



Land and Environment Court
New South Wales

Case Name: Symond Family Investments Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1789

Hearing Date(s): 18-20 September, 30 November, 13 December 2023

Date of Orders: 22 December 2023

Decision Date: 22 December 2023

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.
(2) The appeal is upheld.
(3) Development Application DA279/2022 for the substantial demolition of the existing structure and alterations and additions to an existing four storey commercial building at 356-366 New South Head Road is determined by the grant of consent, subject to conditions of consent at Annexure A.
(4) All Exhibits are returned, except for Exhibits A, L, M, N, P, Q, 3 and 9.

Catchwords: DEVELOPMENT APPLICATION – alterations and additions to existing commercial development in E1 Local Centre – whether consistent with the desired future character of the neighbourhood – height standard is exceeded – FSR standard is exceeded – conditions of consent are disputed

Legislation Cited: Civil Procedure Act 2005, s 56
Environmental Planning and Assessment Act 1979, ss

1.3, 4.15, 4.16, 8.7, 8.15
Environmental Planning and Assessment Regulation
2021, s 38
State Environmental Planning Policy (Resilience and
Hazards) 2021, s 4.6
Uniform Civil Procedure Rules 2005, Sch 7, rr 2.1, 29.5
Woollahra Local Environmental Plan 2014, cl 1.2, 4.3,
4.4, 4.4A, 4.6, 5.21, 6.1, 6.2

Cases Cited: Goodman Fielder Consumer Foods Pty Ltd
v Graincorp Foods Australia Pty Ltd [2020] NSWSC
706
Hutchinson 3G Australia Pty Limited v Waverley
Council (2002) 123 LGERA 75; [2002] NSWLEC 151
Initial Action v Woollahra Municipal Council [2019]
NSWLEC 1097
Penrith City Council v Dincel Construction System Pty
Limited (No 3) [2020] NSWLEC 117
Roche Group Pty Limited v Woollahra Municipal
Council [2022] NSWLEC 1199
Wehbe v Pittwater Council (2007) 156 LGERA 446;
[2007] NSWLEC 827
Woollahra Municipal Council v SJD DB2 Pty Limited
[2020] NSWLEC 115

Texts Cited: Australian Standard AS/NZ 4253:1994, November 1994
Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Symond Family Investments Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
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File Number(s): 2022/286950

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** The Applicant in these proceedings, Symond Family Investments Pty Ltd, seeks to redevelop a site fronting New South Head Road in Double Bay.
- 2 The proposal comprises the partial demolition of an existing building, currently known as ‘Piccadilly Court’, that accommodates retail and commercial uses, as well as alterations and additions to the internal layout, ground floor retail uses and office premises on the upper levels.
- 3 Most relevantly to these proceedings, the Applicant seeks to also construct two additional storeys that provide office space, an external terrace and internal amenities.
- 4 To this end, the Applicant lodged Development Application DA279/2022 (the DA) with Woollahra Municipal Council (the Respondent) on 6 July 2022.
- 5 The DA was publicly exhibited between 27 July – 11 August 2022, and was refused by the Woollahra Local Planning Panel on behalf of the Respondent on 15 September 2022.

Evolution of the appeal

- 6 On 26 September 2022, the Applicant filed an appeal in Class 1 of the Court’s jurisdiction under s 8.7 of *the Environmental Planning and Assessment Act 1979* (EPA Act).
- 7 The Applicant has amended the DA on two occasions prior to the hearing.
 - (1) On 25 October 2022, the Applicant amended the DA following leave to rely upon certain amended plans and other documents. The Amended DA was publicly notified between 27 October – 11 November 2022.
 - (2) On 4 July 2023, the Applicant was granted leave by the Court to further amend the DA, and those amendments were publicly notified to residents.
- 8 On 13 September 2023 the Applicant filed a Notice of Motion seeking to further amend the DA by relying on amended architectural plans, written requests in respect of variations to height and Floor Space Ratio (FSR) controls, and photomontages.

