



Land and Environment Court New South Wales

Medium Neutral Citation:

**Falamaki v Council of the City of Ryde [2022] NSWLEC
1601**

Hearing dates:

19 October 2022

Date of orders:

1 November 2022

Decision date:

01 November 2022

Jurisdiction:

Class 1

Before:

Gray C

Decision:

The Court orders that:

- (1) The appeal is upheld.
- (2) A deferred commencement development consent is granted to development application No LDA2021/0407 for internal alterations to an existing building and associated change in use to a dual occupancy (attached) with the dedication of one of the dwellings that comprise the dual occupancy as affordable housing pursuant to cl 17 of the State Environmental Planning Policy (Affordable Rental Housing) 2009, together with Torrens title subdivision into two lots, at 5 Cooney Street, North Ryde, subject to the conditions of consent in Annexure A.
- (3) Exhibits A and B are retained, and Exhibits 1-5 and C are returned.

Catchwords:

APPEAL – development application – internal alterations and change of use to dual occupancy – contentions resolved – deferred commencement consent

Legislation Cited:

Environmental Planning and Assessment Act 1979 ss 1.4, 4.15, 4.16, 6.4, 6.25, 6.26, 8.7
Environmental Planning and Assessment Regulation 2000, Sch 1
Land and Environment Court Act 1979 s 34AA
Ryde Local Environmental Plan 2014 cl 6.4

State Environmental Planning Policy (Affordable Rental Housing) 2009 Pt 2, Div 1, cll 10, 13, 14, 15, 16A, 17, 18
State Environmental Planning Policy (Resilience and Hazards) 2021 cl 4.6
State Environmental Planning Policy (Exempt and Complying Development Codes) 2008, Pts 2A, 3, cll 2A.1, 2A.3

Cases Cited: *F Hannan Pty Ltd v Electricity Commission of NSW* [No 3] (1985) 66 LGRA 306

Texts Cited: Ryde Development Control Plan 2014
NSW Department of Planning, Seniors Living Policy: Urban Design Guidelines for Infill Development 2004

Category: Principal judgment

Parties: Sajjad Falamaki (Applicant)
Council of the City of Ryde (Respondent)

Representation: Counsel:
R White (Applicant)
S Berveling (Respondent)

Solicitors:
Delana Legal Pty Ltd (Applicant)
City of Ryde Council (Respondent)

File Number(s): 2022/160547

Publication restriction: No

JUDGMENT

1 **COMMISSIONER:** On 22 October 2020 an occupation certificate was issued for a dwelling house at 5 Cooney Street, North Ryde. The dwelling house was constructed following the issue of complying development certificates 2018/074/01 and 2018/074/02. Mr Falamaki now seeks development consent for the carrying out of internal alterations to the dwelling and to change the use of the dwelling to an attached dual occupancy, as well as for Torrens title subdivision of the land. He lodged a development application seeking the same with the Council of the City of Ryde (the Council) on 25 November 2021. The development application proposes that one of the dwellings that form part of the dual occupancy be used for the provision of affordable housing, pursuant to the State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH). The development application was refused by the Council on 13 May 2022. These proceedings are an appeal by Mr Falamaki against that decision, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

- 2 The internal layout of the existing dwelling includes a central wall, the opposite sides of which are largely mirror images of each other. The central wall has a number of openings in it which provides connections between the different rooms. The proposed development is to enclose those openings in the central wall to create two attached dwellings that form the dual occupancy, and to construct a new level within the dwellings in the voids above the garage. The dwelling to the southeast side of the building (unit 5A) is proposed to be used for affordable housing. The proposed development also seeks to subdivide the land into two Torrens title lots, such that each dwelling that forms part of the dual occupancy is on its own Torrens title lot.
- 3 At the first directions hearing of the appeal, the Court made a determination that the proceedings are not to be dealt with under s 34AA(2) of the *Land and Environment Court Act 1979* (LEC Act) and listed the matter for a court hearing pursuant to s 34AA(4).

The Council's position and the outcome of the appeal

- 4 Following the preparation of joint reports by the expert witnesses and the lodgement of a building information certificate application by Mr Falamaki, the Council now agrees that the contentions it raised on the appeal have been resolved, and that there are no contentions that remain outstanding.
- 5 I am nevertheless required to carry out an assessment under s 4.15 of the EPA Act to determine if it is appropriate to grant development consent. Section 4.15(1)(a) of the EPA Act requires that the Court, in exercising the functions of the consent authority, consider the provisions of any applicable environmental planning instrument, development control plan, and regulations. Section 4.15(1) also requires consideration of, inter alia, the likely impacts of the development, the suitability of the site for development, any submissions made by the local residents, and the public interest.
- 6 For the reasons that are set out below, I accept the parties' position that each of the contentions raised by the Council have been resolved. I am also satisfied that each of the jurisdictional preconditions to the grant of development consent which has been identified by the parties, is met. The proposed development is permissible with consent, complies with the relevant development standards and has a design that is acceptable in its context.

The site and the locality

- 7 The site is known as 5 Cooney Street, North Ryde and is legally described as Lot 6 in DP 36487. It is 570m² with a frontage of 20.115m to Cooney Street, and narrows to a width of 15.24m at the rear boundary. The site has a fall of approximately 3.27m from the front boundary to the rear. The eastern part of the site contains a 1.83m wide easement for drainage purposes.

The site is located on the north-eastern side of Cooney Street, between Wicks Road to the southeast and Avon Road to the northwest. On the north-eastern side of Cooney Street, northwest and southeast of the site and along Avon Road, is predominantly single and two storey dwelling houses in addition to a number of dual occupancy developments including within the vicinity of the site at 1 Cooney Street, 60 Avon Road, 67 Avon Road and 76 Avon Road. On the other side of Cooney Street is a catholic school and church.

The history concerning the site

- 9 Complying Development Certificate 2018/074/01 (Council reference CDP2019/0435) was issued on 26 July 2019 for the construction of a dwelling house. This was later modified by Complying Development Certificate 2018/074/02 (Council reference Mod 2020/0063) on 3 April 2020. The modified complying development certificate approved a stairway connecting a small external landing on the southeast side of the building to the rear setback area.
- 10 The grant of CDC 2018/074/01 for the dwelling house was pursuant to Pt 2A of State Environmental Planning Policy (Exempt and Complying Development Codes) 2008 (SEPP ECDC). Part 2A contained transitional provisions that allowed the General Housing Code to continue to apply, notwithstanding that it had been repealed. Clause 2A.1 provided:

2A.1 Housing that would have been complying development under repealed General Housing Code continues to be complying development

(1) Development specified for the General Housing Code as repealed by *State Environmental Planning Policy (Exempt and Complying Development Codes) Amendment (Housing Code) 2017* is also complying development for the purposes of this Policy if the development would have been complying development under this Policy as in force immediately before the repeal of that Code.

