



Land and Environment Court New South Wales

Medium Neutral Citation:

**Roche Group Pty Limited v Woollahra Municipal
Council [2022] NSWLEC 1199**

Hearing dates:

14-15 February 2022

Date of orders:

20 April 2022

Decision date:

20 April 2022

Jurisdiction:

Class 1

Before:

Horton C

Decision:

The Court orders that:

(1) The Applicant's written request, prepared in accordance with clause 4.6 of the Woollahra Local Environmental Plan 2014 in respect of the height of building development standard at clause 4.3 of the Woollahra Local Environmental Plan 2014, is upheld.

(2) The Applicant's written request, prepared in accordance with clause 4.6 of the Woollahra Local Environmental Plan 2014 in respect of floor space ratio development standard at clause 4.4 of the Woollahra Local Environmental Plan 2014, is upheld.

(3) The appeal is upheld.

(4) Development consent for Development Application DA58/2021/1 for alterations and additions to an existing four-storey commercial building at 53 Cross Street, Double Bay is granted, subject to conditions of consent at Annexure A.

(5) All exhibits are returned, except for Exhibits A, B, F and 4 which are to be retained.

Catchwords:

DEVELOPMENT APPLICATION – alterations and additions to existing building – whether proposed development minimises the impacts of new development – the height standard is exceeded

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 4.16, 8.7

State Environmental Planning Policy No 55—Remediation of Land, cl 7
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005
Woollahra Local Environmental Plan 2014, cl 4.3, 4.4, 4.4A, 4.6, 6.1

Cases Cited:

Initial Action v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118
Initial Action v Woollahra Municipal Council [2019] NSW 1097
Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council [2022] NSWLEC 1048
RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130
Ricola Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1047
SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112
Tenacity Consulting v Waringah (2004) 134 LGERA 23; [2004] NSWLEC 140
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827
Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115

Texts Cited:

Sydney Harbour Catchment Map (Amendment 2016)
Woollahra Development Control Plan 2015

Category:

Principal judgment

Parties:

Roche Group Pty Limited (Applicant)
Woollahra Municipal Council (Respondent)

Representation:

Counsel:
A Galasso SC (Applicant)
S Simington (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s):

2021/153551

Publication restriction:

No

JUDGMENT

COMMISSIONER: Alterations and additions are proposed to an existing four-storey commercial building at 53 Cross Street, Double Bay that is the subject of Development Application DA58/2021 (the original application).

- 2 The original application was refused by the Woollahra Local Planning Panel on 15 July 2021 on behalf of the Woollahra Municipal Council (the Respondent). The Applicant in these proceedings, Roche Group Pty Limited, now appeals the refusal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 3 In broad terms, the proposal is for substantial alterations and additions to an existing four-storey building to accommodate additional floor area and internal reconfigurations to allow ground floor retail premises on the levels above; two (2) additional storeys including office premises, a roof terrace, internal amenities and services, and substantial alterations to the two existing basement levels to accommodate eight (8) additional on-site car parking spaces (resulting in a total of 39 on-site parking spaces), five motorbike parking spaces, bicycle parking, internal services and amenities.
- 4 At the commencement of the hearing, the parties agreed that the primary issue for the Court to determine relates to view impacts arising from the exceedance of the height standard and, relatedly, whether the proposal minimises the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion.
- 5 As the proposal exceeds the height of building development standard at cl 4.3 of the Woollahra Local Environmental Plan 2014 (WLEP), and the floor space ratio (FSR) applicable to the site by reference to the Floor Space Ratio Map at cl 4.4A(2) of the WLEP, the applicant relies upon two written requests prepared in accordance with cl 4.6 of the WLEP authored by GSA Planning, and dated February 2022.
- 6 The written request in respect of height (the height request) is at Exhibit 2, Annexure F, and the written request in respect of FSR (the FSR request) is at Exhibit A, Tab 21.

The site and its context

- 7 The site is located on the north-eastern corner of the intersection of Cross Street and Bay Street, Double Bay.
- 8 The frontage to Cross Street is 42.27m, and the frontage to Bay Street is 18.64m, resulting in a total site area of 978.2m².
- 9 The existing building on the site accommodates retail uses and entry lobby on the ground floor, and office accommodation on the three levels above.
- 10 To the north of the site is a residential flat building, known as No 61-63 Bay Street.
- 11 To the east of the site is a six-storey mixed use development at 45-51 Cross Street.
- 12 To the south of the site, on the south-eastern corner of the intersection is a two-storey commercial building at 55 Bay Street that is the subject of consent for a five-storey building.

On the south-western corner of the intersection is a five-storey mixed use development at 38 Bay Street, known as the 'Chancellor' development.

