



Land and Environment Court New South Wales

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| Medium Neutral Citation: | Koolloos and Hazlett v Northern Beaches Council [2023] NSWLEC 1223 |
| Hearing dates: | 5 and 6 April 2023 |
| Date of orders: | 11 May 2023 |
| Decision date: | 11 May 2023 |
| Jurisdiction: | Class 1 |
| Before: | Chilcott C |
| Decision: | <p>The Court orders:</p> <ol style="list-style-type: none">(1) The Applicant's written requests prepared pursuant to cl 4.6 of the Pittwater Local Environmental Plan 2014 to vary the height of buildings development standards in subcll 40(4)(a) and (b) of State Environmental Planning Policy (Housing for Seniors and People with Disability) 2004 are upheld.(2) The appeal is upheld.(3) Development Application DA2021/1963 seeking approval for demolition of two existing dwellings and construction of five three-bedroom seniors living apartments over two semi- connected two storey pavilions, with associated driveway, parking and landscaping, at 10-12 Loquat Valley Road, is determined by way of the grant of consent, subject to the conditions provided at Annexure A.(4) The exhibits are returned, with the exception of Exhibits A and 1. |
| Catchwords: | DEVELOPMENT APPLICATION – seniors living development – whether Applicant's written requests under cl 4.6 of Pittwater Local Environmental Plan 2011 to vary the applicable height of buildings development standards is upheld – whether potential flooding impacts are acceptable - whether bulk and scale of Proposed Development would cause adverse impacts on the character of the locality and adjoining properties – consideration of objector submissions. |
| Legislation Cited: | Environmental Planning and Assessment Act 1979, ss 1.3, 4.15, 4.16, 8.7 |

Environmental Planning and Assessment Regulation 2000,
c11 49, 77
Pittwater Local Environmental Plan 2014, c11 1.2, 2.3, 4.3,
4.6, 5.21, 7.6
Roads Act 1993, s 138
State Environmental Planning Policy – Building
Sustainability Index (BASIX) 2004
State Environmental Planning Policy (Housing for Seniors
or People with a Disability) 2004, Ch 3 c11 15, 18,24, 25, 26,
28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 50,
Sch 3
State Environmental Planning Policy (Housing) 2021, Sch
7A s 2
State Environmental Planning Policy No 65 – Design
Quality of Residential Apartment Development, Sch 1
State Environmental Planning Policy (Resilience and
Hazards) 2021, cl 4.6

Texts Cited:

Australian Standard AS 2890.1, Parking Facilities – Off
Street Parking, 2004
Australian Standard AS 2890.6, Parking facilities, Part 6:
Off-street parking for people with disabilities, 2009
NSW Department of Infrastructure, Planning and Natural
Resources, Seniors Living Policy: Urban Design Guideline
for Infill Development, 2004
Northern Beaches Council, Community Participation Plan,
2019
NSW Department of Planning and the Environment,
Planning Circular PS 20-002,5 May 2020
Pittwater 21 Development Control Plan

Category:

Principal judgment

Parties:

Vicki Koolloos (First Applicant)
Matthew Hazlett (Second Applicant)
Northern Beaches Council (Respondent)

Representation:

Counsel:
M Staunton (Applicants)
N Hammond (Respondent)

Solicitors:
Sattler and Associates Pty Ltd (Applicants)
Northern Beaches Council (Respondent)

File Number(s):

2022/171544

Publication restriction:

No

JUDGMENT

1 **COMMISSIONER:** Vicki Koolloos and Matthew Hazlett (together referred to in the judgment as “the Applicant”) have appealed the deemed refusal of Development Application DA2021/1963 (the DA), made with owner’s consent and lodged with Northern Beaches Council (the Respondent), seeking approval for demolition of two existing dwellings and construction of five three-bedroom seniors living apartments over two semi-connected two storey pavilions, with associated driveway, parking and landscaping (the Proposed Development) at 10-12 Loquat Valley Road, Bayview (the Subject Site).

Background

- 2 The Applicant's development application, lodged on 21 October 2021, and pursuant to the provisions of Sch 7A of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP), as a consequence is determined pursuant to the provisions of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP HSPD).
- 3 The Applicant's appeal comes to the Court pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (the EP&A Act), and they are determined pursuant to the provisions of s 4.16 of the EP&A Act.
- 4 Following the filing of the Applicant's Class 1 appeal, the Northern Beaches Local Planning Panel determined the Applicant's development application by way of refusal.
- 5 The Proposed Development was notified by the Respondent in accordance with the provisions of the Northern Beaches Council Community Participation Plan 2019 from 27 October 2021 to 10 November 2021. The Council received 52 submissions objecting to the DA.
- 6 The Subject Site consists of two existing lots on the northern side of Loquat Valley Road and is located in the R2 Low Density Residential zone under the provisions of cl 2.3 of Pittwater Local Environmental Plan 2014 (PLEP). It has an area of 1490m² and a frontage of 37.9m.
- 7 The Applicant's Class 1 application was filed on 10 June 2022 following which:
 - (1) the Applicant has obtained leave to rely on amended plans on 5 December 2022 (first amendment); and
 - (2) the Applicant has obtained further leave to amend its application on 15 March 2023 (second amendment) and 22 March 2023 (third amendment).
- 8 Each amended version of the Applicant's development application was notified by the Respondent on the following dates:
 - (1) first set of amendments - 5 December 2022
 - (2) second set of amendments - 28 February 2023
 - (3) third set of amendments - 22 March 2023
- 9 Following leave being granted in respect of the first amendment, the Respondent filed an amended statement of facts and contentions (ASOFC) on 11 January 2023, which identified the following contentions as remaining unresolved by the Applicant's Proposed Development:
 - (1) the proposed building height, which was said to be in breach of development standards in subcl 40(4)(a) and (b) of the SEPP HSPD;
 - (2) the bulk and scale of the Proposed Development which was said to give rise to potential adverse impacts on the character of the locality and adjoining properties; and
 - (3) the requirement for conditions of consent to address:
 - (a) potential flooding impacts; and
 - (b) matters concerning proposed building colours and materials.
- 10 A number of immediate neighbours to the Subject Site had made written submissions on the third amendment and requested to be heard at the hearing. The objectors were provided with the plans, the subject of the third amendment, on 22 March 2023, the