(2) Development carried out under this clause is taken (except for the purposes of clause 1.17) to be carried out under a complying development code to be known as the Transitional Housing Code.
- 11 Pursuant to cl 2A.3, Part 2A ceased to have effect on 13 July 2019. As such, the only provisions of the SEPP ECDC that specified the requirements for complying development for housing were contained within Part 3. The approval of CDC 2018/074/01 pursuant to Part 2A on 26 July 2019 occurred after Part 2A ceased to have effect. The Council therefore says that CDC 2018/074/01 is liable to be set aside.
- 12 On 22 October 2020, an occupation certificate was issued, which references 2018/074/02 as the consent to which the certificate relates. Pursuant to s 6.4(c) of the EPA Act, the occupation certificate is taken to be part of the development consent to which it relates. A development consent includes a complying development certificate (s 1.4 of the EPA Act).
- 13 Prior to the issue of the occupation certificate, Mr Falamaki lodged a development application similar to that which is now before the Court. It sought alterations to the existing dwelling to create a dual occupancy, together with strata subdivision. That development application was the subject of an appeal to the Court on 8 July 2020. On

18 January 2021, the appeal was discontinued on the basis that the development application was “fatally flawed” as, on the Council’s view, it would have been inappropriate for the Court to grant development consent for a change of use of a building when the building was not constructed pursuant to a lawful complying development certificate.

The planning framework

- 14 The site is zoned R2 - Low Density Residential pursuant to the Ryde Local Environmental Plan 2014 (RLEP 2014), and attached dual occupancies are a nominated permissible use in the R2 zone. The zone objectives, which are required to be considered in determining a development application, are as follows:

1 Objectives of zone

- To provide for the housing needs of the community within a low 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 variety of housing types.

- 15 The application relies on the provisions of the now repealed SEPP ARH, which continues to apply to development applications lodged before its repeal. Part 2 Division 1 of the SEPP ARH applies to in-fill affordable housing and includes dual occupancies. Clause 10(2) of the SEPP ARH provides that “this Division does not apply to development on land in the Sydney region unless all or part of the development is within an accessible area”. The parties agree that the site is within an accessible area.

- 16 As a result of the application of Part 2 Division 1, cl 13 of the SEPP ARH allows an increase in the maximum floor space ratio (FSR) that applies to the proposal based on the portion of the development which is to be dedicated as affordable housing. Unit 5A is proposed to be dedicated for affordable housing and accounts for 46.9% of the gross floor area of the building. As such, the total FSR that is permissible on the site is 0.969:1, with which the building complies with a FSR of 0.61:1.

- 17 At cl 14 of the SEPP ARH, the policy sets out a number of grounds on which consent cannot be refused if certain criteria are met. It provides, at cl 14:

14 Standards that cannot be used to refuse consent

(1) Site and solar access requirements

A consent authority must not refuse consent to development to which this Division applies on any of the following grounds—

(a) (Repealed)

(b) site area

if the site area on which it is proposed to carry out the development is at least 450 square metres,

(c) landscaped area

if—

- (i) in the case of a development application made by a social housing provider— at least 35 square metres of landscaped area per dwelling is provided, or

(ii) in any other case—at least 30 per cent of the site area is to be landscaped,

(d) deep soil zones

if, in relation to that part of the site area (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) that is not built on, paved or otherwise sealed—

(i) there is soil of a sufficient depth to support the growth of trees and shrubs on an area of not less than 15 per cent of the site area (the deep soil zone), and

(ii) each area forming part of the deep soil zone has a minimum dimension of 3 metres, and

(iii) if practicable, at least two-thirds of the deep soil zone is located at the rear of the site area,

(e) solar access

if living rooms and private open spaces for a minimum of 70 per cent of the dwellings of the development receive a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter.

(2) General

A consent authority must not refuse consent to development to which this Division applies on any of the following grounds—

(a) parking

if—

(i) in the case of a development application made by a social housing provider for development on land in an accessible area—at least 0.4 parking spaces are provided for each dwelling containing 1 bedroom, at least 0.5 parking spaces are provided for each dwelling containing 2 bedrooms and at least 1 parking space is provided for each dwelling containing 3 or more bedrooms, or

(ii) in any other case—at least 0.5 parking spaces are provided for each dwelling containing 1 bedroom, at least 1 parking space is provided for each dwelling containing 2 bedrooms and at least 1.5 parking spaces are provided for each dwelling containing 3 or more bedrooms,

(b) dwelling size

if each dwelling has a gross floor area of at least—

(i) 35 square metres in the case of a bedsitter or studio, or

(ii) 50 square metres in the case of a dwelling having 1 bedroom, or

(iii) 70 square metres in the case of a dwelling having 2 bedrooms, or

(iv) 95 square metres in the case of a dwelling having 3 or more bedrooms.

18 Based on the Statement of Environmental Effects dated 21 November 2021, the proposed development meets the specified minimums for each of these criteria, and therefore cl 14 prevents me from refusing the application on any of those grounds.

19 Clause 15 of the SEPP ARH precludes consent from being granted unless the Court, in exercising the functions of the consent authority, has taken into consideration the Seniors Living Policy: Urban Design Guidelines for Infill Development. Based on the detailed supplementary joint report of the town planners filed on 20 October 2022, I have taken those guidelines into consideration.

20 Clause 16A of the SEPP ARH also prevents a consent authority from consenting to a development “unless it has taken into consideration whether the design of the development is compatible with the character of the local area.” As described above,

the locality is characterised by one and two-storey residential development, including a number of attached dual occupancies. The parties agree, and I accept, that the design of the development is compatible with the character of the local area.

21 Clause 17 of the SEPP ARH precludes the grant of consent unless a condition is imposed that requires the nominated dwelling to be used for the purpose of affordable housing and that requires it to be managed by a registered community housing provider. The parties have agreed on a condition of development consent that satisfies the requirements of cl 17, which can be found in condition 4.

22 Clause 18 of the SEPP ARH permits the subdivision of land to which the division applies. As such, the Torrens title subdivision sought by the proposed development is permissible with development consent.

23 Part 3.3 of the Ryde Development Control Plan 2014 (RDCP) applies to the site and concerns dwellings and dual occupancy. Section 2.1 requires, at (a), that development “is to be consistent with the desired future character of the low density residential areas.” The desired future character is described in the following way:

“2.1 Desired Future Character

The desired future character of dwelling houses refers to the complete building, whether this is the result of the construction of a completely new house, or of an addition or alteration to an existing house.

The desired future character of the low density residential areas of the City of Ryde is one that:

- Has a low scale determined by a maximum 2 storey height limit;
- Has a low density with free-standing dwellings;
- Has a limited number of dual occupancy (attached) buildings, and these buildings look similar to detached dwellings;
- Has dwellings located in a landscape setting which includes a clearly defined front garden and back yard;
- Has buildings which are well designed and have a high degree of amenity;
- Has streetscapes made up of compatible buildings with regard to form, scale, proportions (including wall plate heights) and materials;
- Has streetscapes with dwellings that have a generally consistent front setback and consistent street orientation;
- Has garages and other structures which are not prominent elements in the streetscape and which are compatible with the character of the dwelling;
- Requires minimal disturbance to the natural topography, which means that excavation is to be minimised;
- Has backyards, which are maximised in size;
- Has backyards which form a connected strip of vegetation in neighbourhoods and which include large trees;
- Has allotments with large deep soil areas which allow rainwater to be absorbed and trees to be planted;
- Has mature trees in streets, front gardens and backyards (existing mature trees are retained and new tree plantings encouraged).”

24 Section 2.9.2 of Part 3.3 of the RDCP 2014 concerns side setbacks, and requires that dwellings are generally to be set back from the side boundaries “not less than 1.5m”. Section 2.9.3 concerns rear setbacks, and requires the rear of the dwelling to be

set back “from the rear boundary a minimum distance of 25% of the length of the site or 8 m, whichever is the greater.” The existing dwelling, and the proposed dual occupancy, does not comply with the rear and side setback requirements. This is considered further below.

