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| Case Name:  | Emcon Group Pty Ltd v Randwick City Council (No 2) |
| Medium Neutral Citation:  | [2021] NSWLEC 1549 |
| Hearing Date(s):  | 9 – 10 August 2021 |
| Date of Orders: | 30 September 2021 |
| Decision Date:  | 30 September 2021 |
| Jurisdiction:  | Class 1 |
| Before:  | Walsh C |
| Decision:  | The Court orders that:(1) The appeal is upheld.(2) Development consent is granted to DA/465/2020 for demolition of existing structures and construction of a part 3 and part 4 storey residential flat building containing 3 apartments, ground level parking, landscaping and associated works at 132 Marine Parade, Maroubra subject to conditions of consent at Annexure ‘A’.(3) Exhibits 1, 2, and F are returned. |
| Catchwords:  | DEVELOPMENT APPLICATION – residential apartment development – external wall height – view loss – view sharing – neighbour impacts – alternative designs |
| Legislation Cited:  | Environmental Planning and Assessment Act 1979, s 8.7Randwick Local Environmental Plan 2012 cll 4.3, 4.4State Environmental Planning Policy No 55—Remediation of Land cll 7 |
| Cases Cited:  | Tenacity Consulting v Warringah (2004) 134 LGERA 23; [2004] NSWLEC 140 |
| Texts Cited:  | Randwick Comprehensive Development Control Plan 2013 |
| Category:  | Principal judgment |
| Parties:  | Emcon Group Pty Ltd (Applicant)Randwick City Council (Respondent) |
| Representation:  | Counsel:R White (Applicant)M Harker (Respondent)Solicitors:Madison Marcus Law Firm (Applicant)Randwick City Council (Respondent) |
| File Number(s):  | 2020/350474 |
| Publication Restriction:  | No |

Judgment

1. **COMMISSIONER**: This is an appeal brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by Randwick City Council (Council) of Development Application No. DA/465/2020 (DA) seeking development consent for demolition of existing improvements and construction of a residential flat building and associated works at 132 Marine Parade, Maroubra (site).

Proposed development

1. The DA, with modifications incorporated into amending plans, seeks consent for demolition of the existing dwelling on the site and the construction of a part 3 and part 4 storey residential flat building comprising three units, with vehicle access off Marine Parade.
2. Parking would be provided at the ground/basement level, which would also accommodate the lobby.
3. The first, second and third floor levels are almost identical in design and layout and comprise a single 3-bedroom apartment per level. Each apartment level is provided with private balconies oriented to the south looking over Marine Parade towards Maroubra Beach. The rear private open space is proposed for the exclusive use of the level one unit.

Site and setting

1. I mostly rely on Council’s Amended Statement of Facts and Contentions (Ex 4) for the descriptive material which follows.
2. The site is legally described as Lot 15 DP 5463, Lot 100 DP 1267550 and has a moderate fall from the rear to the front of approximately 1.93m. The site is irregular in shape with an area of 545.6m2 and a front boundary width of 19.9m, rear boundary width of 15.94m, eastern side boundary width of 28.59m, western boundary side boundary width of 33.46m.
3. Development surrounding the site is predominately medium density residential accommodating 3 to 4 storey residential flat buildings. The built form varies in terms of scale, form and age.

Planning framework

1. The site and locality are zoned R3 Medium Density Residential under Randwick Local Environmental Plan 2012 (RLEP). The proposal is permissible with consent.
2. The objectives of the R3 zone are as follows:

• To provide for the housing needs of the community within a medium density residential environment.

• To provide a variety of housing types within a medium density residential environment.

• To enable other land uses that provide facilities or services to meet the day to day needs of residents.

• To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.

• To protect the amenity of residents.

• To encourage housing affordability.

• To enable small-scale business uses in existing commercial buildings.

1. The maximum permissible height of buildings for the site is 12m under cl 4.3(2) of RLEP. There is no dispute that the proposal complies with this control.
2. The maximum permissible floor space ratio (FSR) for a building on the site is 0.9:1 under cl 4.4(2) of RLEP. An FSR of 0.85:1 is indicated in the plans before the Court (Ex E).
3. Randwick Comprehensive Development Control Plan 2013 (RDCP) also applies.