- same day that the Court granted the Applicant leave to rely on those plans.
- 11 The Respondent had subsequently received further objector submissions in relation to the Applicant's third amendment, including as recently as 4 April 2023.
- 12 A site view was undertaken prior to the commencement of the hearing at Court and the following objectors provided oral submissions during the site view:
- (1) Mr Ric Bonomo a resident of Jendi Avenue, Bayview;
 - (2) Mr Steven Cox, a further resident of Jendi Avenue, Bayview;
 - (3) Mr Darren Read, an additional resident of Jendi Avenue, Bayview; and
 - (4) Messrs Bryce Water and Keith Waters, residents of an adjoining property on Loquat Valley Road.
- 13 The objectors' concerns went to the following potential impacts, or design aspects, of the Proposed Development:
- (1) the proposal's bulk, scale and building height;
 - (2) the visual impact of the Proposed Development;
 - (3) concerns in relation to overlooking and privacy arising from the Proposed Development;
 - (4) potential view impacts arising from the Proposed Development;
 - (5) potential flooding, biodiversity, tree loss, carparking, vehicular access and traffic related impacts arising from the Proposed Development;
 - (6) construction vehicles movement and traffic impacts during construction;
 - (7) the adequacy of footpaths and accessible paths of travel to and from the Proposed Development; and
 - (8) the adequacy of proposed setbacks of the Proposed Development to adjoining residences.
- 14 At the commencement of the hearing the Parties submitted that the principal contentions in this appeal as identified in the Respondent's ASOFC (see above at [9]) had been resolved to the satisfaction of the Respondent and its experts on the basis of the Applicant's amended plans and conditions of consent that the Parties agreed should be imposed with any grant of consent.
- 15 However, the Respondent submitted that resident objectors should be heard at the commencement of the on-site view, and that the Parties' expert witnesses should then be directed to address any additional matters raised by objectors, so that these could be considered during the hearing, and the matter then determined by the Court.
- 16 The Court was assisted in its consideration of these matters by the joint reports and oral testimony of the Parties' town planning experts, Mr Greg Boston, for the Applicants, and Adam Susko, for the Respondent, and their stormwater engineering experts, Mr Nathan Broadbent, for the Applicant, and Ms Valerie Tulk, for the Respondent.

Statutory context

Environmental Planning and Assessment Act 1979

- 17 Section 4.15(1) requires:

(1) **Matters for consideration—general** In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—

(a) the provisions of—

(i) any environmental planning instrument, and

(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

(iii) any development control plan, and

(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),

(v) (Repealed)

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

18 Section 4.15(3A) of the EP&A Act provides as follows:

(3A) Development control plans If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—

(a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

(c) may consider those provisions only in connection with the assessment of that development application.

Environmental Planning and Assessment Regulation 2000

19 The following provisions of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) are of relevance in this appeal:

(1) Clause 49(1), which requires that, *inter alia*, a development application must be made by an owner of the land that is the subject of the application or with the consent of the owner of the land;

(2) Clause 77(1), which concerns notification of development applications as follows:

(1) As soon as practicable after a development application is lodged with the consent authority, the consent authority must -

(a) publish notice of the application on the consent authority's website, and

(b) give notice of the application to -

(i) the public authorities (other than relevant concurrence authorities or approval bodies) that, in the opinion of the consent authority, may have an interest in the determination of the application, and

(ii) in the case of a development application other than designated development - the persons that, in the opinion of the consent authority, own or occupy the land adjoining the land to which the application relates (unless the notice is in respect of an application for public notification development).

20 State Environmental Planning Policy (Housing) 2021 (SEPP Housing) commended on 26 November 2021, and the provisions of subss 2(1)(a) and 2(2) of Schedule 7A of the policy states as follows:

(1) This Policy does not apply to the following matters -

(a) a development application made, but not yet determined, on or before the commencement date". And

(2) The provisions of a repealed instrument, as in force immediately before the repeal of the repealed instrument, continue to apply to a matter referred to in subsection (1).

21 The Applicant's development application was lodged on 21 October 2021, and as a consequence the application must be determined pursuant to the repealed instrument, as in force immediately before the repeal of the repealed instrument, which was SEPP HSPD.

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004

22 The provisions of SEPP HSPD, and in particular those in Ch 3 of that instrument in relation to development for seniors housing, apply to the Proposed Development.

23 Under the provisions of cl 15(a) in Ch 3 of SEPP HSPD, the Proposed Development is a permissible form of development on land zoned R2 Low Density Residential under cl 2.3 of PLEP if the development is carried out in accordance with SEPP HSPD, as that clause provides:

15 What Chapter does

This Chapter allows the following development despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy –

(a) development on land zoned primarily for urban purposes for the purpose of any form of seniors housing.

24 The provisions of cl 40 of SEPP HSPD, which concerns development standards in relation to minimum sizes and heights of buildings, is of particular relevance to contentions in this appeal, and provides as follows:

"40 Development standards—minimum sizes and building height

(1) **General** A consent authority must not consent to a development application made pursuant to this Chapter unless the proposed development complies with the standards specified in this clause.

(2) **Site size** The size of the site must be at least 1,000 square metres.

(3) **Site frontage** The site frontage must be at least 20 metres wide measured at the building line.

(4) **Height** in zones where residential flat buildings are not permitted If the development is proposed in a residential zone where residential flat buildings are not permitted -

(a) the height of all buildings in the proposed development must be 8 metres or less, and

Note -

Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).

(b) a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and

Note -

The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.

(c) a building located in the rear 25% area of the site must not exceed 1 storey in height.

(5) Development applications to which clause does not apply Subclauses (2), (3) and (4) (c) do not apply to a development application made by any of the following—

(a) the Department of Housing,

(b) any other social housing provider”

25 Other provisions of relevance to the Proposed Development are identified and discussed below (at [70]) in relation to jurisdictional considerations, where it is noted that the development complies with those other provisions.

Pittwater Local Environmental Plan 2014

26 Development on the Subject Site is subject to the provisions of PLEP, and the following are of particular relevance in this appeal:

(1) clause 1.2(2) of PLEP provides the aims of plan which are:

(aa) to protect and promote the use and development of land for arts and cultural activity, including music and other performance arts,

(a) to promote development in Pittwater that is economically, environmentally and socially sustainable,

(b) to ensure development is consistent with the desired character of Pittwater’s localities,

(c) to support a range of mixed-use centres that adequately provide for the needs of the Pittwater community,

(d) to retain and enhance land used for employment purposes that is needed to meet the economic and employment needs of the community both now and in the future,

(e) to improve access throughout Pittwater, facilitate the use of public transport and encourage walking and cycling,

(f) to encourage a range of housing in appropriate locations that provides for the needs of the community both now and in the future,

(g) to protect and enhance Pittwater’s natural environment and recreation areas,

(h) to conserve Pittwater’s European and Aboriginal heritage,

(i) to minimise risks to the community in areas subject to environmental hazards including climate change,

(j) to protect and promote the health and well-being of current and future residents of Pittwater.