- 9 The Respondent approved the amendment, as the relevant consent authority, pursuant to s 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation), subject to short minutes of order to which the Applicant took no objection, granting leave to file a further amended Statement of Facts and Contentions, and directing further conferral between experts.
- 10 The Statement of Facts and Contentions was further amended (Exhibit 2), identifying the following contentions in dispute:
- (1) Building height
 - (2) Floor space ratio
 - (3) View loss and visual intrusion
 - (4) Desired future character
 - (5) Internal amenity
 - (6) Insufficient or inadequate information
- 11 The Applicant's amendments at [9] comprise:
- Amended architectural plans prepared by SJB Architects (Exhibit F)
 - Amended Clause 4.6 request in respect of height (Exhibit G)
 - Amended Clause 4.6 request in respect of FSR (Exhibit H)
 - Amended photomontages prepared by AE Partnership (Exhibit J)
- 12 On 18 September 2023, the parties jointly sought an adjournment of the proceedings to permit further amendments to be prepared by the Applicant.

The matter is re-opened

- 13 The Court reserved its decision on 20 September 2023 and directed parties to confer on without prejudice conditions of consent that were filed with the Court on 6 October 2023.
- 14 On 3 November 2023, and before the Court delivered judgment, the Applicant filed a Notice of Motion seeking leave to re-open its case to adduce evidence on the Draft Double Bay Planning and Urban Design Strategy (Draft Strategy) that was to be considered by the Council at a meeting set down for 27 November 2023.

- 15 The Notice of Motion was listed for hearing 30 November 2023, at which the Applicant read the Affidavits in the name of Mr Tarquin Nesbitt-Foster dated 3 November 2023, and 30 November 2023.
- 16 The Applicant submits that the interests of justice are served by allowing the application to re-open the case as fresh evidence is now available by virtue of the direction given by Councillors to progress the Draft Strategy.
- 17 Furthermore, as the Draft Strategy directly addresses the desired future character of the Double Bay area, granting the Applicant leave to re-open the case has probative value in respect of three contentions pressed by the Respondent.
- 18 As such, the grounds advanced by the Applicant in support of its application are consistent with those set out in *Goodman Fielder Consumer Foods Pty Ltd v Graincorp Foods Australia Pty Ltd* [2020] NSWSC 706.
- 19 Additionally, as shown by Robson J in *Penrith City Council v Dincel Construction System Pty Limited (No 3)* [2020] NSWLEC 117, the Court's power to make directions and orders in relation to the conduct of proceedings, as provided by rr 2.1 and 29.5 of the Uniform Civil Procedure Rules 2005, is subject to the overriding purpose of the Civil Procedure Act 2005 to facilitate the just, quick and cheap resolution of the real issues in the proceedings: s 56.
- 20 The Respondent does not oppose the Notice of Motion, but notes as there are no minutes available of the meeting of Council held 27 November 2023, the nature of consideration given to the Draft Strategy is uncertain, and submits the Annexures supporting the Affidavit of 30 November show no more than 'a plan to develop a plan', with conditional endorsement of the Draft Strategy, subject to a planning proposal and advice of the relevant Local Planning Panel.
- 21 I accept the Applicant's submission that the further consideration of the Draft Strategy by the Council constitutes fresh evidence on an issue that is the subject of contentions, and is cited in evidence tendered during the hearing in Exhibits A, M and N. Accordingly, I granted the Applicant leave to re-open the matter and rely upon the following documents:

- (1) Agenda – Item R1: Post-exhibition Report on ‘Draft Double Bay Centre Planning and Urban Design Strategy’,
- (2) Attachment 1 – Item R1 (including the ‘Double Bay Planning and Urban Design Strategy’ dated October 2023),
- (3) Any minutes of the meeting of the Respondent’s ‘Strategic and Corporate Committee’ on 30 October 2023, and
- (4) The minutes of the meeting of Councillors (if any) that endorses (conditionally or unconditionally) the ‘Double Bay Planning and Urban Design Strategy’ dated October 2023.

22 I also granted the Respondent leave to put on an Affidavit that was filed 6 December 2023 (December Affidavit) setting out the process required of Council following endorsement of the Draft Strategy, prior to its adoption, should that occur sometime in the future.