- 14 To the west of the site, across Bay Street, is low rise residential development located within the R2 Low Density Residential zone.
- 15 The site is located within the B2 Local Centre zone according to the WLEP, in which commercial premises are permitted where consistent with the following objectives of the zone:
- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
 - To encourage employment opportunities in accessible locations.
 - To maximise public transport patronage and encourage walking and cycling.
 - To attract new business and commercial opportunities.
 - To provide active ground floor uses to create vibrant centres.
 - To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
 - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

The onsite view

- 16 The proceedings commenced with an onsite view that was primarily intended to permit the Court, in the company of the legal representatives and planning experts, to observe the view from two apartments with a northly aspect at No 2-22 Knox Street, Double Bay, said to be disrupted by the proposed development.
- 17 In addition to written submissions contained in the Respondent's bundle (Exhibit 1), oral submissions from residents were heard in respect of the impact on two apartments:
- (1) Apartment 7A and 7B are joined as a single dwelling. Mr Brett Brown, on behalf of the residents, identified what he believes are flaws in the view impact assessment (Ex A Tab 19), and in the written requests prepared by the Applicant in respect of the non-compliance with height. Mr Brown's oral submission is summarised in writing at Exhibit 4.
 - (2) The resident of Apartment 7C is concerned by the cumulative effect of developments that have had, and will have, an impact on existing views of the harbour, the land water interface and of the north shore ridgeline above Taronga Zoo enjoyed to the north. A written transcript of this oral submission, taken with consent, was also appended to Exhibit 4.
- 18 The Court also heard an oral submission from Mr Malcolm Young as a resident of the area, and on behalf of the Double Bay Residents Association, in addition to a written submission at Exhibit 2, folio 579-592. In broad terms, Mr Young's concerns may be summarised as follows:
- (1) As the site is adjacent to low density residential development in the R2 zone, it is appropriate to taper down, and not step up as the proposal does by virtue of the non-compliance with height.

- (2) The circumstances of the site are similar to those at 49-53 Bay Street in which the Court found that the impact of a proposed height exceedance was not acceptable when the objectives of the height standard were considered.
- (3) Six storeys is out of character with the existing and proposed development in the area, and fails to observe the two storey street wall height evident today that permits sunshine on the southern side of Cross Street.
- (4) The visual impact of the proposal affects a large number of residents who enjoy views over the 'natural amphitheatre' of Double Bay to the harbour beyond.
- (5) A reduction in height and floor space would also reduce the deficit in car parking spaces provided in the basement.

19 Additional to those submissions already summarised, twelve resident submissions received in response to the notification of the original application are contained in Exhibit 1 (folios 484-526), and a further seven prepared in response to the amended DA, or the hearing itself are at folios 576-610 and identify similar topics as those summarised above.

The proposal exceeds the height and floor space ratio

- 20 Put simply, the primary dispute in this matter centres on the height of the proposal, and the degree of impact it imposes on views currently enjoyed from the apartments at [17].
- 21 The height request identifies the maximum height of the proposal to be a variation of 4.17m-5.17m above the height of buildings development standard of 18.1m on the Height of Buildings Map at cl 4.3(2) of the WLEP.
- 22 In the joint report, the experts agree that the following heights apply to the proposal:
- (1) The maximum height is at the lift overrun: RL 26.63 or 23.03m.
 - (2) The predominant height relates to the parapet above the sixth storey: RL 25.63 or 22.17m.
 - (3) The finished floor level of the topmost occupied storey: RL 22.03m or 18.51m.
 - (4) Parapet of the 'street wall' element which faces Bay street: RL 18.83 (approximately) or 15.37m.
- 23 The Respondent contends that the height request should not be upheld for the reasons summarised at [4].
- 24 In particular, the Respondent submits that the request must fail because the uppermost storey in the proposal has a real and measurable impact on the amenity enjoyed by Apartments 7A/B and 7C, that is not minimised by the exceedance of the standard, but is rather exacerbated by it. For this reason, the proposed development is not consistent with objective (d) of the height standard.
- 25 In considering the height request, the Court was assisted by expert evidence in planning and urban design, including written and oral evidence on whether the written requests adequately address the matters required by cl 4.6(3) of the WLEP, and

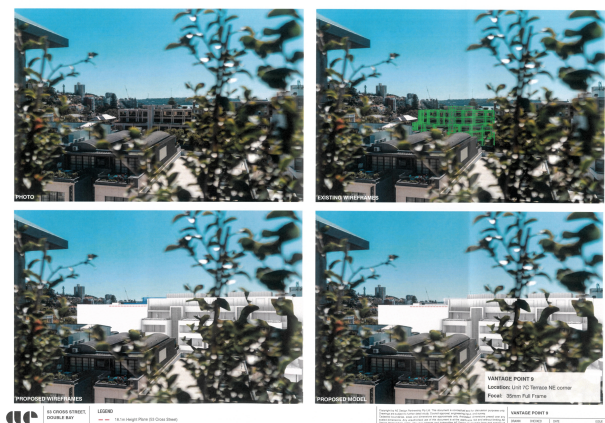
whether the proposed development is consistent with the objectives of the development standard pursuant to cl 4.6(4)(a)(ii) of the WLEP.