(2) the Subject Site is zoned R2 Low Density Residential under the provisions of cl 2.3 of PLEP, and the objectives of the R2 zone are:

- 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 limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.

(3) development for the purposes of seniors living is not a use of land zoned R2 under the provisions of cl 2.3 of PLEP. Notwithstanding that fact, the Proposed Development is a permissible development by dint of the provisions of cl 15 of SEPP HSPD (see above (at [23]));

(4) clause 4.3 of PLEP establishes a height of buildings development standard of 8.5m for the Subject Site, and includes the following objectives:

(a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

(b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,

(c) to minimise any overshadowing of neighbouring properties,

(d) to allow for the reasonable sharing of views,

(e) to encourage buildings that are designed to respond sensitively to the natural topography,

(f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

- (5) clause 4.6 of PLEP concerns the circumstances under which exceptions to development standards may be considered, and relevantly for the current appeal it provides, *inter alia*, as follows:

(1) The objectives of this clause are as follows -

(a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

(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.

(4) Development consent must not be granted for development that contravenes a development standard unless -

(a) the consent authority is satisfied that -

(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, and

(b) the concurrence of the Planning Secretary has been obtained.

- (6) cl 5.21 of PLEP in relation to flood management provides as follows:

(1) The objectives of this clause are as follows—

(a) to minimise the flood risk to life and property associated with the use of land,

(b) to allow development on land that is compatible with the flood function and behaviour on the land, taking into account projected changes as a result of climate change,

(c) to avoid adverse or cumulative impacts on flood behaviour and the environment,

(d) to enable the safe occupation and efficient evacuation of people in the event of a flood.

(2) Development consent must not be granted to development on land the consent authority considers to be within the flood planning area unless the consent authority is satisfied the development—

(a) is compatible with the flood function and behaviour on the land, and

(b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and

(c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and

(d) incorporates appropriate measures to manage risk to life in the event of a flood, and

(e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.

(3) In deciding whether to grant development consent on land to which this clause applies, the consent authority must consider the following matters—

(a) the impact of the development on projected changes to flood behaviour as a result of climate change,

(b) the intended design and scale of buildings resulting from the development,

(c) whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood,

(d) the potential to modify, relocate or remove buildings resulting from development if the surrounding area is impacted by flooding or coastal erosion.

(4) A word or expression used in this clause has the same meaning as it has in the Considering Flooding in Land Use Planning Guideline unless it is otherwise defined in this clause.

(5) In this clause—

Considering Flooding in Land Use Planning Guideline means the Considering Flooding in Land Use Planning Guideline published on the Department's website on 14 July 2021.

flood planning area has the same meaning as it has in the Floodplain Development Manual.

Floodplain Development Manual means the Floodplain Development Manual (ISBN 0 7347 5476 0) published by the NSW Government in April 2005.

Pittwater 21 Development Control Plan

27 Development on the Subject Site is also subject to the provisions of Pittwater 21 Development Control Plan (PDCP) which provides guidance for future development on land where this DCP applies within the Northern Beaches Local Government Area (LGA).

28 The Parts of PDCP that are relevant in the determination of the Applicant's development application in this appeal are the following:

(1) Part B3.11 in relation to development on flood prone land, and which has the following objectives and requirements:

“Objectives

- Protection of people.
- Protection of the natural environment.
- Protection of private and public infrastructure and assets.

Requirements

1. Development must comply with the prescriptive controls set out in the Matrix below. Where a property is affected by more than one Flood Risk Precinct, or has varying Flood Life Hazard Category across it, the assessment must consider the controls relevant at each location on the property.

2. Development on flood prone land requires the preparation of a Flood Management Report by a suitably qualified professional.”

(2) Part C1 in relation to design criteria for residential development, including, in particular, the provisions of Parts C1.3 concerning view sharing, C1.5 concerning visual privacy, C1.21 concerning seniors housing; and

(3) Part D4 in relation to locality specific development controls for the Church Point and Bayview locality, including, in particular, the provisions of Parts D4.3 concerning building colours and materials and D4.5 concerning front building lines.

Contentions

29 The principal contentions remaining in the appeal were identified above (at [9]) and can be summarised as follows:

A flooding contention concerning the imposition of conditions

30 Conditions should be imposed on any consent to achieve consistency with cl B3.11 of the PDCP. The basement car park must be protected from inundation up to the Probable Maximum Flood Level of 5.25m Australian Height Datum (AHD), the proposed flood gate to the carpark must be self-actuating, and the undercroft area must not be enclosed and must not impede flood waters.

Three planning contentions

A contention in relation to building height

31 The Respondent has said that the Proposed Development should be refused due to its excessive height including:

- (1) the breach of the development standard for building height under subcl 40(4)(a) (8 metres), and subcl 40(4)(b) (2 storeys) of the SEPP HSPD
- (2) associated impacts on the locality and adjoining properties caused by the breach of the building height standards in SEPP HSPD; and
- (3) the inadequacy of the Applicant's written request seeking to vary the development standards in subcl 40(4) of SEPP HSPD as, on the Respondent's submission, the request did not demonstrate that compliance with the standard is unreasonable or unnecessary, nor did it demonstrate that there were sufficient environmental planning grounds to justify contravention of the height of buildings development standards sought.

A contention concerning bulk and scale

32 The Respondent had said that the Proposed Development should be refused due to its excessive bulk and scale which, on its submission, would:

- (1) result in unreasonable impacts on the character of the locality and on adjoining properties;
- (2) be inconsistent with Principles 1, 2 and 9 in Sch 1 of State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65); and
- (3) be inconsistent with cl 33(a) and 34 of the SEPP HSPD.

A contention concerning building colours and materials and the imposition of conditions

33 The Respondent had proposed that conditions be imposed on any consent to the Applicant's development application to achieve consistency with the provisions of cl D4.3 of PDCP in respect of building colours and materials, which include a requirement to enhance the visual quality of the streetscape and harmonise with the natural environment.