23 The December Affidavit was accompanied by unconfirmed minutes of the Council meeting at which the Draft Strategy was endorsed, that relevantly record the following:

“THAT Council:

- A. Receives and notes the submissions received in response to the draft Cross Street Precinct Planning and Urban Design Strategy, and the submissions received in response to the Draft Double Bay Centre Planning and Urban Design Strategy.
- B. Receive and note the post-exhibition report on the Draft Double Bay Centre Planning and Urban Design Strategy and supporting documents.
- C. Endorse the updated Double Bay Centre Planning and Urban Design Strategy as provided at Attachment 1 of the report the Strategic and Corporate Committee meeting of 30 October 2023 and requests staff to prepare a planning proposal to a future meeting of the Woollahra Local Planning Panel for advice subject to the following changes:
 - i. Increase the proposed height to the review sites on the north side of Knox Street to five storeys, being 18.4m whilst facilitating a 9m setback from Knox Street above the street wall and retaining the 3.5m setback above the street wall to Knox Lane with a corresponding FSR of 3.2:1.
 - ii. Reduce the proposed heights to the review sites on both sides of New South Head Road and Patterson Street to accommodate a five storeys mixed use, shop-top housing, residential and/or commercial development, being 19m with a 3.5m setback from New South Head Road above the street wall and a corresponding FSR of 3.5:1.
 - iii. Remove any reference to the timed right hand turn restrictions into Kiaora Road”

24 The matter was then listed for short oral submissions on 13 December 2023.

- 25 The Respondent submits that the status of the Draft Strategy, notwithstanding the endorsement at [23], remains unchanged from that at the time of the decision in *Roche Group Pty Limited v Woollahra Municipal Council* [2022] NSWLEC 1199 in which the Court found, at [92], that it would be premature to accord weight to the Draft Strategy prior to further consideration by the Respondent.
- 26 Furthermore, the endorsement at [23] imposes the requirement for advice of the Woollahra Local Planning Panel as an additional step prior to any adoption of any planning proposal. As such the Draft Strategy cannot be said to be either imminent or certain.
- 27 The Applicant considers the endorsement to be a clear statement as to the desired future character of the site itself and sites in the vicinity identified as 'Review Sites' on the harbourside of New South Head Road. The site is not excluded from the Draft Strategy, as other sites are recorded to have been (Exhibit P, Tab 2, folio 22).
- 28 The endorsement engages directly with the desired height, floor space ratio and setback controls considered appropriate for the 'review sites' fronting New South Head Road.
- 29 When the relevant controls proposed in the Draft Strategy are considered, the development the subject of the development application complies with the proposed FSR of 3.5:1, and exceeds the proposed height of 19m by only 175mm at the uppermost parapet, albeit more so when the mechanical plant is considered.

Expert evidence

- 30 Given the nature of the contentions in this matter, experts in town planning and urban design were identified by parties to confer in the preparation of a joint expert report (Exhibit 7).
- 31 The experts on behalf of the Applicant are:
- Mr George Karavanas, town planning
 - Mr Rohan Dickson, urban design
- 32 The experts on behalf of the Respondent are:

- Ms Charmaine Tai, town planning
- Ms Dianna Griffiths, urban design

- 33 It is relevant to record here that the Respondent objected to the tender of an Annexure to the joint expert report at Exhibit 7, and all references to it in evidence, on the basis that the Annexure contained letters that were relied on as expert opinions in economic feasibility for which leave was not sought, nor granted.
- 34 The letters were authored by individuals whose curriculum vitae were not available to the Court, were not available for examination, were not, in at least two instances, independent of the Applicant, provided no supporting reasons and, in all cases, were absent undertakings of the sort required of experts, such as acknowledgement of the Expert Witness Code of Conduct at Sch 7 of the Uniform Civil Procedure Rules 2005.
- 35 However, the Court accepted the Applicant's submission that the letters did not arise from a contention for which expert opinion was required to be adduced, but in support of an environmental planning ground advanced in the written requests and debated in the joint expert report. As such, the opinions expressed are not purported to be those of experts, but of professionals with experience in the design, planning and development of developments like that proposed. The annexures, and references to them, were admitted subject to weight.
- 36 With the contentions so distilled at [10], the experts were directed to confer in order to provide a supplementary joint report prior to the Court resuming on the second day of the hearing.
- 37 The experts filed a supplementary joint report on 18 September 2023 (Exhibit 8), with further amended plans annexed. The parties sought a further adjournment to permit the Applicant to integrate those amendments into the full suite of architectural plans, and written requests in respect of height and FSR.
- 38 At the commencement of the hearing on the final day, the Applicant filed a Notice of Motion comprising:
- (1) Amended architectural plans, later Exhibit L