- 26 Mr Brett Newbold was retained by the Respondent to provide expert planning and urban design opinion. The Applicant retained Mr Rohan Dickson in respect of urban design, and Mr George Karavanas in respect of planning.
- 27 The experts conferred in the preparation of a joint expert report marked Exhibit 2. The joint report contains the following annexures:
- (1) Annexure B: Photomontages prepared by AE Partnership dated 21 January 2022.
 - (2) Annexure C: Photomontages prepared by AE Partnership – showing impact from Cross Street Strategy dated 21 January 2022.
 - (3) Annexure D: Midwinter views from the sun by AE Partnership – 7 pages dated 31 January 2022.
 - (4) Annexure E: Selected photos from Unit 7 at Nos 45-51 Cross Street – provided by Council's assessing officer, June 2021.
 - (5) Annexure F: Clause 4.6 – Height of buildings (Amended) by GSA Planning: dated February 2022.
 - (6) Annexure G: Layouts of Units 7A & B/2-22 Knox Street prepared by AE Partnership dated 2 February 2022.
- 28 In the joint report, the experts set out their consideration under topic headings including: building height, view impacts, visual intrusion, overshadowing of Cross Street, overshadowing of north-facing elevations along Cross Street, the public interest, the variation request, and the hydrant booster.
- 29 The experts agreed on all of the matters set out above, but for the inter-related topics of view impacts, the variation request and the public interest.

The view is considered

- 30 The quantity and quality of the view enjoyed from the Apartments at 2-22 Knox Street is the subject of the height request, expert evidence and submissions from the residents of those apartments at [17].
- 31 In his oral evidence, Mr Newbold accepts that statements made in the expert report should be corrected to acknowledge that the views the subject of his assessment are those that remain after “recently approved developments *and* compliant-height developments” are factored, not *or*.
- 32 So agreed, Mr Newbold also accepts that portions of the harbour channel and associated shorelines, said by him to be visible from Apartments 7A/B and 7C, are not, in fact, affected by the proposed development but by ‘recently approved developments or compliant-height developments’ pre-dating the development the subject of the development application.

- 33 Instead, Mr Newbold considers that the loss of harbour views as a result of the development approved at No 55 Bay Street effectively places greater importance on the view that remains once the development at No 55 Bay Street is factored. This 'surviving' view is described as comprising 'north shore skyline', 'treed ridgeline and top slopes', and 'district views of urban development such [as] buildings and trees along the Darling Point ridgeline'.
- 34 While initially of the opinion that the lateral span of the view of the treed ridgeline that will survive the development approved at No 55 Bay Street is so severely impacted by the proposed development that no 'second order' qualitative assessment is required, Mr Newbold acknowledged that his position is informed by his professional experience that views to natural features are generally valued more than views to what he describes as the 'cosmopolitan mix of buildings and trees' evident in Darling Point.
- 35 The extent of the treed ridgeline lost as a result of the proposal, according to Mr Newbold, is in the order of 40-45%, which he considers to be moderate to Apartment 7A/B, and moderate to severe to Apartment 7C. A further reduction in the extent of uppermost storey in the proposed development of 8-9m could, according to Mr Newbold, be considered to minimise disruption of views, resulting in around 10-15% of the treed ridgeline being obscured.
- 36 Mr Newbold also acknowledges that the view differs from each of the rooms within Apartments 7A/B and 7C. The more easterly the vantage point, the greater the occlusion of the treed ridgeline by development at 28-34 Cross Street for which consent is granted but construction is yet to be completed such that, from Vantage Point 9, reproduced below, the effect of the proposed development is negligible from the eastern terrace of Apartment 7A/B.



Is compliance with the development standard unreasonable or unnecessary in the circumstances of the case?

- 37 The height request invokes two of the five tests established in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 ("*Wehbe*") by way of demonstrating that compliance with the standard is unreasonable or unnecessary in the circumstances of the case, pursuant to cl 4.6(3)(a) of the WLEP.

- 38 In the first instance, the proposed development is said to achieve the objectives of the height standard notwithstanding the non-compliance. I note here that the experts agree that the objectives are achieved, but for objective (d).
- 39 Nevertheless, cl 4.6 of the WLEP requires the consent authority, or in this case the Court exercising the functions and discretions of the Council on appeal, to form its own opinion of satisfaction.
- 40 The means by which such an opinion of satisfaction is to be reached is succinctly put in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, at [22]-[24]:
- “22 The permissive power in cl 4.6(2) to grant consent to development that contravenes a development standard is subject to conditions that must be met before the power can be exercised. First, cl 4.6(3) requires the consent authority to consider a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating both of the matters in cl 4.6(3)(a) and (b), being:
- “(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.”
- 23 Secondly, cl 4.6(4) requires the consent authority to be satisfied of both of the matters in cl 4.6(4)(a)(i) and (ii), being:
- “(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and
- (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out”
- 24 Only if the consent authority meets these requirements in cl 4.6(3) and (4) will the power in cl 4.6(2) to grant consent to development that contravenes the development standard be enlivened.”
- 41 The objectives of the height standard at cl 4.3 of the WLEP are in the following terms:
- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,
 - (b) to establish a transition in scale between zones to protect local amenity,
 - (c) to minimise the loss of solar access to existing buildings and open space,
 - (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,
 - (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.
- 42 In respect of objective (a), the height request asserts that:
- (1) The proposal’s height is consistent with the built form in the Double Bay Centre area generally and reflects recent approvals in the vicinity of the site. To this end, the height request considers the desired future character to be “shaped not only by the provisions of the WLEP, including development standards themselves, but also other factors, including approved development that contravenes the development standard”, as shown by Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, (“SJD No 2”) at [65].

