0 per cent (car parking spaces), and 4.9 per cent (building height) respectively.

3.25 When assessing the addition of levels '13' and '14' qualitatively, we consider that the proposal does not increase the building footprint of the originally approved development.

3.26 While there is an increase in the height of the originally approved development, this height increase does not materially increase overshadowing or visual privacy impacts.

3.27 The below extract of drawing DA-2000 Revision 54 'Shadow Analysis' indicates in yellow surrounded by a red line the change to overshadowing of neighbouring buildings on the winter solstice:



3.28 The below extract of drawing DA-2001 Revision 55 'Shadow Analysis' indicates in yellow surrounded by a red line the change to overshadowing of Newland Park on the winter solstice:

3.29 There is plainly no material increase in overshadowing.

3.30 Drawings DA-0501, DA-0502, DA-0503, and DA-0504 Revision 54 of the proposed modification plans shows significant setback to the west, south, and east. Levels '13' and '14 are further stepped back on the south and east aspects as indicated in drawings DA-0502 and DA-0503 Revision 54. On this it appears that there will be no material visual privacy impacts.

3.31 We have considered the 'Urban Design Report' for the proposed modification prepared by SJB against the design quality principles in the *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development* and the *Apartment Design Guide*.

3.32 In our view, the analysis shows that there is no material change to the satisfaction of

design criteria for:

(a) orientation;

(b) solar access;

(c) visual privacy;

(d) natural ventilation;

(e) ceiling heights;

(f) apartment size and layout;

(g) private open space and balconies;

(h) common circulation and spaces;

(i) storage;

(j) acoustic privacy;

(k) apartment mix;

(l) facades; and

(m) roof design.

3.33 In our opinion, the key beneficial effects of the proposed modification can be summarised as follows:

(a) The proposed modification gives better effect to the 'R4 High Density Residential' zone objectives than the originally approved development. The zone objective are as follows:

- To provide for the housing needs of the community within a high density residential environment.
- To provide a variety of housing types within a high density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for a high concentration of housing with good access to transport, services and facilities.
- To ensure that the existing amenity of residences in the neighbourhood is respected.
- To avoid the isolation of sites resulting from site amalgamation.
- To ensure that landscaping is maintained and enhanced as a major element in the residential environment.

(b) The proposed modification will give better effect to the zone objectives by:

(i) better providing for the housing needs of the community (within a high density residential environment) by providing for four additional apartments (without any material adverse impact) — as per the first dot point of the zone objectives;

(ii) better contributing to the variety of housing types within the high density residential environment through the provision of three additional 3-bedroom units and an additional 4-bedroom unit — as per the second dot point of the zone objectives; and

(iii) including four further dwellings on the site, being a site in a location identified for a 'high concentration of housing with good access to transport, services and facilities' — as per the fourth dot point of the zone objectives.

(c) The four additional apartments will 'better satisfy increasing demand, the changing social and demographic profile of the community, and the needs of the widest range of people from childhood to old age, including those with disabilities' (as per the aim set out in clause 2(3)(c) of *State Environmental Planning Policy No 65-Design Quality of Residential Apartment Development* (**SEPP 65**)). The additional three-bedroom and five-bedroom apartments add to the choice for a family to be accommodated in an apartment, instead of pursing a more expensive free-standing dwelling.

(d) The changes will 'minimise the consumption of energy from non-renewable resources, to conserve the environment and to reduce greenhouse gas emissions' (as per the aim set out in clause 2(3)(e) of SEPP 65). By making better use of the site, a style of living similar to that of a house is able to be achieved, but in a less greenhouse gas intensive way than, for example, the construction of a new free-standing dwelling house on greenfield land in a location more remote from amenities, employment and services.

(e) The changes will 'contribute to the provision of a variety of dwelling types to meet population growth' (as per the aim set out in clause 2(3)(f) of SEPP 65) and 'support housing affordability' growth' (as per the aim set out in clause 2(3)(g) of SEPP 65). By providing the four additional apartments, more compact and more (relatively) affordable dwellings are provided as an alternative to dwelling houses in the same locality.

(f) Given the absence of material adverse impacts, the changes will better achieve 'good design' and 'a density appropriate to the site and its context' (as per design quality principle 3 in Schedule 1 of SEPP 65).

(g) The new dwellings will better 'respond to social context by providing housing and facilities to suit the existing and future social mix' (as per design quality principle 8 in Schedule 1 of SEPP 65).

3.34 In the context of:

(a) beneficial effects of the proposed modification; and

(b) the absence of any material adverse impacts onsite,

we consider that the additional unit numbers/storeys (and consequent basement changes) should not cause the 'substantially the same' test to be failed **quantitively** or **qualitatively**.

3.35 For completeness it should be noted that the percentage variation in unit numbers approved in *Aveo North Shore Retirement Villages* is around **ten times** the percentage variation in apartment numbers in the present case (48 per cent versus 4.9 per cent).

Floor space ratio and gross floor area

3.36 The proposed modification results in an increase in floor space ratio from 3.32:1 to 3.58:1. This is a 7.8 per cent increase.

3.37 The proposed modification results in an increase in gross floor area from 8,726m^2 to 9,401m^2. This is a 7.7 per cent increase.