Issues

1. View loss was the primary concern in this matter. Related issues from Council were: (1) the non-compliance of the proposal with a wall height control contained in RDCP and (2) what was seen to be an inadequate attention to design alternatives. There was also a concern in regard to filed draft conditions in regard to visual privacy impacts to the rear.
2. The experts providing evidence to the Court in this matter were D Waghorn for the Applicant and S Faridy for Council, each having expertise in urban planning.

View loss and related considerations

1. View loss will be experienced by neighbours to the rear, or north, of the site. As alluded to at [[7](#_Ref82693158)], the properties to the rear are occupied by residential flat buildings. It is particular residential units at 43 and 45 Bond Street which are of direct concern, with a number of residential units enjoy high quality views towards the beach at present. It is clear that this enjoyment is in large part related to the under-developed status of the site, occupied as it is by a single dwelling in a setting where significant scale residential flat building development is permissible under RLEP. The central question for this hearing is the reasonableness of the extent of view loss in all of the circumstances that apply.
2. There is a good degree of agreement on the part of the experts on the particulars of the view loss impact on the affected neighbouring properties. Where the experts disagreed was on this question of reasonableness.
3. There were five residential units which were seen to be most relevant and which were given attention in regard to the view loss question. These were at 5/45 and 6/45 Bond Street, and 6/43, 10/43 and 11/43 Bond Street. The experts agreed that a View Impact Assessment prepared by AE Design Partnership (Ex C) was “accurate”, positioning (through its view impact modelling from various vantage points) the experts to express their own opinions in regard to view loss impact (Ex 2 par 7.1). I further note that there was an update to the view impact modelling undertaken as a consequence of certain amendments to the plans before the Court. The updated view impact modelling was tendered as Ex F.
4. The experts considered the four-step view affectation assessment process as developed by then Senior Commissioner Roseth in *Tenacity Consulting v Warringah* (2004) 134 LGERA 23; [2004] NSWLEC 140 (*Tenacity*), and subsequently adopted as a planning principle by the Court. The table at [Figure 1](#_Ref81216563) was prepared by the experts as a summary of the first three assessment steps of *Tenacity*, in regard to which there was considerable agreement.



Figure 1 - Summary table responding to Tenacity steps 1-3 as prepared by the experts with “DW Impact” referencing Mr Waghorn’s opinion and “SF Impact” referencing Mr Faridy’s opinion (Ex 2 Table 1)

1. The fourth *Tenacity* assessment step is concerned with the reasonableness of the impact. I reproduce [29] of *Tenacity* in full below:

“The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.”

1. The experts referenced the three different points to the fourth *Tenacity* step, concerned with assessing the reasonableness of the impact, which I summarise as follows (see *Tenacity* at [29]):
* Point 1 - Compliance, or otherwise, with planning controls.
* Point 2 - If there is a non-compliance, then even a moderate impact may be considered unreasonable.
* Point 3 - For complying proposals: (a) “whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours to bring about impact”, and (b) “if the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable”.
1. It was agreed that the proposal complied with RLEP’s building height (12m) and FSR controls and front, side and rear setback controls under RDCP. There was a (partial) non-compliance with RDCP’s wall height control of up to 1.5m towards the front of the proposed building.
2. Mr Waghorn believed the most significant control, impacting view sharing, to be cl 4.3 of RLEP “which anticipates a 12m height of buildings development standard over the site” (Ex 2 par 7.16). In regard to the wall height control in RDCP, Mr Waghorn believed that “it is the compliant portions of the proposal that are having a moderate-severe impact on the views for properties to the rear” (Ex 2 par 7.9), and that even if the proposal were modified to achieve full compliance with the wall height control and provide for a fully compliant building envelope (Ex 2 par 7.10):

“… the only properties to benefit would be No. 10 & 11/43 Bond Street which are the least affected by the proposed development in terms of overall views from those assessed. For all other properties to the rear, insistence on compliance with the wall height control would not result in any additional views as the rear elevation is compliant with the wall height and setback requirements or will only improve views towards the sky.”