- (2) The height standard applicable to the site permits one storey higher than sites on the southern side of Cross Street that are generally subject to a height limit of 14.7m. Recent approvals at No 16-18 Cross Street of 20.7m in height, and at No 20-26 Cross Street of 21.21m in height are on sites anticipating four-storeys, but for which six storey development has been approved. The subject site anticipates five storey development, and for which six storeys is proposed.
- (3) The proposed development provides a four storey street wall to the boundary, with the upper two levels set back. Relevantly, as the proposal is for alterations and additions, the majority of the existing structure is relied upon, including existing floor-to-floor heights that are generally in accordance with commercial uses set out in the Woollahra Development Control Plan 2015 (WDCP).
- (4) Finally, should the 'Draft Cross Street Precinct Planning and Urban Design Strategy' (Exhibit B, Tabs 9-10) (Draft Planning Strategy) be adopted by the Council, six storey development would be permitted on the southern side of Cross Street which is indicative of an 'upward trend' in the desired future character.

43 In respect of objective (b), the height request asserts that the site does not directly adjoin other zones. While this is not the case, no issue is made of it by the experts, and Mr Galasso SC, counsel for the Applicant, submits that the massing steps down appropriately to the west where the B2 zone adjoins the R2 zone.

44 In respect of objective (c), the height request asserts that:

- (1) While 'eye of the sun' views identify overshadowing of the northern footpath to Cross Street, and eastern footpath to Bay Street, such an outcome would be expected of a fully compliant building envelope.
- (2) Where midwinter shadows exceed those of a compliant development, the impact of additional shadows on the public domain, and on adjoining buildings is minimal. In particular, the impact of the uppermost level of the proposed development would affect between 30-70% of the first and second storey of the approved development at 55 Bay Street that will, regardless, receive at least 3 hours of sunlight, as will apartments and ground floor shop frontages at 28-34 Cross Street.

45 In respect of objective (d) that is the subject of disagreement between the experts, the height requests asserts:

- (1) The existing height and density of Bay Street and Cross Street currently obscure views to some extent, and the proposed development is consistent with that height and density. That said, existing views to water and the treed ridgeline of Mosman are enjoyed from Apartments 7A/B, 7C and 7D.
- (2) Wireframe modelling at Annexure B of the joint report demonstrates that development at 28-34 Cross Street and 55 Bay Street results in a much greater extent of view loss compared to the proposal. Between 50%-80% of the view to

the treed ridgeline is retained, depending on the Apartment and the vantage point.

- (3) The impact of the proposed development on the treed ridgeline is not dissimilar to that imposed by the recently approved development at 28-34 Cross Street.
- (4) Should the Draft Planning Strategy be adopted by the Council, a six storey height limit would apply to development on the southern side of Cross Street, and impose a far greater impact on views from the affected apartments than that now proposed.
- (5) Neither the quantity or quality of the view that is impacted by the proposal is significant, and measures have been taken to minimise the impact, such as setting back the uppermost level by 16m from the western boundary, and reducing its gross floor area to half that of level 5 below.

46 I note here the experts are agreed that the height request has demonstrated that impacts of privacy, overshadowing and visual intrusion, also the focus of objective (d), have been minimised by the midwinter views from the sun at Annexure D of the joint report, and by siting and design features that prevent visual intrusion to adjoining properties at 45-51 Cross Street, and 61-63 Bay Street.

47 In respect of objective (e), the height requests asserts the additional height is unlikely to affect views from the public domain, however the setback of the upper levels will allow increased view corridors over the site from distant vantage points.

The Applicant's position on objective (d)

48 The Applicant submits that the wording of objective (d) is a composite objective, requiring the minimisation of impact arising from visual intrusion, privacy, overshadowing and the disruption of views. Accordingly, the objective should be read in its totality.

49 The experts agree that the impacts of visual intrusion, privacy and overshadowing are minimised, and no contention is pleaded by the Respondent to the contrary. The Applicant submits that the assessment required of the Court is not to ignore those impacts that are minimised, but to recognise that three types of impacts identified in objective (d) have been satisfactorily minimised.

50 With particular respect to view impacts, the Applicant submits that it is the whole of the view that must be considered, and not a section or segment of that view. It is unreasonable to focus solely on the extent of treed ridgeline obscured by the proposal, when the view from the Apartments at 7A/B and 7C also encompasses views to Darling Point, Bellevue Hill and Point Piper.

51 Furthermore, any assessment of the view should be both qualitative and quantitative.

52 In undertaking such an assessment, the Court may find that the proposed development imposes view impacts, in similar terms to the finding made by Clay AC in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 ("*SJD No 1*") in respect of

visual intrusion. However, such a finding is not fatal and only invites consideration of whether those impacts have been minimised.

53 In other words, as it was put by Morris AC in *Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council* [2022] NSWLEC 1048, at [99]: “The objective of the control contemplates some impact, it just requires the impact to be minimised.”