- (2) Clause 4.6 in respect of height, later marked Exhibit M
 - (3) Clause 4.6 in respect of FSR, later marked Exhibit N
- 39 In similar terms to [9], the Respondent approved the amendment, as the relevant consent authority, pursuant to s 38 of the EPA Regulation, subject to the Applicant paying the Respondent for costs thrown away pursuant to s 8.15(3) of the EPA Act.

The site and its context

- 40 The site, known as 356-366 New South Head Road, is located on the harbour side of New South Head Road, within the Double Bay Commercial Centre.
- 41 The site has a primary frontage to New South Head Road of 17.64m, and a depth of around 34.42m, with a total area of 461.8m².
- 42 The site extends to the rear to also address Goldman Lane and Short Street, and the site provides pedestrian access between the front and rear of the site through an arcade.
- 43 As the proposal is for alterations and additions to an existing building, it is relevant to describe the existing building. The existing building presents a two-storey façade to New South Head Road, above which it inclines away from New South Head Road on two further levels. A three-storey street wall presents to Goldman Lane.
- 44 At the rear of the site, the building addresses the intersection between Goldman Lane and Short Street. The junction between Goldman Lane and Short Street forms a kind of T-intersection, in which Short Street appears to bend in continuation but in reality, becomes Goldman Lane. The alignment is depicted in the aerial photograph, Figure 1, re-produced from the Amended Statement of Facts and contentions authored by the Respondent (Exhibit 2) as follows:



- 45 The site is located within a zone formerly identified in the Woollahra Local Environmental Plan 2014 (WLEP) as B2 Local Centre zone that has subsequently been rezoned E1 Local Centre zone.
- 46 The objectives for development in the E1 zone are as follows:
 - To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.
 - To encourage investment in local commercial development that generates employment opportunities and economic growth.
 - To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.
 - To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
 - To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
 - To ensure development is of a height and scale that achieves the desired future character of the local centre.
 - To encourage development that is compatible with the local centre's position in the centres hierarchy.
 - To ensure development provides diverse and active ground floor uses to contribute to vibrant and functional streets and public spaces.
 - To maximise public transport patronage and encourage walking and cycling.
 - To encourage the retention and planting of trees and other vegetation as part of development to minimise the urban heat island effect and to improve microclimates.
- 47 Commercial premises are permitted with consent in the E1 zone, which encompasses office and retail premises.

- 48 As the site is located within the Double Bay Commercial Centre, it is relevant to record here the provisions of Chapter D5 of the Woollahra Development Control Plan 2015 (WDCP) that deals with the Double Bay Centre. The objectives of the Chapter are as follows:

“O1 To retain and enhance through block connections which allow pedestrians to move freely within the Double Bay Centre.

O2 To develop the particular qualities of different parts of the Double Bay Centre.

O3 To encourage a diverse mix of uses in the Double Bay Centre and maintain retail uses at ground level.

O4 To conserve and enhance the visual and environmental amenity of all buildings and places of heritage significance in the Double Bay Centre.

O5 To enhance the way development contributes to a sense of place.

O6 To ensure a high standard of architectural and landscape design in any new developments within the Double Bay Centre.

O7 To preserve and enhance the diversity of uses in the Double Bay Centre.

O8 To ensure that new development is compatible with the existing built form, and streetscape and village character.

O9 To encourage view sharing and individual privacy.

O10 To ensure new development is designed to be compatible with the heritage significance of listed heritage items.”