1. Mr Waghorn believed that requiring compliance with the wall height control would result in “a disproportionate reduction to the development potential” and that this would “achieve a minor view gain (to) the two properties that are least affected by the proposed development in terms of views from those assessed” (Ex 2 par 7.13).
2. Mr Faridy highlighted the non-conformance with the RDCP wall height control and believed there were “more skilfull” design opportunities which would provide the applicant with the same or similar development potential and amenity and reduce the impact on the views of neighbours. I will give attention to these points in my consideration, below.

Consideration

Interpretation of RDCP wall height control

1. In regard to Point 1 of the fourth step of *Tenacity* at [[20](#_Ref82686627)], concerned as it is with reasonableness of view loss impact, it is clear that there is a numerical control relating to wall height which the proposal exceeds (10.5m as measured to the topmost point of an external wall “taken to be the underside of the eaves or the highest point of a parapet” (Section 4.4 of Part C2 of RDCP). The experts agree the wall height numerical control exceedance is a maximum of “1.50m when measured to the top of the roof or 1.28m when measured to the underside of the roof” (Ex 2 par 3.1), with Mr Waghorn seemingly accepting the maximum non-conformance as 1.5m.
2. Before considering any impacts associated with non-conformance, it is appropriate to first turn to what is behind the wall height control. The key point of disagreement related to the third wall height control objective and only a particular element of that. The objective of relevance is as follows (Section 4.4 of Part C2 of RDCP):

“• To control the bulk and scale of development and minimise the impacts on the neighbouring properties in terms of overshadowing, privacy and visual amenity.”

1. Mr Faridy’s concern was in relation to “visual amenity” (Ex 2 par 3.2.3):

“My understanding of visual amenity is the view available to adjoining properties just like their solar or privacy amenity. The aim of good planning should be to ensure that such amenities are not diminished or unreasonably impacted as a result of non-complying or poor building design. To fully understand ‘visual amenity’ I would compare the existing visual amenity and proposed visual amenity of adjoining properties. The existing significant visual amenity of adjoining properties, in particular those facing Bond Street is silhouette of roof of buildings along Marine Parade and water views beyond. This valuable visual amenity will be lost or diminished and replaced by a solid structure and therefore I do not consider the proposed development as compliant with the third objective of External Wall Height control.”

1. Mr Waghorn disagreed (Ex 2 par 3.16):

“In my opinion “visual amenity” when read in conjunction with Objective Dot Point 3 relates to controlling bulk and scale as a result of the wall height, rather than an impact of the development as a whole. The term “visual amenity” therefore relates to the appearance of the building from neighbouring properties. The explanation under Part 4.4 – Wall height of RDCP states that “*external wall height control has been devised to ensure that adequate floor to ceiling height, realistic floor slab and roof construction and basement or semi-basement car parking could be achieved under different topographical conditions*”. The variation to the wall height is towards the front of the property (facing the public domain) and entirety compatible with the scale and wall height of surrounding properties. When considered in the context of the wall height control and that of surrounding buildings, the majority of which breach the wall height control, the impact on the “visual amenity” is minimised and the proposal is not considered to be out of character with surrounding buildings.”

1. These matters were also given some consideration in cross-examination. Mr Faridy confirmed his opinion that the term “visual amenity” included view loss, albeit acknowledging there was no express reference to it in Part 4.4. Mr Waghorn indicated his view that the term “visual amenity” in this provision was appropriately understood as, rather than view loss, a reference to the visual amenity effects of the appearance of the building and in particular its “bulk and scale”. In this examination, Mr Waghorn was taken to an agreed statement in Ex 4 and that in regard to the fifth zone objective (for the R3 Medium Density Residential Zone under RLEP) which was “(to) protect the amenity of residents”, that the experts agreed that this objective would be considered in the expert report under the topic of view loss (Ex 2 par 1.2).
2. I prefer the opinion of Mr Faridy in regard to this question of the interpretation of the term “visual amenity”. The term “amenity” is reasonably well understood but perhaps not so often defined in judgments, but I note the first stated definition of the online Macquarie Dictionary definition as follows:

“the quality of being pleasant or agreeable in situation, prospect, disposition, etc.; pleasantness: the amenity of the climate.”