54 In *SJD No 2*, his Honour, at [78] explains the nature of the assessment, or evaluative task, to be undertaken in respect of the impacts:

“In terms, what is to be minimised under the objective in cl 4.3(1)(d) are “the impacts of new development on adjoining or nearby apartments”, not the disruption of views, loss of privacy, overshadowing or visual intrusion. True, the impacts of the new development on the adjoining or nearby apartments are to be from the disruption of views, loss of privacy, overshadowing or visual intrusion, but it is the collective impacts of the new development on adjoining or nearby properties from these various sources of impact that is to be minimised.”

55 In respect of view impacts, the assessment should identify a baseline of the amenity currently enjoyed, and the views and outlook currently enjoyed by the properties (*SJD No 2* at [80]).

56 In summary, the view enjoyed from the Apartment 7A/B and 7C is broader than that assessed by Mr Newbold, and steps have been taken to minimise the impact of the proposal on that view.

57 While approval for proposed development at 49-53 Bay Street was refused by the Court in *Ricola Pty Ltd v Woollahra Municipal Council* [2021] NSWLEC 1047 (“*Ricola*”), the circumstances of that proposal are distinguished from the factual circumstances in this case for the reasons that follow:

- The nature of the view enjoyed by Apartment 7A/B and 7C is described in *Ricola* as comprising “views of the harbour channel, the land and water interface along the northern shoreline, and the ridgeline backdrop, as well as the Darling Point ridgeline.” However, in this case, the harbour channel, land and water interface and a portion of the ridgeline backdrop are assumed lost owing to the consent granted to No 55 Bay Street.
- For those reasons, and by reason of the proposed development being a six-storey development in *Ricola*, the view impact was greater in *Ricola* than in this case, as demonstrated in Figure 4 of the decision which depicts what is described by the Commissioner as a ‘keyhole view’ that would remain in the event the development was approved.
- The Commissioner found, on the basis of the written request prepared in accordance with cl 4.6 of the WLEP, that the impact of the proposal on view impacts had not been minimised.

The Respondent’s position on objective (d)

According to the Respondent, the import of *Ricola* in this case is the finding by the Commissioner that consistency with the desired future character is different to demonstrating that impacts of the development have been minimised. In that case the Commissioner found the written request prepared in accordance with cl 4.6 failed as it relied on the change of character in the local area arising from other approvals in the vicinity.

- 59 In this case, the Respondent does not contend that the proposal is at odds with the desired future character, only that the impact arising from the non-compliance has not been minimised.
- 60 The impact that would be caused by a development that complies with the height standard is deemed to have minimised impacts on adjoining or nearby properties from disruption of views, as the objectives of a standard presuppose the impact of a complying envelope.
- 61 Likewise, any development that imposes an impact that is greater than the impacts caused by a compliant height development cannot be said to minimise impacts.
- 62 To the extent the height request asserts that impacts are minimised, it relies on fictional elements of a hypothetical development to claim a setback of 16m at the uppermost level has been provided.
- 63 However, the comparative assessment is not to be made between the proposal and a hypothetical alternative, but between the proposal and a development that complies with the height standard as shown by Gray C in *Ricola* at [98] when the Commissioner noted that the impact created in that case was “one that is not anticipated by the numeric control, as the impact is greater than that of a complying development”.
- 64 Further, to ‘minimise’ means to ‘reduce to the smallest possible amount of degree’, which is different to the meaning of ‘reducing’ which means to ‘bring down’ or ‘lower in degree, intensity’. While the amended application has reduced the built form at the uppermost level, it does not equate to a minimising of the form, or its impacts.
- 65 Mr Newbold’s oral evidence is that a further setback of 8-9m at the uppermost level is required for the treed ridgeline to be obscured by only 10-15%, which would constitute a minimising of the impact on the disruption of views.
- 66 As for the Draft Planning Strategy, no weight should be given to it as the Council is yet to consider submissions following public exhibition, it has not been adopted, and so is neither imminent or certain.

The objectives of the standard are achieved, notwithstanding the non-compliance

- 67 For the reasons stated at [42(1)]-[42(3)] above, I accept that the proposed development is of a height that is consistent with the desired future character of the neighbourhood (objective (a)).

For the reason advanced by the Applicant at [43], I accept that the proposal establishes a transition in scale between the B2 and R2 zone to the west that protects local amenity (objective b)).

69 For the reasons that follow, I accept that the proposal minimises the loss of solar access to existing buildings and open space (objective (c)), and protects the amenity of the public domain by providing public views of the harbour:

(1) In arriving at this opinion of satisfaction, I note that impacts on solar access are not entirely avoided, and that areas of the public domain, existing buildings, and approved developments nearby, will experience periods of overshadowing by the proposal, and by the non-compliance in particular. However, in my view the proposal has taken steps to minimise the impact of the overshadowing.

(2) In particular, the western setback of 2.5m at Level 5 depicted in the Midwinter views from the sun at Annexure D of the joint report demonstrates that the departure from the DCP envelope in this respect results in greater solar access to the north eastern corner of 38 Bay Street, and to parts of the public domain between 9am-11am.