- 49 Section D5.1.2 describes the siting of Double Bay in the following terms:

“The Double Bay Centre is located in Sydney’s Eastern Suburbs, in a large natural amphitheatre close to, but visually separated from the harbour foreshore. It sits at the base of a valley, cradled between the two ridges of Darling Point/Edgecliff and Bellevue Hill.

The principal entry into Double Bay is New South Head Road which traverses the centre. Other street connections include Ocean Avenue, Bellevue, Kiaora and Manning Roads and Greenoaks Avenue. New South Head Road is characterised by its unique street geometry, views to extensive landscape elements beyond, and a sense of spatial containment from the street edge building and surrounding landscape.”

The onsite view

- 50 In accordance with its usual practice, the proceedings commenced with an onsite view during which the Court, in the company of the legal representatives and experts, heard two oral submissions that objected to the proposal.
- 51 The objections were heard inside units 5H and 6G within the apartment building at 2-22 Knox Street, known as ‘Stamford Cosmopolitan Apartments’ (Cosmopolitan Apartments). Both units face broadly east and south, being

located on the opposite side of the Short Street/Short Street intersection described at [44].

- 52 The units enjoy district views that span from the east to the south-west that include views of Double Bay, Bellevue Hill and Woollahra. It is commonly held that these views will be affected by the proposal.
- 53 By consent of the parties, the objectors were also provided a summary of changes proposed in architectural plans and montages contained in the Notice of Motion at [8].
- 54 Common themes found in the public submissions, include:
- (1) The proposal exceeds the height permitted for development on the site.
 - (2) The height and bulk of the proposal adversely impacts views that are currently enjoyed from properties in the immediate area.
 - (3) The proposal may generate noise.
 - (4) The potential for overlooking may result in a loss of privacy.

The height standard is exceeded

- 55 The proposed development exceeds the height of building standard of 14.7m, applicable to the site by virtue of the relevant map at cl 4.3(2) of the WLEP. The Applicant relies on a written request prepared by GSA Planning dated 19 September 2023 (Height Request) (Exhibit M) that describes that the height of the proposal “ranges from 12.865m at the Level 2 parapet to New South Head Road, to a maximum of 19.175m at the roof parapet and 20.075m to the top of the mechanical plant equipment at roof level, which is 30.44% – 36.56% above the development standard”.
- 56 In general terms, the Height Request states the proposal presents a three-storey street wall to New South Head Road and a two-storey street wall to Short Street, with levels recessed above. The additional height comprises a portion of Level 3 and the entirety of Level 4 of the proposal that is, in part, contributed to by an existing through-site link in the form of a double height void.
- 57 The height request relies on the first test as it is expressed in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (*Wehbe*), in

asserting compliance with the height standard is unreasonable and unnecessary as the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

- 58 The objectives of the height standard at cl 4.3 of the WLEP are as follows:
- (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.
- 59 In respect of objective (a) of the height standard, the Height Request asserts that the proposal's height is consistent with the built form in the Double Bay Centre area as understood in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (SJD DB2) wherein the desired future character of the neighbourhood or area can be shaped by not only the provisions of the WLEP, but other factors such as approved development that contravenes development standards.
- 60 The Height Request advances two approaches to understand the extent of the term 'neighbourhood' used in the objective. Firstly, where the neighbourhood is defined by the extent of the E1 Local Centre zone, or secondly, by a more localised area based on the precincts identified in the WDCP.
- 61 Adopting the first approach, the Height Request notes height controls vary across the E1 zone from 14.7m to 23.5m, as does development in the zone for which consent has been granted, with a high number of approvals tabulated in Table 1 of the Height Request that exceed the height controls by a factor of up to 50% over the same control of 14.7m that applies to this site.
- 62 Adopting the second approach, the relevant precincts are identified by Chapter D5 of the WDCP as the New South Head Road, Goldman Lane and Short Street precincts in which development on a number of sites either contravene

the height standard or are, in effect, anomalous and are within the visual catchment of the site. These sites are identified as:

- 357-359 New South Head Road
- 377 New South Head Road
- 294-298 New South Head Road & 2-10 Bay Street (in respect of which two development applications are relevant)
- 374-382 New South Head Road that cannot be said to exceed a height standard as the site was subject to a site-specific planning proposal. That said, the development presents a six-storey street wall to all three street frontages

- 63 I note here that while the Height Request also states, at p 12, that the Cosmopolitan Apartments appears to comply with the height standard of 18.1m applicable to that site, consistent with Annexure L of the JER, prepared by Ms Tai, the building appears to exceed that height with the parapet marked at a level of 23.22m, above which a lift overrun continues to RL 24.94 (Exhibit 5, Tab 1). This appears to equate to a height of 21.78m.
- 64 The approval of those developments cited above demonstrate an emerging built form character of 5-6 storeys along New South Head Road that is evolving over time in a manner consistent with SJD DB2, at [53]-[54].
- 65 In respect of objective (b) of the height standard, the site is centrally located in the E1 Local Centre zone and is not close to another zone that would require a transition in scale. That said, local amenity within the E1 zone is protected by the setting back of the upper three levels, and absence of openings to adjoining properties to the north and south.
- 66 In respect of objective (c) of the height standard, shadow diagrams and view from the sun diagrams prepared at hourly intervals, and a 3D Neighbourhood Solar Study demonstrate no unacceptable impacts on solar access to surrounding development or the public domain. While there is no loss of solar access shown to public open space, a minor reduction in solar access is expected to upper level windows of commercial development at 401-407 New South Head Road at around 2.30-3pm on 21 June when compared to development that complies with the height standard.

- 67 The reduction, described as negligible, is also shown at the head height of a pedestrian, and to shopfronts along the footpath on the opposite side of New South Head Road, when compared to a compliant envelope.
- 68 To the extent there is a reduction in solar access, the Height Request asserts the impact has been minimised by the setting back of the upper two levels of the proposal.
- 69 In respect of objective (d) of the height standard, the Height Request identifies existing built form in the Double Bay Centre to have already obstructed views from the opposite side of New South Head Road to Sydney Harbour, and so the primary views disrupted by the proposal are those views from the Cosmopolitan Apartments described at [52] that do not fall within the description of iconic views, but are rather an outlook to vegetation and sky.
- 70 Units 5H, 6G and 7F will maintain views to sky and while some views to Double Bay and Bondi Junction are obstructed, the impact is minimised by the recessed massing of the upper levels of the proposal.
- 71 Likewise, the Height Request asserts that any loss of privacy to units in the Cosmopolitan Apartments is minimised by orienting windows and terraces to New South Head Road and Goldman Lane, where a planter bed and plantings serve to filter sightlines, and where a separation distance of at least 18.5m is further moderated by vertical blades to the glazing at Level 4. Finally, as the proposal is for commercial purposes, use of the upper levels of the development is likely to be limited to 8am-6pm, Monday to Saturday.
- 72 Overshadowing impacts are said to be minimised in the manner described at [66]-[68].
- 73 Visual Intrusion, defined in terms similar to those in SJD DB2, is the final element in objective (d) that is to be minimised. The Height Request asserts that the proposal, by virtue of the stepped setback and high quality architectural design, does not constitute a visual intrusion or, at worst, is one that has been minimised. Units in the Cosmopolitan Apartments also enjoy expansive views to the north from living areas and terraces that are wholly unaffected by the proposal.