Issues raised on the appeal

- 25 A Statement of Facts and Contentions was filed by the Council on 4 July 2022, which raises a number of contentions that the Council now agrees are resolved. The contentions concern the lawfulness of the complying development certificate pursuant to which the dwelling was constructed (contention 1), the compatibility of the proposed development with the desired future character of the area (contention 2), residential amenity arising from privacy impacts (contention 3), and stormwater and floodplain management (contention 4).

Expert evidence

- 26 Expert opinion evidence on the town planning issues was given in a joint report by Mr Hussein Bazzi, a town planner engaged by Mr Falamaki, and Mr Ben Tesoreiro, a town planner engaged by the Council. They also prepared a supplementary joint report that was filed on 20 October 2022, which specifically deals with the Seniors Living Policy: Urban Design Guidelines for Infill Development, which is required to be considered pursuant to cl 15 of the SEPP ARH. In the supplementary joint report, they agree that the built form of the development has already been established and is largely unchanged by the proposal.
- 27 Expert opinion evidence on stormwater management was given in a joint report by Mr Abdul-Hadi Moussa, a civil engineer engaged by Mr Falamaki, and Mr Daniel Pearce, a development engineer employed by the Council.

Each of the contentions raised by the Council has been resolved

- 28 As a result of the evidence of the experts, the agreement that works will be carried out to obtain a building information certificate, and the deferred commencement condition that requires the issue of the building information certificate, each of the contentions raised by the Council on the appeal have been resolved.

Lawfulness of the existing building

- 29 The Council’s contention is that it is inappropriate for consent to be granted for a change of use of the building when “the basis of the lawfulness for the original building is incorrect”. This contention is advanced on the basis that CDC 2018/074/01 was granted on a legislative basis that no longer existed at the time it was granted. Although a development consent is considered valid unless and until declared otherwise by the Court (see *F Hannan Pty Ltd v Electricity Commission of NSW* [No 3] (1985) 66 LGRA

306), the Council's position is that this CDC is liable to be set aside. Further, the Council has identified a number of inconsistencies between what has been observed onsite (on 17 June 2022) and what was approved by CDC 2018/074/01 as modified.

30 The Council considers that this can be resolved through the issue of a building information certificate for the building as currently constructed. Pursuant to s 6.25(3) of the EPA Act, the building information certificate would operate to prevent the Council from taking proceedings to seek an order requiring the building to be demolished, altered, added to or rebuilt. The parties agree that a requirement for the issue of a building information certificate can be imposed as a deferred commencement condition, so that any building irregularities arising from the circumstances around the grant of the CDC 2018/074/01 and from inconsistencies between what is on site and what was approved can be resolved prior to the issue of a building information certificate and therefore prior to the operation of the consent for the proposed development.

31 An application for a building information certificate was made to the Council on 13 October 2022, supported by works as executed plans. Prior to the issue of building information certificate, the Council intends to send a notice of the works that are required done before the Council could issue a building information certificate, consistent with s 6.26(7) of the EPA Act. The Council, through Dr Berveling, indicated to the Court that the notice will include the requirement to provide flood protection for the existing garage area. Such work is required for the building as currently built, regardless of whether or not the proposed development is pursued.

32 Without making any finding that the course agreed upon by the parties is strictly necessary, I accept that the Council's concerns with respect to both the validity of the CDC 2018/074/01 and the consistency of the current built form with what was approved can be allayed by the imposition of a deferred commencement condition requiring the issue of a building information certificate, as agreed by the parties. The building information certificate will prevent the Council from pursuing proceedings for the making of an order requiring the building to be demolished, altered, added to or rebuilt, the basis of which could arise through the circumstances around the issue of the CDC 2018/074/01 and if work has been carried out that requires development consent and goes beyond what was authorised by the CDC. The Court, exercising the functions of the consent authority, has power to impose such a condition pursuant to s 4.16(3) of the EPA Act. As a result of the parties' agreement on the imposition of a deferred commencement condition of the type proposed, nothing raised by the Council in contention 1 warrants refusal of the development application.

Character and setbacks

33 The Council's second contention is that the development is incompatible with the desired future character of the low density residential area, and does not meet the RDCP setback requirements.

Mr Bazzi and Mr Tesoreiro remained in disagreement on this point in their first joint report. Mr Bazzi opined that the building is well established in the local character of the area, and that the built form controls in relation to height and setbacks in the RDCP are irrelevant in circumstances where there are no proposed changes to these elements of the built form. Further, Mr Bazzi's evidence is that the building remains two storeys in scale and presents as two storeys when viewed from the street, and that the rear and side setbacks result from the irregular shape of the allotment. Mr Tesoreiro's evidence is instead that the building is three storeys at the rear, which is inconsistent with the RDCP and in the streetscape. He also points out that the 1.5m side setback control is not adhered to at multiple locations along the northwest side elevation, with the smallest side setback at 1.15m, and the building does not comply with the requirement for a rear setback between 8m and 9.5m.

35 However, the Council now concedes that the built form is consistent with the two-storey residential character of the local area, which comprises both dwelling houses and dual occupancies. Its position is that the existing setbacks do not cause an unacceptable adverse impact on visual privacy or solar access, and strict compliance with the setback controls is not necessary in circumstances where there is no adverse impact, the existing setbacks already exist in the current building and there are no changes proposed to the external built form.

36 Given that the proposed development is for internal alterations and a change of use, I accept Mr Bazzi's evidence that the side and rear setbacks have limited relevance in circumstances where there is no change to the setbacks. I accept the Council's position that although the reduced setbacks are undesirable, it is acceptable that they remain as they currently are in circumstances where they do not cause an adverse impact. Further, I accept Mr Bazzi's evidence that the existing building presents as two storeys from the street, and I agree with the Council's position that the built form is consistent with the two-storey residential character of the local area. For those reasons, I accept that the second contention raised by the Council is no longer in issue and nothing raised in that contention warrants refusal of the proposed development.

Residential amenity

37 The Council's third contention is that the proposed development will give rise to overlooking opportunities, adversely affecting the visual privacy of neighbouring properties. In the particulars to this contention, the Council also raises solar access for the principal private open areas, overshadowing of adjoining properties, and internal connections within Unit 5.

38 Mr Bazzi and Mr Tesoreiro remained in disagreement on this point in their joint report. The main source of their disagreement is the adequacy of the plans. The Council's position is now that the plans are adequate, and in the supplementary joint expert

report Mr Bazzi and Mr Tesoreiro agree that the proposed and existing privacy screening prevents overlooking, there is adequate solar access and there is no issue concerning the internal connections within Unit 5.

39 I accept Mr Bazzi's evidence that the plans are adequate to demonstrate that the solar access to the private open spaces is acceptable. Further, the proposed (and existing) privacy screening prevents any overlooking of neighbouring properties. Any overshadowing of the neighbouring developments already exists with the present built form and will not change as a result of the proposed development.

40 For those reasons, each of the matters raised by the Council in the third contention has been resolved and does not warrant refusal of the development application.