70 In respect of objective (e), I accept the setback of the upper levels allows increased view corridors over the site from distant vantage points.

71 I also accept that that the proposed development has minimised the impact of disruption of views, being one of the impacts to be minimised by objective (d) of the height standard.

72 It is helpful at this point to explain that I agree with the Applicant's submission that the view enjoyed from Apartments 7A/B and 7C is more panoramic than that suggested by the photomontages prepared by the Applicant, which primarily focuses on the view directed to the north, and to the treed ridgeline.

73 On the basis of the site view, I accept that the view enjoyed from the apartments takes in the mature canopy of the street trees in Bay Street, the well vegetated slopes of Darling Point to the west, the treed ridgeline of Bellevue Hill and Point Piper to the east, and the treed ridgeline to the distant north.

74 These elements are not only visible from the vantage point of the north facing balconies but are also evident from inside the rooms visited during the onsite view.

75 In this context, the treed ridgeline in the distant northern view forms a component of the view, but a minor one in my view. As a result of the approved development at 55 Bay Street, the land/water interface that is currently enjoyed from Apartment 7A/B is substantially reduced and is removed altogether from the view shed currently enjoyed by Apartment 7C.

76 What is left of the treed ridgeline is a thin sliver on which the proposal imposes a view impact quantified by Mr Newbold at around 40% in Vantage Point 5, and between 18-45% in Vantage Points 1-4.

The view that is impacted, when considered within the rubric of *Tenacity Consulting v Waringah* (2004) 134 LGERA 23; [2004] NSWLEC 140 ("*Tenacity*"), is not iconic, and due to the obscuring effect of Nos 28-34 Cross Street and 55 Bay Street, is partial.

78 In answer to the fourth step in *Tenacity*, the aspect of the proposal that causes the impact is the non-compliance with the height controls. However, contrary to the Respondent's submission, it is not the case that a development that exceeds the numeric height standard should have no greater impact than a complying development. As shown by his Honour Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 ("*Initial Action*") at [87]:

"Clause 4.6 does not directly or indirectly establish a test that the non-compliant development should have a neutral or beneficial effect relative to a compliant development... Compliance with the height development standard might be unreasonable or unnecessary if the non-compliant development achieves this objective of minimising view loss or visual intrusion. It is not necessary... that the non-compliant development have no view loss or less view loss than a compliant development."

79 I do not understand the Commissioner in *Ricola* to be advancing that any comparison is required. Rather, that any development that imposes an impact beyond that which may reasonably be anticipated of a complying development, must demonstrate by reason of a cl 4.6 written request, the means by which the impact is minimised.

80 The Commissioner found that the written request in *Ricola* failed to identify the steps taken to minimise the impact beyond that anticipated by the numeric control.

81 In the circumstances of this case, the height request has identified ways in which the impact on the disruption of views has been minimised:

- (1) The non-compliance at the uppermost level of the proposal has been positioned to the east of the site, associated with a 16m setback and half the GFA of the level below.
- (2) Positioning the uppermost level to the east has two effects that may be described as minimising: firstly, to set to one side the built form that obscures part of the treed ridgeline currently within the view of the Apartment 7A/B and 7C, and secondly, to locate that portion of built form where it is progressively more concealed behind the built form approved at 28-34 Cross Street, the more the viewer moves to the east, evident in a comparison between Vantage Point 1 and Vantage Point 9 in Annexure B of the height request.

82 While not expressly stated in the height request, but integral to the positioning of the uppermost level in the location stated above, is the relocation of the lift core and stairs that are currently broadly positioned in the centre of the site, but which are to be demolished and relocated. The effect of this is to position the element of greatest non-compliance to the extremity of the view enjoyed from Apartment 7A/B and 7C, and where it is most likely to be obscured as the viewer moves east by the approved development at 28-34 Cross Street.

This placement of the greatest height in an area of greatest occlusion when viewed from the apartments satisfies me that the impact on the disruption of views has been minimised and has not merely been reduced, as the Respondent argues.

- 84 While the proposed development will impact the views currently enjoyed from the apartments, the extent of that disruption from the apartments has been considered and has been minimised by the Applicant. While the development will undoubtedly result in part of the view from the apartments being impacted, I have come to the conclusion, after considering the evidence of the experts and of the view impact assessment, that the impact on the views enjoyed from the apartments, is minor.
- 85 With respect to Mr Young's submission, I am unable to give any weight to the image relied upon by Mr Young at Annexure 1 as it depicts a hand drawn approximation of the proposal, without also representing the recently approved and compliant developments on Cross Street, and Bay Street.
- 86 I also accept that the wording of objective (d) places a focus on the disruption of views to those properties that are adjoining or nearby that is unlikely to infer district or distant views such as that currently enjoyed by Mr Young.
- 87 On these grounds, I am satisfied that the height request demonstrates that compliance with the height standard is unreasonable or unnecessary in accordance with cl 4.6(3)(a) of the WLEP.