1. When considering how the term “visual amenity” might be interpreted, as put at RDCP Part 4.4, I see nothing convincing in the evidence to suggest it have other than a plain interpretation. That is, the agreeableness or pleasantness of the visual aspect of what one might experience from a neighbouring property (in this instance). So it would include both, say, how a new building might be experienced visually (eg whether that being annoying or agreeable in some way say its bulk or scale) or what might be lost or gained, in terms of visual experience, through the erection of a building (eg through loss of a pleasant view or the screening of something disagreeable).
2. This finding means that, for me, the non-conformance with the wall height control is in play when the *Tenacity* assessment steps are under consideration. Point 2 of *Tenacity’s* fourth step suggests that if there is a non-compliance then even a moderate impact may be considered unreasonable.

Reasonableness of view loss impact

1. The experts have made assessments of the impacts from the neighbouring properties and they are generally severe, or somewhat only less, from each of the viewing points. But those assessments are in consideration of the overall development. I agree with Mr Waghorn that it can only be expected that there will be a considerable degree of view loss from the relevant properties from almost any development of the subject site, under current controls.
2. It was useful for me when the parties took the experts to the five viewing positions and I was able to gain a grasp of the extent to which the wall height control under the DCP was influential. That is, the marginal effect of the wall height contravention. The neighbouring properties gaining most attention were Units 10 and 11 at 43 Bond Street. The relevant viewing position from Unit 10 was a living room, and from Unit 11 was a balcony off a master bedroom. There was also moderate attention to Unit 6 at 43 Bond Street (immediately below Unit 10), where the relevant viewing position was from a master bedroom. It seemed to be agreed, and it would seem to me an accurate depiction, that the wall height contravention makes little or no difference to view loss from 45 Bond Street.
3. Having regard to what was described as Point 2 of the fourth principle of *Tenacity* [[20](#_Ref82686627)], I am of the opinion that the marginal effect of the wall height contravention is of limited significance when the view loss impact is the point of attention. That is to say, the view loss is most considerably associated with the compliant aspects of the proposal. There was a good understanding of the marginal effect from the three key vantage points (VP) available from reference to the material at Ex F, and Ex C. Having considered this material it is clear that the wall height contravention would have a quite small-scale effect on the views from each of the 43 Bond Street viewer positions (VP 4 at 10/43 Bond Street, VP 5 at 11/43 Bond Street and VP 2 from 6/43 Bond Street). I do not see Point 2 of Tenacity as indicating “moderate impact” as necessarily unreasonable, only that in some circumstances it may be considered as unreasonable. As a baseline position, and given this small scale of improvement to views which would be available were the western wall height to be entirely compliant with the RDCP requirement (and noting compliance with all other controls), I do not see why this impact would be properly seen as unreasonable. Noteworthy is Council’s attention to the views of Malabar Headland and Malabar National Park (ie in contrast to the water views), which I will come to below when considering alternative design solutions.

Consideration of alternative designs

1. Point 3 of the fourth principle of *Tenacity* (which is at [[20](#_Ref82686627)] above) raises the issue of the consideration of alternative designs. While this point is directly concerned with complying proposals, it does warrant attention here. Mr Faridy raised two (“skilful design”) possibilities which he believed would reduce view loss and promote view sharing. The first was to reduce the overall height of the building which would necessitate increased excavation for the site. The second possibility would involve increasing side boundary setbacks among other things.
2. The applicant rejected the second possibility as a matter of statutory principle it seemed. That is, by noting the fact of the proposal’s compliance with side and rear boundary setback controls. For me, that was not the point. When considering alternative solutions, an applicant is certainly welcome to that alternative (increasing setbacks beyond already compliant configurations) as a means of achieving necessary skilful design alternatives to address impact and a satisfactory design. In regard to the first possibility (building height reduction), on balance, it does not seem to me that this move sufficiently influences the view loss outcome. Here, I am referring to Council’s reference to the enjoyment of views of Malabar Headland and Malabar National Park in particular for VP 4 and 5. I am not convinced on the importance of the relatively narrow horizontal field of view of these particular areas that would be retained from the identified viewer positions, through the suggested lowering of the proposed building; noting the (albeit also confined) water views that would be retained between the proposed building and its neighbour to the west (134 Marine Parade). The adverse implications for the proposal principally relate to additional excavation costs and the lowering of residential units generally. Here, I acknowledge again the building’s compliance with RLEP building height controls and Mr Faridy’s acceptance that the proposal was satisfactory in streetscape character terms.