34 The Parties have resolved each of these contentions to their mutual satisfaction, on the following bases.

Resolution of the Parties' contentions

The flooding contention

- 35 The Parties expert flooding engineers, Ms Valerie Tulk (for the Respondent) and Mr Nathan Broadbent (for the Applicant) had filed a joint report on 9 March 2023 in which:
- (1) they agreed that the flooding contention would be resolved by:
 - (a) the imposition of the conditions set out in particulars a, b and c to the flooding contention; and
 - (b) the Applicant's plans and documents that were the subject of the grant of leave arising from the Applicant's first amendment to its development application.
 - (2) the experts also considered the Applicant's amended architectural plans Revision F, (which were provided on a without prejudice basis at that time but were later the subject of leave granted on 15 March 2023, being the Applicant's second amendment of its development application), and in relation to which:
 - (a) they agreed that the revision F plans were consistent with the earlier Revision E plans in respect of flooding matters; and
 - (b) they noted that sheets A07E and A07F of the plans both depicted an open undercroft below the car basement slab allowing for passage of floodwaters beneath the Applicant's building.
- 36 The Parties expert flooding engineers also filed a supplementary joint report on flooding filed, 30 March 2023 in which the experts:
- (1) acknowledged the amendments made to the stormwater management plans by ACOR Consultants, CC210341, sheets C1-C11, Rev D dated 16 March 2023 and which formed part of the Applicant's third amendment to its development application;
 - (2) agreed that the Rev D stormwater plans were consistent with the Rev F architectural plans incorporating Rev G for sheets A06F and A07G (being the Applicant's third amendment of its development application plans; and
 - (3) agreed that:
 - (a) the Applicant's proposed rainwater tank needed to be relocated so that it would not impede floodwaters flowing beneath the building; and
 - (b) this outcome is reflected in the Applicant's revised architectural and stormwater plans.
- 37 On the basis of the above, the Respondent confirmed in closing submissions that the Parties' stormwater experts were satisfied. I agree, that the remaining contention in relation to stormwater management and flooding is resolved; and
- (1) the proposed basement car park would be protected from inundation up to the Probable Maximum Flood Level of 5.25m AHD;
 - (2) the Applicant's proposed flood gate to the basement carpark would be self-actuating and the undercroft area of the proposed Development is not enclosed and so would not impede the flow of any flood waters; and
 - (3) the Applicant's amended plans satisfy the provisions in cl B3.11 of PDCP (see above at [28(1)]).

The town planning contentions

- 38 The Parties' expert town planners, Mr Adam Susko (for the Respondent) and Mr Greg Boston (for the Applicant) filed a joint expert report 10 March 2023 in which they considered the responsiveness of the Applicant's Rev F plans which were the subject of leave granted on 15 March 2023 (that is the second amendment to the Applicant's

development application).

39 In their report, the expert town planners agreed that the Applicant's Rev F plans resolved contentions in relation to building height and the bulk and scale of the Proposed Development, as well as the contention concerning colours and materials, and they recommended conditions that if imposed would resolve the Respondent's remaining planning contentions.

40 The Parties' expert town planners also prepared a supplementary joint report dated 5 April 2023, in which they provided further advice concerning:

- (1) the Applicant's written request prepared pursuant to cl 4.6 of PLEP seeking to vary the height standards in cl 40(4)(a) and (b) of SEPP HSPD; and
- (2) the oral submissions made by objectors on site at the beginning of the hearing.

41 The Parties have agreed, and I am satisfied, that:

- (1) the remaining planning contentions in the appeal, are resolved by the evidence of the Parties' expert planners for the reasons provided below at [42] to [57]; and
- (2) the expert town planners' have considered the submissions of the Resident objectors, and the Respondent has concluded, and I am satisfied, that all matters raised by the objectors have been satisfactorily addressed and resolved by the Applicant's amended plans and accompanying documents for reasons also described below (commencing at [60]).

- 42 The Proposed Development is subject to a height of building development standard under cl 40(4)(a) of the SEPP HSPD of 8m, and the Applicant's proposed building has a height of up to 9.5m, measured to the underside of the uppermost ceiling level, in contravention of that standard. The height breach is isolated to the northern edge of the topmost floor of the Proposed Development.
- 43 Further, the Proposed Development also contravenes the two-storey development standard in cl 40(4)(b) of SEPP HSPD as the building has a three-storey built form when viewed from the northern, eastern and western boundaries of the Subject Site.
- 44 The Applicant has provided two written requests prepared pursuant to the provisions of cl 4.6 of PLEP seeking to vary the development standards in subcll 40(4)(a) and (b) of SEPP HSPD, both prepared by Boston Blyth Fleming and dated 5 April 2023.
- 45 The Respondent's expert town planner has considered that the Applicant's written requests to vary the development standards in subcll 40(4)(a) and (b) of SEPP HSPD and opined that each was satisfactory and demonstrated sufficient environmental planning grounds to justify the variation sought.
- 46 Within their joint expert report, the Parties' expert town planners had also agreed, *inter alia*, that:
- (1) the Applicant's proposed building:
 - (a) responds to the topography of the Subject Site;
 - (b) maintains a two-storey appearance when viewed from Loquat Valley Road; and
 - (c) has a form that is not incongruent with the established height of buildings in the R2 zone in which the Subject Site is located when viewed from the street;
 - (2) that the height of the Applicant's proposed building does not result in any significant impact with regards to solar access or view sharing experienced from neighbouring properties.
- 47 The Respondent's expert had also agreed that the Proposed Development would have a lesser height than the existing house on the Subject Site and that the parapet level of the roof is less than the roof height of the dwelling on the adjoining lot at 14 Loquat Valley Road.
- 48 In closing, the Respondent submitted that, relying on the evidence of the Parties' expert planners, including the satisfaction expressed by the Respondent's expert, Mr Susko, in relation to the Applicant's written requests under cl 4.6 of PLEP, the contention concerning the height of the Applicant's Proposed Development was resolved.
- 49 I have considered the submissions of the Parties and the evidence of their expert town planners, and, consistent with their evidence in their supplementary joint report, I am satisfied that the Applicant's written requests to vary the height developments standards in subcll 40(4)(a) and (b) for the reasons they expressed in their report, which I adopt, as follows:
- (1) in relation to the request to vary the 8m standard in subcl 40(4)(a) of SEPP HSPD:
 - (a) as required under the provisions of cl 4.6(3)(a), compliance with the development standard is unreasonable or unnecessary in the circumstances of the case because the Proposed Development achieves

the objectives of the standard notwithstanding the non-compliance because:

- (i) although the standard in subcl 40(4)(a) of SEPP HSPD had no explicit objective, the objectives of cl 4.3 of PLEP in relation to height of buildings provide implicit objectives for cl 40(4)(a) noting that development on the Subject Site would otherwise have a 8.5m height standard under cl 4.3;
 - (ii) the objectives of cl 4.3 of PLEP are provided above (at [26(4)]); and in relation to these, the Parties' expert planners agree that the Proposed Development would achieve the objectives in cl 4.3 for reasons provided at [7] of their supplementary joint report dated 6 April 2023, and which include the reasons provided above (at [46]) and [47];
 - (b) as required under the provisions of subcl 4.6(3)(b) of PLEP, there are sufficient environmental planning grounds to justify contravening the development standard, including:
 - (i) the Proposed Development has had to respond to the topography of the Subject Site which falls 7m across its surface in a northerly direction towards the rear of the site, and 5m across its frontage in an easterly direction, which makes strict compliance with the standard difficult to achieve;
 - (ii) the flood affectation of the rear of the Subject Site requires that the floor levels of the development be set above existing ground level;
 - (iii) compliance with the standard would necessitate a significant reduction in the floor space ratio (FSR) of the development in circumstances where the development otherwise complies with the FSR standard objective, and a reduction in FSR would be contrary to subs 1.3(c) of the EP&A Act as it would not promote the orderly and economic use of land;
 - (iv) compliance with the standard would not promote good design and amenity of the built environment contrary to subs 1.3(g) of the EP&A Act;
 - (c) as required under the provisions of subcl 4.6(4)(a)(ii) the Proposed Development is consistent with the objectives for development within the R2 zone (see above at [26(2)]) in which the development is proposed to be carried out as it would provide for the housing needs of the community within a low density residential environment as encouraged by the terms of SEPP HSPD.
- (2) in relation to the request to vary the two-storey control standard in subcl 40(4)(b) of SEPP HSPD:
- (a) as required under the provisions of subcl 4.6(2)(a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case because the Proposed Development achieves the objectives of the standard notwithstanding the non-compliance because:
 - (i) subcl 40(4)(b) of SEPP HSPD includes a note (see above at [24]) stating that the purpose of the subcl is to avoid an abrupt change in the scale of development in the streetscape; and
 - (ii) consistent with the evidence of the expert town planners above (at [46(1)] and [47]), the Proposed Development would not create an abrupt change in the scale of development in the streetscape, as the building has been appropriately articulated and located with non-compliant elements located to the rear of the property where they are not discernible in the streetscape;
 - (b) as required under the provisions of subcl 4.6(3)(b) of PLEP, there are sufficient environmental planning grounds to justify contravening the development standard, including:
 - (i) the Proposed Development has had to respond to the topography of the Subject Site which falls 7m across its surface in a northerly direction towards the rear of the site, and 5m across its frontage in

- an easterly direction, facilitates a two-storey built form while overlapping into a three storey form, while presenting as a one- and two-storey building from the street;
 - (ii) compliance with the standard would necessitate a significant reduction in the floor space ratio (FSR) of the development in circumstances where the development otherwise complies with the FSR standard, and a reduction in FSR would be contrary to subs 1.3(c) of the EP&A Act as it would not promote the orderly and economic use of land;
 - (iii) compliance with the standard would not promote good design and amenity of the built environment contrary to subs 1.3(g) of the EP&A Act; and
 - (c) as required under the provisions of subcl 4.6(4)(a)(ii) the Proposed Development is consistent with the objectives for development within the R2 zone (see above at [26(2)]) in which the development is proposed to be carried out as it would provide for the housing needs of the community within a low density residential environment as encouraged by the terms of SEPP HSPD;
- (3) in relation to the written requests for each standard:
 - (a) the Proposed Development would 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; and
 - (b) the concurrence of the Planning Secretary can be assumed consistent with the terms of the Planning Circular PS 20-002 issued by the NSW Department of Planning and Environment dated 5 May 2020.

50 Based on my conclusions above (at [49]), I am satisfied that:

- (1) the Applicant's written requests to vary the height development standards in subcll 40(4)(a) and (b) should be upheld; and
- (2) the Respondent's contention concerning the height of the Proposed Development is resolved.

- 51 The Parties' expert town planners have agreed that the Respondent's contention concerning the bulk and scale of the Proposed Development are resolved by Applicant's amended architectural plans and amended landscape plans. Those contentions related to:
- (1) the degree of articulation and screening of the rear elevation, which was said to be insufficient;
 - (2) A requirement for additional depth or fenestration to the rear elevation of the larger/wider western building in order to create an illusion of two separate buildings;
 - (3) the visual bulk of the building which was said to be exacerbated by the expanse of white painted render; and
 - (4) a requirement for a greater level of planting at the rear of the development.
- 52 The experts agreed that the Applicant's amended plans had:
- (1) introduced a curved indentation to the western building element, between the two sets of apartments;
 - (2) provided additional of planter boxes at the rear of the development along with a roof garden atop the entire development;
 - (3) resolved to their satisfaction the height of the eastern stone wall alongside the driveway; and
 - (4) provided for a change in materials to the rear façade.
- 53 The experts had further agreed that:
- (1) the bulk and scale of the Applicant's proposed building does not result in any unreasonable view sharing impacts on neighbouring properties, particularly in relation to the adjoining dwelling at 14 Loquat Valley Road, the view impacts from which are narrow and minor;
 - (2) while no revised shadow diagrams have been provided, a reasonably accurate assessment of the potential for overshadowing has been carried out;
 - (3) the bulk and scale does not result in a built form that generates any unreasonable degree of overshadowing onto the primary private open spaces of adjoining developments; and
 - (a) the potential overshadowing of the Proposed Development are acceptable;
 - (b) the Proposed Development achieves an acceptable level of visual and acoustic privacy to neighbouring properties to the north and west;
 - (c) the east-facing window from the ground level living and dining areas of proposed Unit 1 may cause privacy impacts to the rear garden of the dwelling at 8 Loquat Valley Road, but this is addressed by an agreed condition to be imposed with any grant of consent requiring the installation of a fixed louvred privacy screen (see agreed condition 38(i));and
 - (d) any headlights from vehicles driving down the driveway of the Proposed Development into the garage may have a potential impact to the dwelling at 8 Loquat Valley Road. The Parties have agreed on the terms of a condition to be imposed with the grant of consent requiring that:
 - (i) the height of a stone-clad wall in the development be increased to a height of 1.8m; and
 - (ii) landscaping be provided within the gap between the wall and the property at 8 Loquat Valley Road (see agreed condition 38(ii)).
- 54 The Respondent, relying on the evidence of it's expert town planner, also submitted that the Applicant's amended plans provide additional fenestration and façade articulation to the rear of the Proposed Development, as well as a darker palette of

materials and an increased emphasis on greening of the Subject Site, and together these had resolved its contention concerning the bulk and scale of the Proposed Development.

55 On the basis of the Parties' submissions, relying on the evidence of their expert town planners above (at [1] to [54]), I am satisfied that the contention in relation to the bulk and scale of the Proposed Development is resolved.

The contention in relation to conditions concerning building colours and materials

56 The Parties' expert town planners had agreed within their joint expert report that the Respondent's contention concerning the proposed colours and materials of the Proposed Development could be resolved either by way of a suitably worded condition and/or by way of the Applicant providing an updated colours and materials schedule within its amended plans.