Stormwater and floodplain management

41 The Council also contended that the proposed development does not satisfy the engineering requirements relating to drainage and flooding. The issues raised within this contention concern: firstly, the protection of the basement from inundation in a probable maximum flood event, secondly, the lack of drainage from the covered paved areas at the rear of the dwellings, and thirdly, the existence of structures that encroach over the Council's drainage easement.

42 In relation to the first and second issue identified above, the parties agree that these issues concern the building as currently in situ and are required to be resolved prior to the issue of a building information certificate. Mr Pearce has set out, in the joint report, how the first two issues can be resolved from the Council's perspective. This includes providing an opening at the rear of each garage flush with the floor level, grading the sub-floor area so that it is flush with the rear of the garage and linearly graded to the level of the rear yard, filling the recessed paved area to be flush with the surrounding ground level, and providing an opening at the rear of the development at surface level to ensure the conveyance of flow through the area. Mr Falamaki has largely agreed to much of this work, and will be required to carry it out or carry out other works that achieve the same outcome, prior to the issue of a building information certificate. In circumstances where the issue of a building information certificate is the subject of a deferred commencement condition, these issues with the drainage of the building in situ will be resolved prior to the consent becoming operational. A condition of consent proposed by the parties then requires that the final works-as-executed stormwater management plan be submitted prior to the issue of an occupation certificate for the development.

43 In relation to the third issue identified above, Mr Moussa and Mr Pearce have agreed on conditions of consent that require encroaching retaining walls to be modified to timber sleeper retaining walls, with any piled footings to be located clear of the easement.

As a result of this evidence and the parties' agreement that works to resolve the drainage of the garage and paved area need to be carried out prior to the issue of a building information certificate, the Council's position is that none of the matters in this contention remain in dispute or warrant refusal of the development application. I accept that these matters are resolved through the course of action agreed to by the parties, which includes the issue of the building information certificate once the drainage works have been carried out to the Council's satisfaction, the deferred commencement condition, the condition of consent requiring the final works works-as-executed stormwater management plan to be submitted prior to the occupation certificate, and the condition of consent requiring the modification of encroaching retaining walls. On that basis, the matters raised in this contention are all addressed through conditions of consent and do not warrant refusal of the proposed development.

Development consent should be granted

- 45 For the reasons expressed above, each of the contentions raised by the Council on the appeal has been addressed or do not warrant refusal of the proposed development. A final contention concerning the public interest focuses on the past conduct of Mr Falamaki and is not relevant to the merits of the proposed development, and, therefore, similarly does not warrant refusal of the development application. The Council accepts that it is appropriate for a deferred commencement consent to be granted in accordance with the conditions agreed by the parties.
- 46 The proposed development is permissible on the site, and complies with the standards that apply pursuant to the SEPP ARH. It also complies with the height development standard that arises pursuant to the RLEP, is compatible in its local streetscape context and does not cause any unacceptable impacts on neighbouring development. I have considered the contents of the parties' agreed jurisdictional statement, together with the Class 1 Application and its attachments, and the evidence tendered at the hearing. Based on those documents, I have considered the matters required to be considered pursuant to s 4.15(1) of the EPA Act.
- 47 Consistent with the requirements of Sch 1 of the Environmental Planning and Assessment Regulation 2000, the development application is accompanied by the BASIX certificate dated 22 November 2021.
- 48 Consideration has been given as to whether the subject site is contaminated as required by cl 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021. Given the history of the use of the site for residential purposes, and that the development application proposes a continuation of the use of the land for residential accommodation, the site is unlikely to be contaminated and a report pursuant to cl 4.6(2) is not required.
- 49 Further, based on the stormwater drainage plan, the agreement of the engineers and the agreement that drainage works will be carried out prior to the grant of a building information certificate, I am satisfied of the matters in cl 6.4(3) of the RLEP.

50 Accordingly, I am satisfied that each of the jurisdictional preconditions identified by the parties is met and that there is power to grant development consent to the proposed development, and that it is appropriate to grant consent in the circumstances, subject to the conditions agreed by the parties.

Final orders

51 The Court orders that:

- (1) The appeal is upheld.
- (2) A deferred commencement development consent is granted to development application No LDA2021/0407 for internal alterations to an existing building and associated change in use to a dual occupancy (attached) with the dedication of one of the dwellings that comprise the dual occupancy as affordable housing pursuant to cl 17 of the State Environmental Planning Policy (Affordable Rental Housing) 2009, together with Torrens title subdivision into two lots, at 5 Cooney Street, North Ryde, subject to the conditions of consent in Annexure A.
- (3) Exhibits A and B are retained, and Exhibits 1-5 and C are returned.

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J Gray

Acting Commissioner of the Court
Annexure A (230530, pdf)

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Decision last updated: 01 November 2022

Annexure A

DETERMINATION OF DEVELOPMENT APPLICATION BY GRANT OF DEFERRED COMMENCEMENT CONSENT

Development Application No: LDA2021/0407

Development: Internal alterations and additions to convert the existing dwelling to a dual occupancy under State Environmental Planning Policy (Affordable Rental Housing) 2009 as well as Torrens Title subdivision

Site: Lot 6 in DP 36487 known as 5 Cooney Street, North Ryde

The above development application has been determined by the granting of consent subject to the conditions specified in this consent.

Date of determination: 1 November 2022

Date from which consent takes effect: Date of determination.

TERMINOLOGY

In this consent:

- (a) Any reference to a Construction, Compliance, Occupation or Subdivision Certificate is a reference to such a certificate as defined in the *Environmental Planning and Assessment Act 1979*.
- (b) Any reference to the “applicant” means a reference to the applicant for development consent or any person who may be carrying out development from time to time pursuant to this consent.
- (c) Any reference to the “site”, means the land known as Lot 6 in DP 36487 known as 5 Cooney Street, North Ryde

The conditions of consent are as follows:

PART 1 - The following are the Deferred Commencement condition(s) imposed pursuant to Section 4.16 of the Environmental Planning & Assessment Act 1979.

- (A) Pursuant to Section 4.16 of the Environmental Planning and Assessment Act 1979, a deferred commencement consent is granted to LDA2021/0407 subject to the following condition of consent:
 - 1. A Building Information Certificate has been issued for the entire building on the site.
- (B) Written evidence that the matter identified in deferred commencement condition (A) 1 above has been satisfied, must be submitted to Council within 12 months

from the date of this development consent, failing which, this development consent **will lapse** pursuant to Section 4.53(6A) of the Environmental Planning and Assessment Act 1979.

- (C) This Development Consent will not operate until such time that the Council notifies the Applicant in writing that that deferred commencement consent condition (A) 1 above has been satisfied; and

Upon Council giving written notification to the Applicant that deferred commencement consent condition (A) 1 above has been satisfied, the development consent will become operative from the date of that written notification, subject to the following conditions of consent:

PART 2 - The conditions in the following sections of this consent shall apply upon satisfactory compliance with the above requirements and receipt of appropriate written confirmation from Council.