- 74 The experts agree there is a reduction in view loss as a result of the amended plans at Exhibit L when the deletion of the raked roof form is considered. The extent of change is best understood by reference to a marked section (Exhibit O) prepared by the Applicant's architect, Mr Adam Haddow, and a hand-marked perspective that was agreed between the experts.
- 75 I note here that the experts agree the view loss from Unit 5G is negligible, and is minor from Units 6G and 7F (Exhibit 8, pars 18-19).
- 76 That said, the Respondent submits that a reduction in view loss and visual impact does not necessarily equate to a minimisation of view loss as minimisation may be thought of as achieving something down to 'an acceptable level', that is not the case here.
- 77 In respect of objective (e) of the height standard, no public views are identified that are either protected or placed at risk by the proposal.
- 78 The Height Request also advances five grounds it relies on as environment planning grounds said to be sufficient to justify the contravention of the height standard, pursuant to cl 4.6(3)(b) of the WLEP summarised as follows:
- (1) Firstly, there are social benefits in providing additional commercial space within the Double Bay Commercial Centre that achieve certain objects of the EPA Act including the promotion of social and economic welfare of the community (s 1.3(a)), and the orderly and economic use and development of land (s 1.3(c)), as well as achieving the management, development, conservation and economic use of property that is an aim of cl 1.2 of the WLEP.
 - (2) Secondly, the proposal is for the refurbishment of an existing building that is only economically feasible by means of the addition of floor space that allows an upgrade to a contemporary level of functionality. This ground is supported by those letters at [35]. In essence, those letters, and the ground advanced in the Height Request, assert the existing building has passed its useful life and argue that only full redevelopment of the site provides a market return to warrant capital expenditure.
 - (3) Thirdly, the proposal is consistent with the desired future character of the area for reasons similar to those summarised at [59]-[64], and as understood in *Initial Action v Woollahra Municipal Council* [2019] NSWLEC 1097 in which achieving a consistent scale with neighbouring development was held, at [42], to be properly described as an environmental planning ground. The Draft Strategy has also identified

the site to have potential for a maximum of six storeys, while five are proposed.

- (4) Fourthly, the existing ground floor arcade provides a public benefit as it is a means of public access between New South Head Road and Short Street, attracting pedestrian activity in the commercial centre. However, its double height volume also contributes to the exceedance of the height standard.
- (5) Fifthly, the decision to reuse the existing floor slabs on Levels 1, 2 and 3 minimises the exceedance that would otherwise be the case, and is less than the floor to floor height required by the WDCP for commercial floor space.

Expert evidence in respect of the Height Request

- 79 The Respondent submits, firstly, that as objective (a) of the height standard does not identify the Double Bay Centre as the neighbourhood in question, a different definition must apply to 'neighbourhood' than that of the E1 zone. Secondly, such a proposition is lent further weight by the express reference in the zone objectives to the 'local centre', as distinct from the reference to 'neighbourhood' found in objective (a) of the height standard.
- 80 In the first instance, Mr Dickson and Mr Karavanas share the opinion that the term 'neighbourhood' refers to the E1 Local Centre. However, they also entertain the alternative which is that the neighbourhood may be defined by reference to the precinct areas identified in Chapter D5 of the WDCP, as it is in the Height Request, summarised at [60].
- 81 The relevant Precincts are depicted in diagram form in Figure 5 of the Height Request.
- 82 In support of his primary position, Mr Karavanas maintains that if the precincts are considered distinct in character, then 'neighbourhood' cannot be derived by somehow combining the 3 precincts shown in Figure 5, precisely because of the distinction between them, and which is an area that is different again from the area identified within the Visual Catchment Plan, prepared on behalf of the Respondent (Exhibit 7, Annexure K).
- 83 It is for this reason that Mr Karavanas considers the Visual Catchment plan flawed. For example, it fails to acknowledge that a person standing at the intersection of Goldman Lane and Gum Tree Lane would see the rear of the

site and the rear of Bay street properties simultaneously. However, Bay Street properties are not captured by the Visual Catchment plan.

84 The Visual Catchment Plan cited at [82] is re-produced below:



85 Ms Tai considers regard must be had to the E1 zone and the Precincts as both apply, and are not inconsistent.

86 Next, the experts considered the extent of approvals that contribute to the evolving character over time as understood in SJD DB2, and cited in the Height Request. In essence, there is agreement that the approvals contributing to the desired future character of an area are not only those that depart from the controls, but include approvals that also comply with the controls.

87 In essence, the disagreement between the experts lies in the degree to which developments tabulated in the Height Request on corner lots, and for which consent has been granted, contribute to the desired future character of the area.