57 The Applicant's amended plans now provide for an updated schedule of colours and materials, and the Parties submitted that their expert town planners had confirmed that those plans have resolved the Respondent's contention.

Conclusion in relation to the resolution of remaining contentions in the appeal

58 Based on my findings above at [37], [50], [55] and [57], I am satisfied that the remaining contentions in the appeal have been resolved on the basis of the Applicant's amended plans, the agreements of the Parties' experts, and the proposed imposition of agreed conditions of consent.

59 The Respondent confirmed during the hearing that, as a consequence of the resolution of contentions in the appeal, it did not oppose the grant of consent to the Applicant's development application subject to conditions, and consideration of the matters raised by objectors during the site view.

Consideration of objector on-site submissions

60 As noted above (at [12]), objector submissions were received during the on-site view and the matters identified as matters of concern to those objectors were also identified above (at [13]).

61 In response to matters raised by objectors the Court directed the Parties' expert town planners to prepare a supplementary joint report to respond to the matters raised in submissions.

62 More specifically, the expert town planners confirmed their agreement that the matters identified above at [13(1)] to [13(4)] are resolved through the Applicant's amended plans and agreed conditions of consent, consistent with the resolution of the principal

contentions in the appeal. This includes the objections concerning the potential impacts of the Proposed Development in relation to bulk and scale, height, visual impacts, overlooking and privacy impacts.

63

The expert town planners had noted that concerns in relation to potential flooding impacts had been resolved by the Parties expert stormwater engineers, Ms Tulk and Mr Broadbent, who had also confirmed that:

- (1) the Respondent's flooding contentions were resolved on the basis of the Applicant's amended plans and the Parties' agreed conditions, as detailed above (at [36]) and [37];
- (2) the Proposed Development was compliant with the provisions of cl 5.21 of PLEP in relation to flood planning (see above at [26(6)] and below at [77]).

64

The Respondent also confirmed in closing that:

- (1) the potential impacts of the Proposed Development on biodiversity had been assessed by the Respondent's biodiversity officers and:
 - (a) the Respondent was satisfied that the Proposed Development complied with the provisions of cl 7.6 of PLEP as confirmed in the Respondent's Assessment Report tendered as evidence at the hearing within the Respondent's Bundle (at folio 521); and
 - (b) no contention had been raised by the Respondent in relation to biodiversity matters;
- (2) the potential impacts of the Proposed Development in relation to tree loss had been assessed by the Respondent's landscape officer, as documented in the Respondent's Assessment Report tendered as evidence at the hearing within the Respondent's Bundle (at folio 517-521); and
 - (a) agreed condition 38(iv) requires that the Applicant's landscape plan be updated to include for the planting of five additional native canopy trees within the rear 8m of the Subject Site;
 - (b) the Respondent is satisfied that matters relating to landscaping are satisfactorily addressed through the Applicant's amended plans and agreed conditions to be imposed with any grant of consent;
- (3) the objectors' concerns in relation to access to and from the Subject Site by persons with disabilities had been resolved, noting that:
 - (a) the Respondent's traffic engineer had confirmed that the proposed footpath gradients as illustrated on the Applicant's amended plans were acceptable;
 - (b) the Parties' agreed condition 59 specifically address footpath access to and from the Subject Site on the north side of Loquat Valley Road, which are required to be constructed in accordance with s 138 of the *Roads Act 1993*; and
 - (c) the Parties' expert town planners had agreed within their supplementary joint report that:
 - (i) the required footpath extension along Pittwater Road to provide connectivity to bus routes is also required to be constructed under a separate development application DA2019/0154 which had been the subject of a grant of consent by the Respondent; and
 - (ii) the Court could be satisfied that the required access to bus stops on both the eastern and western sides of Pittwater Road is capable of being provided, subject to imposition of a condition of consent, and which the Parties have agreed as condition 73.
- (4) matters concerning carparking and traffic management had not been raised as a contention in the appeal; and
 - (a) the Respondent's Assessment Report, tendered as evidence at the hearing confirmed that:
 - (i) subject to conditions, the Proposed Development does not give rise to any traffic engineering issues;
 - (ii) the traffic generated by the Proposed Development will not give

- rise to any appreciable impacts on the function of the surrounding road network; and
 - (iii) the Applicant's proposed off-street parking arrangements exceed the provisions of SEPP HSPD and the design of the spaces complies with the design requirements, including width for car parking spaces within the Australian Standards AS 2890.1 in relation to "Parking facilities - Off-street car parking" and AS 2890.6 in relation to "Parking facilities – Part 6: Off-street car parking for people with disabilities";
 - (b) the Parties' expert town planners commented within their supplementary joint report responding to matters raised by objectors that:
 - (i) in relation to the matter of headlight glare from cars using the driveway to access the basement in the Proposed Development, any such vehicles would be heading down the driveway and any headlights will not be directed to residences on Jendi Avenue adjoining the rear of the Subject Site;
 - (c) the potential impacts of construction vehicles and traffic, including the potential use of a shared driveway at 7 Loquat Valley Road, were satisfactorily addressed by agreed conditions 22, 23, 48 and 49 which required the preparation and implementation of traffic management plans during the demolition and construction phases of the Proposed Development;
- (5) in relation to potential construction impacts on the valley at the rear of the Proposed Development:
 - (a) the Parties' expert planners had agreed that construction impacts external to the Applicant's proposed building footprint would be appropriately addressed through the imposition of agreed conditions 43, 44 and 45 which require the implementation of protection of trees, vegetation and stormwater quality during the construction phase of the development;
 - (b) the Parties have agreed the imposition of a condition 42:
 - (i) limiting, *inter alia*, the location stockpiles of materials and equipment on land identified as being within the 1% Annual Exceedance Probability (AEP) flood extent; and
 - (ii) requiring that any fencing, including temporary fencing, must be open so as to allow for the unimpeded movement of flood waters;
- (6) in relation to potential biodiversity impacts the Respondent's Assessment Report, tendered as evidence at the hearing states, and I am satisfied, that the Applicant's development application is consistent with the provisions of relevant environmental controls including those within:
 - (a) the *Biodiversity Conservation Act 2016*;
 - (b) the Biodiversity Conservation Regulation 2017;
 - (c) the provisions of cl 7.6 of PLEP in relation to biodiversity protection; and
 - (d) the provisions of PDCP cl B4.4 in relation to "flora and fauna habitat enhancement category 2 and wildlife corridor".