1. **Approved Plans/Documents.** Except where otherwise provided in this consent, the development is to be carried out strictly in accordance with the following plans and support documents:

Document Description	Date	Plan No/Reference
Site Analysis	12/11/21	A301
Ground Floor - Existing	12/11/21	A302A
Ground Floor - DA	12/11/21	A302C
Level 1 – Existing	12/11/21	A303A
Level 1 - DA	12/11/21	A303C being Annexure B to the Affidavit of Sajjad Falamaki sworn 19 July 2022 in Land and Environment Court proceedings 2021/00160547
Garage Existing	12/11/21	A304
Garage Proposed	12/11/21	A305
Roof Plan	12/11/21	A306
Elevation - East	12/11/21	A307
Elevation - West	12/11/21	A308
Elevations – North & South	12/11/21	A309
Proposed Cross Section	12/11/21	A310
Longitudinal Section	12/11/21	A311
Demolition/Waste/Sediment	12/11/21	A312
Landscape Plan		Issue D
Torrens Title Subdivision	12/11/21	A315
BASIX Commitments	12/11/21	A324

Prior to the issue of a **Construction Certificate**, the following amendments shall be made (as marked in red on the approved plans):

The Development must be carried out in accordance with the amended plans approved under this condition.

(Reason: To ensure the development is carried out in accordance with the determination).

2. **Amendment to plans.** The development shall be amended to ensure that the development is in accordance with the Works as Executed plans provided to Council for its assessment and issue of Building Information Certificate BIC2022/0035.
3. **Building Code of Australia.** All building works approved by this consent must be carried out in accordance with the requirements of the Building Code of Australia.

(Reason: Statutory requirement).

4. **BASIX.** Compliance with all commitments listed in BASIX Certificate(s) numbered 1139722M_02, dated 22 November 2021

(Reason: Statutory requirement).

5. **Affordable housing restriction- SEPP Affordable Rental Housing.** Unit 5A as depicted on the plans set out in condition 1 must be dedicated as Affordable Housing within the meaning of State Environmental Planning Policy (Affordable Rental Housing) (AHSEPP) 2009.

- (a) The following must be complied with for 10 years from the date of the issue of the occupation certificate for the approved development:
 - (i) Unit 5A must be used for the purposes of affordable housing, and
 - (ii) all accommodation that is used for affordable housing must be managed by a registered community housing provider.
- (b) A restriction must be registered, before the date of the issue of any occupation certificate for the development, against the title of the property on which development is to be carried out, in accordance with section 88E of the Conveyancing Act 1919, that will ensure that the requirements of paragraph (a) are met.

If the proposal is to be subdivided, upon registration of a subdivision plan, the restriction may be placed on the title of the allotment for which the Unit is nominated as affordable housing in lieu of the restriction applying to the overall development site.

(Reason: Statutory requirement).

6. **Affordable Housing - Fittings and Finishes.** The Principal Certifying Authority must be satisfied that the affordable housing dwelling have the internal fittings and finishes at the same standard as the other dwelling within the development.

(Reason: Ensure adequate provision is provided).

7. **Affordable Rental Housing SEPP- Infill Housing.** Any change to the registered community housing provider managing the approved affordable housing dwelling in the 10 year period from the date of the issue of the occupation certificate must be notified to Ryde City Council.

(Reason: Statutory requirement).

8. **Hours of work.** Building activities (including demolition) may only be carried out between 7.00am and 7.00pm Monday to Friday (other than public holidays) and between 8.00am and 4.00pm on Saturday. No building activities are to be carried out at any time on a Sunday or a public holiday

(Reason: To ensure reasonable standards of amenity for occupants of neighbouring properties).

9. **Public space.** The public way must not be obstructed by any materials, vehicles, refuse, skips or the like, under any circumstances, without prior approval from Council.

(Reason: To ensure public safety).

10. **Public Utilities.** Compliance with the requirements (including financial costs) of any relevant utility provider (e.g. Energy Australia, Sydney Water, Telstra, RMS, Council etc) in relation to any connections, works, repairs, relocation, replacements and/or adjustments to public infrastructure or services affected by the development.

(Reason: Access to public utilities).

11. **Design and Construction Standards.** All engineering plans and work inside the property shall be carried out in accordance with the requirements of the relevant Australian Standard. All Public Domain works or modification to Council infrastructure which may be located inside the property boundary, must be undertaken in accordance with Council's DCP Part 8.5 (Public Civil Works) and Part 8.2 (Stormwater and Floodplain Management), except otherwise as amended by conditions of this consent.

(Reason: To ensure that all works are undertaken in accordance with any relevant standard and DCP requirements.)

12. **Service Alterations.** All services or utilities required to be altered in order to complete the development works are to be undertaken in accordance with the requirements of the relevant service provider (eg Telstra, Jemena, Ausgrid, etc), with all costs associated with this alteration to be borne by the applicant.

(Reason: To ensure public services are maintained.)

13. **Restoration.** Public areas must be maintained in a safe condition at all times. Restoration of disturbed road and footway areas for the purpose of connection to public utilities, including repairs of damaged infrastructure as a result of the construction works associated with this development site, shall be undertaken by the Applicant in accordance with Council's standards and specifications, and DCP Part 8.5 (Public Civil Works), to the satisfaction of Council.

(Reason: To ensure the amenity and state of the public domain is maintained.)

14. **Road Opening Permit.** In accordance with the requirements of the Roads Act, the applicant must obtain consent (Road opening Permit) from Council prior to any excavation being undertaken in the road reserve (this includes verge and public footpath areas). No works shall be carried out in the road reserve without this permit being paid and a copy kept on the site.

(Reason: To ensure the amenity and state of the public domain is maintained.)

PRIOR TO CONSTRUCTION CERTIFICATE

A Construction Certificate must be obtained from a Principal Certifying Authority to carry out the relevant building works approved under this consent. All conditions in this Section of the consent must be complied with before a Construction Certificate can be issued.

Council Officers can provide these services and further information can be obtained from Council's Customer Service Centre on 9952 8222.

Unless an alternative approval authority is specified (eg Council or government agency), the Principal Certifying Authority is responsible for determining compliance with the conditions in this Section of the consent.

Details of compliance with the conditions, including plans, supporting documents or other written evidence must be submitted to the Principal Certifying Authority.

15. **Section 7.11.** A monetary contribution for the services in Column A and for the amount in Column B shall be made to Council as follows:

A – Contribution Type	B – Contribution Amount
Community & Cultural	\$4,191.06
Open Space & Recreation	\$7,216.83
Transport Facilities	\$2,215.54
Plan Administration	\$204.35
The total contribution is	\$13,827.79

These are contributions under the provisions of Section 7.11 of the Environmental Planning and Assessment Act, 1979 as specified in City of Ryde Section 7.11 Development Contributions Plan 2020, effective from 1 July 2020.

The above amounts are current at the date of this consent, and are subject to **quarterly** adjustment for inflation on the basis of the contribution rates that are applicable at time of payment. Such adjustment for inflation is by reference to the Consumer Price Index published by the Australian Bureau of Statistics (Catalogue No 5206.0) – and may result in contribution amounts that differ from those shown above.

The contribution must be paid **prior to the issue of any Construction Certificate**. Payment may be by EFTPOS (debit card only), CASH or a BANK CHEQUE made payable to the **City of Ryde**. Personal or company cheques will not be accepted.

A copy of the Section 7.11 Development Contributions Plan may be inspected at the Ryde Customer Service Centre, 1 Pope Street Ryde (corner Pope and Devlin Streets, within Top Ryde City Shopping Centre) or on Council's website <http://www.ryde.nsw.gov.au>.

(Reason: Statutory requirement).

16. **Security deposit.** The Council must be provided with security for the purposes of section 80A(6) of the *Environmental Planning and Assessment Act 1979* in a sum determined by reference to Council's Management Plan prior to the release of the **Construction Certificate**. (category: dwelling houses with delivery of bricks or concrete or machine excavation).