Conditions

1. The conditions filed by Council (without prejudice) which were tendered as Ex 3, were generally agreed by the Applicant. A point of dispute was in relation to visual privacy which centrally involved the treatment of the northern façade windows (to the master bedroom/ensuite on each level) and whether the elevated outdoor deck for Unit 101 was appropriate. Mindful of the provisions of clause 5.3 of RDCP, I generally accept Council’s position. As indicated above, there are considerable amenity impacts on the residences to the rear associated with view loss and visual bulk as a consequence of the building massing. The opportunity should be taken to minimise visual privacy impacts which appear very likely, otherwise, under the configuration proposed by the Applicant.

Other issues

1. In regard to State Environmental Planning Policy No 55 – Remediation of Land, and in particular cl 7(1), I note and accept the uncontested advice from the Applicant (Ex A Tab 4 p 41) that the land has been used for residential purposes for an extended timeframe and is not considered to be at risk of contamination. No further consideration is required in this instance.
2. In regard to RLEP, I note and accept:
* With respect to cl 6.1, regarding acid sulfate soils, there are no further requirements in this instance (Ex 4 p 6).
* With respect to cl 6.2, regarding earthworks, there has been due consideration to the matters listed, noting the Applicant’s geotechnical report (Ex A Tab 10) and agreed conditions.
* With respect to cl 6.4, regarding stormwater management, I am satisfied with regard to the matters listed at subcl 6.4(3), noting the agreed conditional requirements placed on the development in proposed Condition 21.
* With respect to cl 6.7, regarding foreshore scenic protection, because of the proposal’s architectural presentation and siting, and noting that Council did not contest this, I am satisfied that the proposal is located and designed to minimise its visual impact on public areas of the coastline, including views to and from the coast, foreshore reserves, open space and public areas, and, as well, contributes to the scenic quality of the coastal foreshore.
* With respect to cl 6.10, regarding essential services, I am relevantly satisfied with regard to the listed matters given the agreed conditions and the fact that the matters listed were not points of contestation in the parties’ agreement with regard to conditions (without prejudice on Council’s part in all instances).
1. Section 4.15(1)(d) of the EPA Act requires consideration of objecting submissions. Ex 4 references two written submissions and in addition there was one oral submission made on Day 1 of the hearing. View loss and visual privacy were the major issues raised in submissions which were not otherwise addressed in revised plans. Each of these matters are considered in the body of the report.

Conclusion

1. I am satisfied that the proposal provides an adequate response to the view loss question, and that the objectives of the wall height control are adequately satisfied despite the numerical non-compliance. The proposal warrants conditional approval.

Orders

1. The Court orders that:
2. The appeal is upheld.
3. Development consent is granted to DA/465/2020 for demolition of existing structures and construction of a part 3 and part 4 storey residential flat building containing 3 apartments, ground level parking, landscaping and associated works at 132 Marine Parade, Maroubra subject to conditions of consent at Annexure ‘A’.
4. Exhibits 1, 2, and F are returned.

……………………….

P Walsh

Commissioner of the Court

[Annexure A (446677, pdf)](http://www.caselaw.nsw.gov.au/asset/17c3566ad89ba6d2cac501af.pdf)

[Architectural Plans (2711567, pdf)](http://www.caselaw.nsw.gov.au/asset/17c356736a5e8eefc67b3959.pdf)

[Landscape Plans (744976, pdf)](http://www.caselaw.nsw.gov.au/asset/17c35675f6d4f30b55c7830b.pdf)

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