65 As a consequence of the above points (at [62] to [64]), I am satisfied that the matters raised by objectors during the site view have been considered and satisfactorily addressed through the Applicant's amended plans and through the imposition of the Parties' agreed conditions of consent, as required under the provisions of s 4.15(1)(d) of the EP&A Act.

Other jurisdictional matters

66 In closing, the Respondent confirmed, and I am satisfied, that there were no jurisdictional matters that would form a basis for refusal of the Proposed Development, including in relation to the following:

- 67 The provisions of SEPP HSPD apply to the Proposed Development pursuant to the savings provisions in subcl 2(1)(a) of Sch 7A of the SEPP Housing.
- 68 The Respondent's contention that the Proposed Development is not compliant with the height development standards in subcl 40(4)(a) and (b) of the SEPP HSPD is resolved as confirmed above (at [50]).
- 69 The Respondent's contention in relation to the bulk and scale of the building, including that the Proposed Development would not contribute to the quality and identity of the area, and did not adequately consider the visual and acoustic privacy of neighbours in the vicinity, such that it was not compliant with the cl 33(a) and 34 of the SEPP HSPD, is resolved subject to the imposition of conditions , as confirmed above (at [55]);
- 70 The Respondent also confirmed, and I am satisfied, that the remaining requirements of the SEPP HSPD are met by the Proposed Development as follows:
- (1) in relation to the provisions of cl 18 concerning restrictions on occupation of seniors housing allowed under Ch3, the Parties have agreed the imposition of a condition 86 which satisfy the requirements of subcl 18(2);
 - (2) in relation to the provisions of cl 26 concerning the location and access to facilities, the Applicant has provided a written access report, tendered as Exhibit F in the proceedings, confirming that residents of the Proposed Development will have access that complies with the provisions of subcl 26(2) to the facilities identified in subcl 26(1)(a) to (c) of SEPP HSPD, and as noted above (at [64(3)]) the Parties have agreed conditions in relation to the construction of required footpaths;
 - (3) in relation to the provisions of cl 28 concerning the provision of water and sewage services, the Respondent's written assessment report tendered as evidence at the hearing, confirmed, and I am satisfied, that the Proposed Development will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage;
 - (4) in relation to the provisions of subcl 29(2) concerning a requirement to consider certain site compatibility criteria for development applications to which cl 24 of SEPP HSPD does not apply, I am satisfied that the matters referred to in subcl 25(5)(b)(i), (ii) and (v) of SEPP HSPD have been considered, as confirmed within the Respondent's assessment report tendered as evidence at the hearing;
 - (5) in relation to the provisions of cl 30 which requires that a consent authority, or the Court on appeal, must not consent to a development application made pursuant to Ch 3 unless it is satisfied that the Applicant has taken into account a site analysis prepared by the Applicant in accordance with this clause, and:
 - (a) the Applicant has provided a site analysis within its statement of environmental effects prepared by Boston Blyth Fleming and dated September 2012, tendered as Exhibit B in the proceedings; and
 - (b) I am satisfied that the Applicant has taken account of this analysis in the preparation of its Proposed Development, in satisfaction of the provisions of cl 29;
 - (6) in relation to the provisions of cl 31 concerning the design of in-fill self-care housing and the requirement that consent authority must take into consideration (in addition to any other matters that are required to be, or may be, taken into consideration) the provisions of the Seniors Living Policy: Urban Design Guideline for Infill Development published by the Department of Infrastructure, Planning and Natural Resources in March 2004:
 - (a) the Respondent's assessment report tendered as evidence at the hearing included an assessment of the Proposed Development against the provisions of the Seniors Living Policy: Urban Design Guideline for Infill Development, which I have reviewed;
 - (b) the Respondent's assessment identified a number of matters in relation to the bulk and scale of the proposed Development that were the basis for the Respondent's contention concerning bulk and scale (see above at

- [32]), and which is now resolved; and
- (c) I am satisfied that the provisions of the Seniors Living Policy: Urban Design Guideline for Infill Development have been considered and the provisions of cl 31 of SEPP HSPD fulfilled;
- (7) in relation to the provisions of cl 32, that require that a consent authority, or the Court on appeal, must not consent to a development application made pursuant to Ch 3 of SEPP HSPD unless it is satisfied that the proposed development demonstrates that adequate regard has been given to the design principles set out in Div 2 of that Chapter, and:
- (a) the Respondent's assessment report tendered as evidence at the hearing, which I have reviewed, addresses the responsiveness of the Proposed Development to the design principles in cl 33 to 39 of SEPP HSPD, and confirms that:
- (i) the development responds acceptably in relation to cl 33 (other than in relation to subcl 33(a)), 35, 37, 38 and 39;
- (ii) the Proposed Development, as assessed did not comply with the provisions of subcl 33(a) in relation to neighbourhood amenity and streetscape and cl 34 in relation to visual and acoustic privacy, but these matters have now been resolved through the Applicant's amended plans, the agreements of the Parties' expert town planners and the imposition of agreed conditions of consent (see above at [53]); and
- (iii) the Proposed Development, as assessed did not comply with the provisions of cl 36 in relation to stormwater management, but these matters were subsequently resolved as a consequence of the Applicant's amended plans, the agreements of the Parties' expert stormwater engineers, and the imposition of agreed conditions of consent (see above at [37]);
- (b) on the basis of the above considerations (at [(a)]), I am satisfied that the Proposed Development demonstrates that adequate regard has been given to the principles set out in Div 2 of Ch 3 of SEPP HSPD;
- (8) in relation to the provisions of cl 40 of SEPP HSPD, I am satisfied that:
- (a) the Proposed Development complies with the provisions of this clause other than in relation to the height development standards in subcl 40(4) (a) and (b); but
- (b) these non-compliances have been resolved as a consequence of the Applicant's written requests under cl 4.6 of PLEP, which I am satisfied should be upheld, consistent with the agreements of the expert town planners (see above at [50]);
- (9) in relation to the provisions of cl 41 which requires that a consent authority, or the Court on appeal, must not consent to a development application made pursuant to Chapter 3 of SEPP HSPD to carry out development for the purpose of a hostel or self-contained dwelling unless the proposed development complies with the standards specified in Sch 3 of SEPP HSPD for such development, and:
- (a) the Respondent's assessment report, tendered as evidence at the hearing, relying on the Applicant's access report which formed Exhibit F in the proceedings, confirmed that the Applicant's Proposed Development complies with the standards in Sch3 of SEPP HSPD, subject to with the Parties' agreed conditions of consent; and
- (b) I am satisfied that the Proposed Development, as amended, complies with the provisions of cl 50 of SEPP HSPD;
- (10) in relation to the provisions of cl 50 which provides standards that cannot be used to refuse development consent for self-contained dwellings:
- (a) the Respondent's assessment report tendered as evidence at the hearing, which I have reviewed, addresses the responsiveness of the Proposed Development to the provisions of cl 50 and confirmed that the Proposed Development complies with the terms of cl 50 other than in

relation to the height provisions of subcl 50(a), but which have been resolved through my conclusions above (at [50]) in relation to the Applicant's written requests pursuant to cl 4.6 of the PLEP

71 On the basis of my conclusions above (at [70]), I am satisfied that the Proposed Development satisfies the relevant jurisdictional provisions of SEPP HSPD.