(Reason: Statutory requirement).

17. **Infrastructure Restoration and Administration Fee** must be paid to Council in accordance with Council's Management Plan prior to the release of the **Construction Certificate**.

(Reason: Statutory requirement).

18. **Fibre-ready facilities and telecommunications infrastructure.** Prior to the issue of any Construction Certificate satisfactory evidence is to be provided to the Certifying Authority that arrangements have been made for:

- (i) The installation of fibre-ready facilities to all individual lots and/or premises in a real estate development project so as to enable fibre to be readily connected to any premises that is being or may be constructed on those lots. Alternatively, demonstrate that the carrier has confirmed in writing that they are satisfied that the fibre ready facilities are fit for purpose.

And

- (ii) The provision of fixed-line telecommunications infrastructure in the fibre-ready facilities to all individual lots and/or premises in a real estate development project demonstrated through an agreement with a carrier.

(Note real estate development project has the meanings given in Section 372Q of the Telecommunications Act).

(Reason: Statutory requirement).

The detailed plans and documentation detailing these works must be submitted with the application for a Construction Certificate and prepared by a suitably qualified Civil Engineer.

(Reason: To ensure that the development is not adversely effected by extreme storm events and is aligned with the controls and objectives of the City of Ryde DCP 2014 Part 8.2 – *Stormwater and Floodplain Management*)

19. **Construction over Pipeline in Drainage Easement.** Any retaining walls spanning the public drainage easement after the issue of Building Information Certificate BIC2022/0035 are to be demolished and, if necessary, reconstructed as timber retaining walls. Any piled footings related to the reconstructed structures must be extended below the zone of influence of the foundation of services in the easement and be clear of the easement. The zone of influence is to extend from a point offset from the edge of the pipe by half the pipe diameter, at the depth of the pipe invert and extending upwards at the angle of repose for the given subsurface conditions. To demonstrate compliance with this requirement, cross section details prepared by a suitably qualified engineer, showing the new footing, the exact location and depth of the stormwater pipe in the easement and the resulting zone of influence are to be submitted with the application for a Construction Certificate.

(Reason: To ensure structures spanning the easement do not impose on access to this service or be impacted by the structure.)

20. **Erosion and Sediment Control Plan.** An Erosion and Sediment Control Plan (ESCP) must be prepared by a suitably qualified consultant, detailing soil erosion control measures to be implemented during construction. The ESCP is to be submitted with the application for a Construction Certificate. The ESCP must be in accordance with the manual "Managing Urban Stormwater: Soils and Construction" by NSW Department – Office of Environment and Heritage and must contain the following information;
- (a) Existing and final contours
 - (b) The location of all earthworks, including roads, areas of cut and fill
 - (c) Location of all impervious areas
 - (d) Location and design criteria of erosion and sediment control structures,

- (e) Location and description of existing vegetation
- (f) Site access point/s and means of limiting material leaving the site
- (g) Location of proposed vegetated buffer strips
- (h) Location of critical areas (drainage lines, water bodies and unstable slopes)
- (i) Location of stockpiles
- (j) Means of diversion of uncontaminated upper catchment around disturbed areas
- (k) Procedures for maintenance of erosion and sediment controls
- (l) Details for any staging of works
- (m) Details and procedures for dust control.

The ESCP must be submitted with the application for a Construction Certificate.

(Reason: To protect downstream properties, Council's drainage system and natural watercourses from sediment build-up transferred by stormwater runoff from the site.)

PRIOR TO COMMENCEMENT OF CONSTRUCTION

Prior to the commencement of any demolition, excavation, or building work the following conditions in this Part of the Consent must be satisfied, and all relevant requirements complied with at all times during the operation of this consent.

21. Site Sign

- (a) A sign must be erected in a prominent position on site, prior to the commencement of construction:
 - (i) showing the name, address and telephone number of the Principal Certifying Authority for the work,
 - (ii) showing the name of the principal contractor (if any) or the person responsible for the works and a telephone number on which that person may be contacted outside working hours, and
 - (iii) stating that unauthorised entry to the work site is prohibited.
- (b) Any such sign must be maintained while the building work, subdivision work or demolition work is being carried out, but must be removed when the work has been completed.

(Reason: Statutory requirement).

22. Residential building work – provision of information. Residential building work within the meaning of the Home Building Act 1989 must not be carried out unless the PCA has given the Council written notice of the following information:

- (a) in the case of work for which a principal contractor is required to be appointed:
 - (i) the name and licence number of the principal contractor; and

- (ii) the name of the insurer by which the work is insured under Part 6 of that Act.
- (b) in the case of work to be done by an owner-builder:
- (i) the name of the owner-builder; and
 - (ii) if the owner-builder is required to hold an owner-builder permit under that Act, the number of the owner-builder permit.

If any of the above arrangements are changed while the work is in progress so that the information notified under this condition becomes out of date, further work must not be carried out unless the PCA for the development to which the work relates has given the Council written notice of the updated information (if Council is not the PCA).

(Reason: Statutory requirement).

23. **Safety fencing.** The site must be fenced prior to the commencement of construction, and throughout demolition and/or excavation and must comply with Safework NSW requirements and be a minimum of 1.8m in height.

(Reason: Statutory requirement).

24. **Proposed Property Addressing.** Proposed addressing for the new development must have been lodged with Council, prior to the commencement of construction.

(Reason: Assist in wayfinding).

25. **Road Activity Permits.** To carry out any work in, on or over a public road (including verge), the consent from Council is required as per the *Roads Act 1993*. Prior to the commencement of the relevant works and considering the lead times required for each application, permits for the following activities, as required and as specified in the form "*Road Activity Permits Checklist*" (available from Council's website) are to be obtained and copies submitted to Council with the *Notice of Intention to Commence Public Domain Works*.

- a) Road Use Permit - The applicant shall obtain a Road Use Permit where any area of the public road or footpath is to be occupied as construction workspace, other than activities covered by a Road Opening Permit or if a Work Zone Permit is not obtained. The permit does not grant exemption from parking regulations.
- b) Work Zone Permit - The applicant shall obtain a Work Zone Permit where it is proposed to reserve an area of road pavement for the parking of vehicles associated with a construction site. Separate application is required with a Traffic Management Plan for standing of construction vehicles in a trafficable lane.

- c) Road Opening Permit - The applicant shall apply for a road-opening permit and pay the required fee where the applicant is required to dig into or adjust Council Assets (Assets include all facilities within the road reserve). Additional road opening permits and fees are required where there are connections to public utility services (e.g. telephone, telecommunications, electricity, sewer, water or gas) within the road reserve. No opening of the road or footpath surface shall be carried out without this permit being obtained and a copy kept on the site.
- d) Elevated Tower, Crane or Concrete Pump Permit - The applicant shall obtain an Elevated Tower, Crane or Concrete Pump Permit where any of these items of plant are placed on Council's roads or footpaths. This permit is in addition to either a Road Use Permit or a Work Zone Permit.
- e) Crane Airspace Permit - The applicant shall obtain a Crane Over Airspace Permit where a crane on private land is operating in the air space of a Council road or footpath. Approval from the Roads and Maritime Services for works on or near State Roads is required prior to lodgement of an application with Council. A separate application for a Work Zone Permit is required for any construction vehicles or plant on the adjoining road or footpath associated with use of the crane.
- f) Hoarding Permit - The applicant shall obtain a Hoarding Permit and pay the required fee where erection of protective hoarding along the street frontage of the property is required. The fee payable is for a minimum period of 6 months and should the period be extended an adjustment of the fee will be made on completion of the works. The site must be fenced to a minimum height of 1.8 metres prior to the commencement of construction and throughout demolition and/or excavation and must comply with WorkCover (New South Wales) requirements.
- g) Skip Bin on Nature Strip - The applicant shall obtain approval and pay the required fee to place a Skip Bin on the nature strip where it is not practical to locate the bin on private property. No permit will be issued to place skips.