There are sufficient environmental planning grounds to justify contravening the development standard

- 88 Next, the height request advances environmental planning grounds it asserts are sufficient to justify the contravention of the height standard. His Honour Preston CJ explained in *Initial Action*, at [24] that the environmental planning grounds relied upon must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole.
- 89 The height request advances four environmental planning grounds, in addition to the compliance it considers to be demonstrated with the objectives of the height standard, and the B2 zone. The four grounds may be summarised as follows:
- (1) The first ground is that the proposal is consistent with the desired future character of the area, as expressed in both the controls contained in the WLEP and in approvals granted by the Council in the area such as 16-18 Cross Street and 20-26 Cross Street, as expressed by the Commissioner in *SJD No 1* and confirmed by his Honour in *SJD No 2*, and more recently in the approval by the Council of 19-27 Cross Street.
 - (2) Such consistency is an environmental planning ground for the reasons set out by O'Neill C in *Initial Action v Woollahra Municipal Council* [2019] NSW 1097 at [42]:

“I am satisfied that justifying the aspect of the development that contravenes the development standard as creating a consistent scale with neighbouring development can properly be described as an environmental planning ground within the meaning identified by his Honour in Initial Action [23], because the quality and form of the immediate built environment of the development site creates unique opportunities and constraints to achieving a good design outcome (see s 1.3(g) of the EPA Act).”

- (3) In the circumstances of this case, the objectives of the height standard and the objectives of the B2 zone, read together, seek a height and scale that is consistent with the desired future character of the neighbourhood.
- (4) The height and scale of the immediate area is defined by six storey buildings at 19-27 Cross Street, 28-34 Cross Street and 45-51 Cross Street. While the proposal exceeds the overall height of these developments, the site is a corner site on which prominence is sought in the height and FSR controls, and where the retention of the majority of the structure results in a floor-to-floor height at ground floor and first floor level that moderately exceeds the heights preferred in Control C4 of Section 5.6.3.2 of the WDCP.
- (5) The second ground is that the commercial use proposed is consistent with the objectives of the B2 zone to provide employment opportunities, and contribute to daytime activation and vibrancy in Double Bay. In pursuit of that consistency, the height request identifies that applying the preferred floor-to-floor height of 3.4m for commercial buildings on those new floors proposed to be added to the existing height of 3.84m at the first floor contributes to a non-compliance.
- (6) The third ground is that the non-compliance will not result in unacceptable environmental impacts in terms of solar access, views or privacy for reasons set out at [46], and in Section 5 of the Statement of Environmental Effects (Exhibit A, Tab 18) which I note deals with the assessment of natural environmental impacts and of built environment impacts.
- (7) The fourth ground is that the proposed development provides a high level of urban design which minimises impacts resulting from the height non-compliance by means of its four-storey street wall, well-articulated facades, setback to upper levels, roof terraces and soft landscaping which has the effect of breaking up the form and reducing the perceived scale. The feasibility of such design features is said to be improved by the non-compliance.

90 For the reasons that follow, I accept that the grounds relied on are environmental planning grounds sufficient to justify the contravening of the standard:

- (1) I accept that Figure 1, the height plane blanket in Cross Street, and Figure 3, being a streetscape elevation of the northern side of Cross Street, re-produced below, supports the demonstration of a visual consistency in height when considered in context with the massing of existing built form to the north of Cross Street, and with existing and proposed development to the south side.

4.3 of the WLEP should be upheld.

The FSR Standard is exceeded

95 While an exceedance of the FSR standard is not pleaded in the Amended Statement of Fact and Contentions (Exhibit 3), as stated at [6], the Applicant identifies an exceedance and relies on the FSR request prepared by GSA Planning, dated November 2021.

96 The FSR of 2.5:1 permitted on the site according to the Floor Space Ratio Map at cl 4.4(2) is exceeded by the proposal. The site is also denoted on the FSR Map as 'Area 1' to which a benefit of 0.5:1 FSR applies.

97 Accordingly, the FSR applicable to the site is 3:1. The FSR of the proposed development is expressed as 3.9:1.

98 The relevant objective at cl 4.4(1)(b) of the WLEP is for buildings in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, and Zone B4 Mixed Use—to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.

99 The objective of the FSR standard at cl 4.4A(1) is to encourage the development of prominent corner buildings in Double Bay. The FSR request cites the chapeau to Part D5.4.7 of the WDCP to assert that the existing character of Cross Street is informed by corner buildings that “do not, in the main, provide good street definition.”

100 Instead, the FSR request asserts consistency with the desired future character of Cross Street by reference to Part D5.4.7 of the WDCP on grounds that may be summarised as follows:

- (1) The proposed massing results in a built form that is contextually compatible with adjoining development and built form to the east of the site on Cross Street.
- (2) The proposal directly responds to the poor street definition of the existing character by proposing a strong built form that acts as a western gateway to the Cross Street precinct and has been designed to soften the bulk through its articulated built form, strong street wall and recessive upper levels.
- (3) Recent approvals include developments in excess of the FSR standard ranging from 3.29:1 – 3.54:1, which demonstrates the evolving character of Cross Street, with which the proposed development should be unified by virtue of the objective at Part 5.47 to “unify the street on the north side of the street boundary”.