3.38 In our opinion, for reasons similar to those expressed above (in relation to unit numbers, etc), the minor increase in floor space ratio and gross floor area should not, on **qualitative** or **quantitative** grounds, fail the 'substantially the same' test.

Environmental impacts of the proposed changes

3.39 We have considered various possible environmental impacts of the proposed changes above. We have, in that preceding analysis, not identified any material adverse impacts arising from the modification.

3.40 There is no material change to the footprint and internal layout. The shadow analysis indicates that the increase in height will not have any material impact on overshadowing. The presence of significant setbacks indicate that there will be no material visual privacy impacts. On this basis, we consider that there is no potential for any additional material adverse impacts on neighbours.

3.41 The documents that we have reviewed do not lead us to believe that there would be any additional adverse privacy or amenity impacts on neighbours by reason of the increase in height or number of apartments.

3.42 The material that we have reviewed does not suggest to us that the amenity enjoyed by the occupants of the building will be reduced as a result of the modification.

3.43 In short, we consider that a comparison of the consequences of carrying out the modified development (compared to the originally approved project) does not prevent the 'substantially the same' test from being satisfied.

Conclusion on the 'substantially the same' test

3.44 The power to modify a development consent is one to be regarded as beneficial and facultative (*North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475). There is an implied shift in the persuasive burden to the Council to demonstrate why the proposed modification should not be regarded as appropriate (*TL & TL Tradings Pty Ltd v Parramatta City Council* [2016] NSWLEC 150 at [84] – [85]). The 'substantially the same' test should be applied in the context of this statutory purpose. Its scope should extend to beneficial modifications of this kind.

3.45 Accordingly, in our opinion, the development — as modified by **the proposed modification application** — will remain substantially the same development as the development originally approved by the development consent.

4. Matters for consideration under section 4.55(3)

4.1 A modification application is legally distinct from a development application (*Peter Duffield and Associates Pty Ltd v Canada Bay City Council* (2002) 124 LGERA 349).

4.2 Your intended application is to be made under section 4.55(2) of the EP&A Act. The constraints on the exercise of the power to modify a development consent are found only in section 4.55 and are not to be derived from other provisions of the EP&A Act: *Intrapac Skennars Head Pty Ltd v Ballina Shire Council* [2021] NSWLEC 83 at [38].

4.3 This means that the material constraint on the approval of any proposed modification is that the proposed modified development must be 'substantially the same' as the development as originally approved.

4.4 The grant of the original development consent was the subject of various constraints that are **not** derived from section 4.55.

4.5 In particular, the development consent was only able to be granted if the authorised development is to be carried out in accordance with the applicable environmental planning instrument(s): section 4.2(1) of the EP&A Act.

4.6 However, in the leading decision of *North Sydney Council v Michael Standley and Associates* (1998) 43 NSWLR 468, the Court held at 480–481 that:

> A modification application may be approved **notwithstanding the development would be in breach of an applicable development standard** were it the subject of an original

development application (bold added).

4.7 In essence, the reason for this is that a **modification** application is not a **development** application. The development standards in an environmental planning instrument only strictly apply to the determination of development applications — and not to modification applications.

4.8 The Land and Environment Court has consistently applied *Michael Standley* since it was decided. (For example in *SDHA Pty Ltd v Waverley Council* [2015] NSWLEC 65, at [33]-[35].)

4.9 Section 4.55(3) of the EP&A Act says:

> In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of **relevance to the development the subject of the application**. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified (bold added).

4.10 This means that the consent authority must consider the matters under section 4.15(1) **that are relevant to the aspects of the development to which the application relates** (*1643 Pittwater Road Pty Ltd v Pittwater Council* [2004] NSWLEC 685 at [51]).

4.11 We consider that this requires, for example, **consideration** of:

(a) provisions of any environmental planning instrument that are relevant to the aspects of the development to which the modification application relates;

(b) the likely natural, social and economic impacts to the locality caused by the proposed modification application;

(c) whether the site is suitable for the proposed modified development; and

(d) whether the modification of the consent is in the public interest.

4.12 In considering these merit issues, the consent authority must **consider** any development standard in an environmental planning instrument that is relevant to the proposed modification, but will not be legally **bound** to apply it.

4.13 Nonetheless, if there is a relevant development standard imposed under an environmental planning instrument, it must be **taken into consideration** by the consent authority.

4.14 The obligation to 'take into consideration' the provisions of a development control plan under section 4.15(1) was explained by the Court of Appeal in *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105 (at [213]-[215]). We consider that the explanation would apply equally to the provision of an environmental planning instrument imposing a development standard in a modification application.

4.15 The obligation is as follows:

(a) At a practical level, a decision-maker is required, at the least, to ask the question: 'What does the standard provide?'.

(b) The decision-maker is **not** required to refuse the application because a standard specified in an instrument had not been observed.

(c) A decision-maker may need to consider:

(i) why it may be appropriate to not apply the standard in the instrument; or

(ii) whether, in the particular application under consideration, non-compliance with the standard in the instrument might be ameliorated by the imposition of conditions.

(d) Reasons may be advanced by an applicant as to why the standard ought not to apply at all. These will also have to be considered. Much will depend upon the subject matter of the standard and the nature and extent of the application under consideration.

Please do not hesitate to contact me on (02) 8035 7858 or Emily Ryan on (02) 8289 5833 if you have any queries regarding this advice.

Yours sincerely

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