(Reason: Legal requirement).

26. **Development to be within site boundaries.** The development must be constructed wholly within the boundaries of the premises. No portion of the proposed structure shall encroach onto the adjoining properties. Any doors/gates on the boundary must be installed so they do not open onto any footpath.

(Reason: To maintain public safety and amenity in public domain areas adjoining the development site.)

DURING CONSTRUCTION

Unless otherwise specified, the following conditions in this Part of the consent must be complied with at all times during the construction period. Where applicable, the

requirements under previous Parts of the consent must be implemented and maintained at all times during the construction period.

27. **Critical stage inspections.** The person having the benefit of this consent is required to notify the Principal Certifying Authority during construction to ensure that the critical stage inspections are undertaken, as required under clause 162A(4) of the *Environmental Planning and Assessment Regulation 2000*.

(Reason: Statutory requirement).

28. **Noise from construction work.** All feasible and reasonable measures must be implemented to minimise the emission of noise from construction work.

(Reason: To protect the amenity of the neighbourhood).

29. **Sediment/dust control.** No sediment, dust, soil or similar material shall leave the site during construction work.

(Reason: To protect the amenity of the area).

30. Site Facilities

The following facilities must be provided on the site:

- (a) toilet facilities in accordance with Safework NSW requirements, at a ratio of one toilet per every 20 employees, and
- (b) a garbage receptacle for food scraps and papers, with a tight fitting lid.

(Reason: Statutory requirement).

31. Site maintenance

The applicant must ensure that:

- (a) approved sediment and erosion control measures are installed and maintained during the construction period;
- (b) building materials and equipment are stored wholly within the work site unless an approval to store them elsewhere is held;
- (c) the site is clear of waste and debris at the completion of the works.

(Reason: To ensure the site is appropriately maintained during construction).

32. **Tree protection – no unauthorised removal.** This consent does not authorise the removal of trees unless specifically permitted by a condition of this consent or identified as approved for removal on the stamped plans.

(Reason: To ensure trees are not removed from the site unless there is approval for the work).

33. **Tree protection – during construction.** Trees that are shown on the approved plans as being retained must be protected against damage during construction.

(Reason: To ensure the protection of existing trees on site).

34. **Stormwater Management - Construction.** The stormwater management works required under the condition “*Stormwater Management*” in this development consent shall be constructed in accordance with the Construction Certificate version of the details of these works.

(Reason: To ensure the stormwater system is constructed as approved)

35. **Erosion and Sediment Control Plan - Implementation.** The applicant shall install erosion and sediment control measures in accordance with the Construction Certificate approved Soil Erosion and Sediment Control (ESCP) plan at the commencement of works on the site. Erosion control management procedures in accordance with the manual “Managing Urban Stormwater: Soils and Construction” by the NSW Department – Office of Environment and Heritage, must be practiced at all times throughout the construction.

(Reason: To prevent soil erosion and the discharge of sediment over the land.)

PRIOR TO OCCUPATION CERTIFICATE

An Occupation Certificate must be obtained from a Principal Certifying Authority prior to commencement of occupation of any part of the development, or prior to the commencement of a change of use of a building.

Prior to issue, the Principal Certifying Authority must ensure that all works are completed in compliance with the approved construction certificate plans and all conditions of this Development Consent.

Unless an alternative approval authority is specified (eg Council or government agency), the Principal Certifying Authority is responsible for determining compliance with conditions in this Part of the consent. Details to demonstrate compliance with all conditions, including plans, documentation, or other written evidence must be submitted to the Principal Certifying Authority.

36. Works as Executed drawings certified by a registered surveyor shall be provided to Council prior to the issue of any Occupation Certificate for the building.
37. **BASIX.** The submission of documentary evidence of compliance with all commitments listed in BASIX Certificate(s) numbered 1139722M_02, dated 22 November 2021

(Reason: Statutory requirement).

38. **Landscaping.** All landscaping works approved by condition 1 are to be completed prior to the issue of the final **Occupation Certificate**.

(Reason: To ensure the development is in accordance with the development consent).

39. **Design of Structures spanning the Public Drainage Easement (Lot 5A).** Any structure (retaining wall/steps) spanning the public drainage easement on Lot 5A after the issue of Building Information Certificate BIC2022/0035 must be designed and constructed in a modular manner to allow the structure to be readily removed at the request of Council. The structure must incorporate non-destructive fixings (bolted connections) which can be readily unfastened as well as consider a variety of load conditions (placement of hitch points) which would enable the structure to be lifted off the footings (if any). Details and notes concerning the temporary removal of the structure must be incorporated on the structural details submitted to the Accredited Certifier with the application for a Construction Certificate, as well as a record provided to Council

(Reason: Ensure access to the easement).

40. **Letterboxes and street/house numbering display.** All letterboxes are to be designed and constructed in accordance with Australia Post requirements and the house/unit numbering displayed shall be in accordance with the official property addressing allocated by Council's Land Information Section. The display of the street address shall be of a sufficient size and clarity to be easily visible from the street.

(Reason: To assist in way finding).

41. **Stormwater Management - Work-as-Executed Plan.** A Work-as-Executed plan (WAE) of the as constructed Stormwater Management System must be submitted with the application for an Occupation Certificate. The WAE must be prepared and certified (signed and dated) by a Registered Surveyor and is to clearly show the constructed stormwater drainage system (including any onsite detention, pump/ sump, charged/ siphonic and onsite disposal/ absorption system) and finished surface levels which convey stormwater runoff.

(Reason: To clarify the configuration of the completed stormwater management system.)

42. **Restriction as to User - Floodway.** A restriction as to user is to be registered on the property title prior to the issue of any Occupation Certificate for the development works requiring that no further significant works and alterations to the landform or development are undertaken such as to impact on flooding without the approval of Council.

(Reason: To ensure that the site topography and any flood mitigation measures are maintained for the ongoing life of the development)

43. **Positive Covenant - Access to easement.** If any retaining walls span the public drainage easement after the completion of works, a positive covenant registered in accordance with Section 88 of the Conveyancing Act 1919 shall be placed on the property title, requiring the property owner to remove all structures spanning the easement in the property at their cost, when requested to do so by Council or other service provider, in accordance with Council's DCP Part 8.4 (*Title Encumbrances*) Section 2.1.3. The terms of the restriction shall be generally in accordance with Council's current standard terms for such measures and be to the satisfaction of Council. The drafted terms are to be submitted to Council with a completed "Application Form for Endorsement of Title Encumbrances" (available from Council's website) for review and the covenant must be registered on the title prior to the release of any Occupation Certificate for the development works.

(Reason: To ensure that Council has authority to remove / modify structures which span / encroach over a public easement.)