101 For the reasons stated above, and for reasons similar to those set out at [42(1)]-[42(3)], I am satisfied that the proposed development is consistent with the objective at cl 4.4(1) (b), and cl 4.4A of the WLEP, notwithstanding the non-compliance with the standard, and so I am satisfied that compliance with the standard is unreasonable or unnecessary pursuant to cl 4.6(3)(a) of the WLEP.

The FSR request advances environmental grounds that are virtually identical to those at [89], and on the basis of the site being a prominent corner site subject to greater height and FSR standards than a number of nearby sites, and due to the consistency with the WDCP set out at Table 3 of the Statement of Environmental Effects (Exhibit A, Tab 18).

- 103 I accept the grounds advanced by the FSR request are sufficient to justify the contravention of the FSR standard. In arriving at this conclusion, I note that Control Drawing 3, at Part D5.5.7 of the WDCP, with which there is only partial conformity, contains certain controls that are more applicable to shop top housing, and not to commercial uses that are otherwise an objective of development in the B2 zone, such as a 12m deep floorplate.
- 104 I am also satisfied that the proposed development is consistent with the objectives of cl 4.4(1)(b), and cl 4.4A(1) of the WLEP, and so is in the public interest because of that consistency, pursuant to cl 4.6(4)(a)(ii) of the WLEP.
- 105 I also consider there to be no matters that would preclude the secretary's concurrence in accordance with cl 4.6(5) of the WLEP and so I find the written request in respect of cl 4.4A of the WLEP should be upheld.

Jurisdictional pre-requisites to the grant of consent

- 106 Clause 7 of the State Environmental Planning Policy No 55—Remediation of Land (SEPP 55) requires a consent authority to consider whether the land is contaminated and, if so, whether the land is suitable in its current state or requires remediation.
- 107 According to the Preliminary Site Investigation (PSI) prepared by Douglas Partners dated February 2022 (Exhibit E), the subject site was the site of an AMPOL service station until it was demolished sometime between 1989 and 1991. Excavation for the existing basement, undertaken in the early 1990's, was to a depth of 6m that would have caused the removal of underground fuel storage tanks at that time.
- 108 The PSI considers there to be a risk that the former use of the site has impacted groundwater at the perimeter of the site and proposes indoor air monitoring for a period of six weeks. On the joint submission of the parties, I allowed time for an air quality assessment to be completed following the conclusion of the hearing.
- 109 On 4 April 2022, the Court was advised that the results of the Air Quality Assessment and the final PSI Report, when read together, resolved all contentions in respect of contamination.
- 110 The Air Quality Assessment was undertaken at eight on-site locations, and two off-site locations. The results of the measured concentrations of TPH and VOC in indoor air at the site, relative to the measured concentration at 365 New South Head Road and published background levels and adopted screening criteria, indicate no obvious evidence of significant vapour intrusion into the existing basement.

On this basis, I am satisfied that the site is not contaminated, and is suitable in its current state for the purpose for which the development is proposed to be carried out, in accordance with cl 7 of SEPP 55.

- 112 In arriving at this state of satisfaction I note the Structural Assessment prepared by Xavier Knight dated 10 Feb 2022 (Exhibit D) that strengthening of the existing basement and foundations is to be undertaken in lieu of any excavation that would penetrate the slab or underlying soils.
- 113 By the same reasoning, I am also satisfied that the proposed development will not disturb, expose or drain acid sulfate soils and cause environmental damage, being the objective of cl 6.1 of the WLEP, and so an acid sulfate soils management plan is not required.
- 114 The site is within an area defined on the Sydney Harbour Catchment Map (Amendment 2016), being land to which the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Harbour Catchment SREP) applies. I have considered the relevant planning principles in Part of the Harbour Catchment SREP with which I conclude the proposed development is consistent.

Conclusion

- 115 After considering all of the evidence before the Court, including the submissions of residents in the area, I have determined that the proposed development is deserving of the grant of consent, subject to conditions pursuant to s 4.16(1) of the EPA Act.
- 116 The parties have filed agreed without prejudice conditions of consent that incorporate the results of the indoor air quality monitoring at [110], and which form Annexure A.

Orders

- 117 The Court orders that:
- (1) The Applicant's written request, prepared in accordance with clause 4.6 of the Woollahra Local Environmental Plan 2014 in respect of the height of building development standard at clause 4.3 of the Woollahra Local Environmental Plan 2014, is upheld.
 - (2) The Applicant's written request, prepared in accordance with clause 4.6 of the Woollahra Local Environmental Plan 2014 in respect of floor space ratio development standard at clause 4.4 of the Woollahra Local Environmental Plan 2014, is upheld.
 - (3) The appeal is upheld.
 - (4) Development consent for Development Application DA58/2021/1 for alterations and additions to an existing four-storey commercial building at 53 Cross Street, Double Bay is granted, subject to conditions of consent at Annexure A.
 - (5)

All exhibits are returned, except for Exhibits A, B, F and 4 which are to be retained.

.....

T Horton

Commissioner of the Court

Annexure A.pdf

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Decision last updated: 20 April 2022