State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development

72 The Respondent's assessment report tendered as evidence at the hearing, which I have reviewed, considered the responsiveness of the Proposed Development to the provisions of SEPP 65, and concluded that it complies with those provisions other than in relation to Principles 1, 2 and 9 in Sch 1 of SEPP 65.

73 However, the Parties' expert town planners have reviewed the Applicant's amended plans and have confirmed their agreement that the development now complies with to Principles 1, 2 and 9 in Schedule 1 of SEPP 65, including through the Applicant's inclusion of a green roof to enhance future views across the Subject Site, and the Respondent has submitted, and I am satisfied, that its contentions in relation to this matter are resolved.

State Environmental Planning Policy – Building Sustainability Index (BASIX) 2004

74 The Applicant has provided a revised BASIX Certificate (No. 1234384M_03 and dated 3 April 2023) and I am satisfied that the certificate and accompanying documents satisfy the jurisdictional requirements of State Environmental Planning Policy – Building Sustainability Index (BASIX) 2004.

State Environmental Planning Policy (Resilience and Hazards) 2021

75 The Respondent's assessment report tendered as evidence at the hearing, which I have reviewed, considered the responsiveness of the Proposed Development to the provisions of cl 4.6 of the State Environmental Planning Policy (Resilience and Hazards) (SEPP R&H), and notes that:

- (1) the Subject Site has been used for residential purposes historically, and the Proposed Development proposes a continuation of that historic use;
- (2) the Subject Site has had no other uses prior to its use for residential purposes; and
- (3) the Subject Site is unlikely to pose any risk in relation to contaminated materials.

76 Based on the considerations above (at [75]) I am satisfied that the provisions of cl 4.6 of SEPP R&H are satisfied.

77 The following provisions of PLEP are of relevance to the Proposed Development:

- (1) subclause 5.21(2) (see above at [26(6)]) in relation to flood planning require that consent must not be granted to development on land within the flood planning area, unless satisfied that the development meets the requirements of subcl 5.21(a) to (e); and
 - (a) the Subject Site is located within a flood planning area, as defined under the provisions of cl 5.21;
 - (b) the Applicant has prepared a Flooding Report tendered at the hearing as Exhibit H, which the Parties expert stormwater engineers have agreed satisfies the requirements of cl 5.21; and
 - (c) I am satisfied that the Proposed Development and it's supporting documents, as amended, have satisfied the requirements of subcl 5.21(2) of PLEP.
- (2) as previously noted (see above at [64(6)(c)]), I am satisfied that the Proposed Development is compliant with the provisions of cl 7.6 of PLEP in relation to the maintenance of biodiversity.

Pittwater 21 Development Control Plan

78 The Parties have submitted, relying on the evidence and agreements of their expert town planners and stormwater engineers in their respective joint reports, and I am satisfied, that the Proposed Development, as amended, complies with the relevant controls in PDCP, or where it does not the Proposed Development represents a reasonable alternative such that it merits the application of flexibility as required under the provisions of subs 4.15(3A)(b) of the EP&A Act (see above at [18]), including in relation to the provisions of:

- (1) Part B3.11 in relation to flood prone land in relation to which the Parties have agreed the imposition of certain conditions with any grant of consent to ensure compliance with the flooding management requirements of PDCP and alignment with the recommendations in the Applicant's flood management report (conditions 39, 74 and 92);
- (2) Part C1 in relation to design criteria for residential development, particularly cl C1.3 in relation to view sharing, cl C1.5 in relation to visual privacy, and cl C1.21 in relation to seniors housing, noting that the resolution of contentions concerning height and the bulk and scale of the Proposed Development (see above at [50] and [55]) were central to achieving compliance;
- (3) Part D4 in relation to the locality specific controls for the Church Point and Bayview locality, particularly Parts D4.3 concerning building colours and materials and D4.5 concerning the front building line for developments, concerning which the resolution of the contention concerning building colours and materials (see above at [57]) was central to achieving compliance.

Conclusion

79 Based on my findings above at I conclude that:

- (1) the Parties' contentions in the appeal have been resolved, as confirmed above at [58]);
- (2) regard has been had to the objectives of the Subject Site's R2 zoning in determining the Applicant's development application, particularly in relation to:
 - (a) resolving the Respondent's contention concerning the height of the Proposed Development; and
 - (b) my conclusion that the Applicant's written requests under cl 4.6 of PLEP to vary the development standards in subcll 40(4)(a) and (b) of SEPP HSPD should be upheld, and which required consideration of the R2 zone objectives for development on the Subject Site;
- (3) the Applicant's development application can be approved having regard to the matters in subs 4.15(1)(b) – (e) of the EP&A Act (see above at [17]), including in relation to the submissions received in response to notification, which have been considered (see above at [65]) in my determination of the Applicant's development application; and
- (4) the jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 4.16 of the EP&A Act have been satisfied as confirmed above (at [66] to [78]);
- (5) approval of the Proposed Development, as amended, is in the public interest.

80 The Respondent also confirmed at the conclusion of the hearing that, noting the above points, including the consideration of the objector submissions and the agreements of the town planning experts to those submissions, it did not oppose the grant of consent to the Applicant's development application, as amended, subject to imposition of agreed conditions as filed by the Parties.

Orders

81 The orders of the Court are:

- (1) The Applicant's written requests prepared pursuant to cl 4.6 of the Pittwater Local Environmental Plan 2014 to vary the height of buildings development standards in subcll 40(4)(a) and (b) of State Environmental Planning Policy (Housing for Seniors and People with Disability) 2004 are upheld;
- (2) The appeal is upheld;
- (3) Development Application DA2021/1963 seeking approval for demolition of two existing dwellings and construction of five three-bedroom seniors living apartments over two semi- connected two storey pavilions, with associated driveway, parking and landscaping, is determined by way of the grant of consent, subject to the conditions provided at Annexure 'A';
- (4) The exhibits are returned, with the exception of Exhibits A and 1.

M Chilcott

Commissioner of the Court

171544.22 Annexure A (506638,.pdf)

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