44. **Engineering Compliance Certificates.** To ensure that all engineering facets of the development have been designed and constructed to the appropriate standards, Compliance Certificates must be obtained for the following items and are to be submitted to the Accredited Certifier prior to the release of any Occupation Certificate. All certification must be issued by a qualified and practising civil engineer having experience in the area respective of the certification unless stated otherwise.
- (a) Certification from an Engineer specialising in Flood and Overland Flow analysis that the finished surface levels and the overland flowpath have been constructed in accordance with this development consent and that the requirements of the condition "*Stormwater Management*" have been satisfied.
 - (b) Confirming that the Stormwater Management system (including any constructed ancillary components such as onsite detention) servicing the development complies with Council's DCP 2014 Part 8.2 (Stormwater and Floodplain Management) and associated annexures, and has been constructed to function in accordance with all conditions of this consent relating to the discharge of stormwater from the site.
 - (c) Confirming that erosion and sediment control measures were implemented during the course of construction and were in accordance with the manual "*Managing Urban Stormwater: Soils and Construction*" by the NSW Department – Office of Environment and Heritage and Council's DCP 2014 Part 8.1 (Construction Activities).
 - (d) Compliance certificate from Council confirming that all external works in the public road reserve have been completed to Council's satisfaction.

(Reason: To ensure that all engineering components are completed to the satisfaction of an appropriately qualified person, prior to occupation or use of the development.)

PRIOR TO SUBDIVISION CERTIFICATE

The following conditions in this Part of the consent apply to the Subdivision component of the development.

All conditions in this Part of the consent must be complied with prior to the issue of a Subdivision Certificate.

45. **Final Occupation Certificate.** The final occupation certificate associated with the approved development (including related modifications) must be issued for the entire development prior to the release of the Subdivision Certificate.

(Reason: To ensure that the development works are fully completed and that should the new lot come under separate ownership, such owners will not be burdened by outstanding works.)

46. **Removal of encroachments.** All structures, services etc. are to be wholly contained within the legal property boundaries of each lot. All existing structures and services etc are either to be demolished, relocated and/or have appropriate easement/s registered over the encroachment to ensure their legal operation.

(Reason: To avoid dispute over the maintenance or preservation of encroaching structures.)

47. **Easement for Drainage of Water.** The drainage system servicing one of the lots is noted to traverse the alternate lot(s) and therefore an Easement for Drainage of Water must be created over the respective part(s) of the drainage system. Where the subdivision will result in rainwater storage/ detention tanks straddling the new lot boundaries, a reciprocal drainage easement must be created over the storage, allowing each lot to drain over the alternate lot and warranting shared responsibility in maintenance of the system. The easement width, location and alignment must be in accordance with the Council's DCP Parts 8.2 (*Stormwater and Floodplain Management*) and Part 8.4 (*Title Encumbrances*) and is to be based on recent Works-As-Executed plans of the stormwater system. Council must be listed as the prescribed authority to release or vary the terms of the easement.

Plans and documentation complying with this condition must be submitted with the application for a Subdivision Certificate.

(Reason: To ensure drainage services and conveyance of stormwater runoff are maintained.)

48. **Subdivision Certificate - Compliance Certificates.** The following compliance certificates must be provided to Council prior to the release of the Subdivision Certificate;

- (a) Surveyor Certification – A registered surveyor must certify that necessary easements have been created for all services and structures which encroach into adjacent lots and that all remaining services, dwelling and structures are contained wholly within their respective allotments.
- (b) Sydney Water (Section 73 Compliance Certificate) - A compliance certificate must be obtained from Sydney Water, under Section 73 of the Sydney Water Act 1994. Sydney Water will determine the availability of water and sewer services, which may require extension, adjustment or connection to Sydney Water mains.
- (c) Other Utility Providers – Written confirmation confirming compliance with the requirements (including financial costs) of electrical and telecommunication providers (e.g. AusGrid, Telstra).

(Reason: To ensure the newly created lots have access to and can maintain essential services.)

49. **Final plan of subdivision.** The submission of a final plan of subdivision suitable for endorsement by the Authorised Officer of Council.

(Reason: Statutory requirement).

50. **Final plan of subdivision – title details.** The final plan of subdivision shall contain detail all existing and/or proposed easements, positive covenants and restrictions of the use of land.

(Reason: Statutory requirement).

51. **Section 88B Instrument.** If required, the submission of an Instrument under Section 88B of the Conveyancing Act 1919 plus 3 copies, creating Easements, Positive Covenants and Restrictions on Use. This Instrument shall nominate the City of Ryde as the authority empowered to release, vary or modify the terms of the Instrument.

(Reason: Ensure compliance with the conditions of consent).

52. **Occupation Certificate.** A final occupation certificate in relation to Development Consent No.# dated # must be in force.

(Reason: Statutory requirement).

53. **Sydney Water – Section 73 Compliance Certificate.** A compliance certificate must be obtained from Sydney Water, under Section 73 of the Sydney Water Act 1994. Sydney Water will determine the availability of water and sewer services, which may require extension, adjustment or connection to Sydney Water mains. A Section 73 Compliance Certificate must be completed before the issue of any Occupation Certificate. Sydney Water will assess the development and if required will issue a Notice of Requirements letter detailing

all requirements that must be met. Applications can be made either directly to Sydney Water or through a Sydney Water accredited Water Servicing Coordinator.

Go to www.sydneywater.com.au/section73 or call 1300 082 746 to learn more about applying through an authorised WSC or Sydney Water.

(Reason: Statutory requirement).

54. **Notice of Arrangement (Utility Provider).** Notice of Arrangement and compliance with the requirements (including financial costs) of any relevant utility provider (e.g. Ausgrid, Sydney Water, Telstra, Council etc).

(Reason: Statutory requirement).

55. **Fibre-ready facilities and telecommunications infrastructure.** Prior to the issue of any Subdivision Certificate satisfactory evidence is to be provided to the Certifying Authority that arrangements have been made for:

- (i) The installation of fibre-ready facilities to all individual lots and/or premises in a real estate development project so as to enable fibre to be readily connected to any premises that is being or may be constructed on those lots. Alternatively, demonstrate that the carrier has confirmed in writing that they are satisfied that the fibre ready facilities are fit for purpose.

And

- (ii) The provision of fixed-line telecommunications infrastructure in the fibre-ready facilities to all individual lots and/or premises in a real estate development project demonstrated through an agreement with a carrier.

(Note real estate development project has the meanings given in Section 372Q of the Telecommunications Act).

(Reason: Statutory requirement).

56. **Building Code of Australia.** Certification from a suitably qualified accredited building consultant will need to be provided confirming compliance with the relevant sections of the Building Code of Australia for the following:

- a) Separating Wall (Part 3.7.3.2). The wall separating the two dwellings has an FRL (Fire Resistance Level) of not less than 60/60/60 extending from the ground to the underside of the roof cladding.
- b) Smoke Alarms (Part 3.7.5.2). The smoke alarms in each dwelling are connected to the consumer mains power and are interconnected as there are alarms on both floor levels.

(Reason: To ensure that the building complies with the Building Code of Australia requirements).

57. **Official Property Addressing.** The property addressing displayed on the administration sheets of a subdivision or strata plan, must be in accordance with the official property addressing allocated by Council's Land Information Section.

(Reason: To assist in way finding).