88 According to Ms Tai, corner lots are distinct as they are subject to particular provisions that permit additional floor space in order to encourage the development of prominent corner sites in Double Bay, whereas Mr Karanvanas

considers it relevant to an assessment of character that the consents granted on those corner sites all breach the height standard applicable to those sites.

89 Mr Dickson's evidence is that it is possible to satisfy the character statements found in the WDCP for each of the precincts, as he has shown on pp 11-12 of Exhibit 7.

90 It is now helpful to set out the relevant provisions of the WDCP addressed in the Height Request and considered by the experts.

Desired future character of the neighbourhood is defined

91 Section D5.3.2 of the WDCP sets out key strategies for the Double Bay Centre. Of particular relevance to the proposal, according to the Respondent, is a strategy to improve Double Bay's built form to provide appropriate definition to the public domain by the following:

“...

b) Promote high quality architectural design throughout the centre that positively contributes to the streetscape.

c) Ensure that new development is compatible with the existing built, streetscape and village character (Exhibit 4, folio 145-146)

...”

92 Chapter D5.4 deals with Street Character, and Section D5.4.3 applies its focus to New South Head Road in the following terms:

“Existing character

New South Head Road is a historically significant road connecting the city to South Head. The road traverses the Double Bay Centre where it has a strong curved form punctuated with vistas of green at either end. The quality and scale of existing buildings do not yet realise the potential of the space.

Desired future character

a) Accentuate the curved street geometry of New South Head Road with four and five storey buildings.

b) Retain green vistas at each end of New South Head Road.”

93 The annotated street section for New South Head Road contains guidance as to desired future character in the following terms:

“Setback development of the upper-most floor level from the street boundary

Build to the street alignment with masonry walls, articulated with deep window reveals or punched openings

Integrate sound attenuation devices into the design of the built street edge with enclosable balconies, articulated window sills, string courses, double glazing and the like.

Parapets encouraged

Use the ground floor level articulation zone to encourage transition from the street to the shop – this space could also be used for outdoor dining or shop display

Provide continuous awning”

- 94 As the site is also within an area defined as ‘The Lanes’, the provisions at Section D5.4.8 of the WDCP are also relevant, and provide:

“Existing character

Most of the lanes are currently the “back” of lots. These are characterised by their lack of pedestrian amenity and extensive vehicle crossovers, and tend to be visually blighted by service areas and unscreened rubbish areas.

Desired future character

- a) Facilitate the service role of lanes, while encouraging increased active retail frontage.
- b) Improve pedestrian amenity by providing adequate footpaths, limiting the width and numbers of vehicle crossovers, setting buildings back on one side and preserving natural daylight to the lanes.
- c) Enhance the spatial definition of lanes with ground and first floor building lines and buildings up to two storeys in height.”

- 95 Likewise, while it is disputed as to whether the site is a part of Short Street, the provisions relevant to Short Street are as follows:

“Existing character

The building on the northern side of Short Street, and its extensive vehicle crossovers, establishes an overbearing scale and unmodulated façade which dominates the spatial quality of Short Street.

Desired future character

- a) Increase active retail frontage.
- b) Moderate the scale of built form along the north side of the lane with buildings of predominantly two storeys, set back 2m from the lane boundary, and interspersed with four storey development.
- c) Apply a 3m setback on No.2 Short Street at the Short Street frontage.
- d) Protect the amenity of the lane by preventing uninterrupted four storey buildings constructed to the street boundary along the northern built edge.
- e) Widen footpath to southern side of Short Street.”

- 96 The annotated street section for Short Street contains guidance as to desired future character in the following terms:

“The building line is setback to expand the public domain at street level and improve pedestrian amenity

Each development site may be permitted to build to 4 storeys on 50% of Short Street frontage if it is interspersed with 2 storey development.

Increase active retail frontage”

- 97 Finally, as the development addresses Goldman Lane, the provisions of Section D5.4.12 apply in the following terms:

“Existing character

The character of Goldman Lane is quite intimate with restaurant entrances on both sides of the lane and through-site links connecting to New South Head Road. Its spatial quality could be improved by strengthening the built form along each side.

Desired future character

- a) Increase the spatial definition of the lane and street surveillance with an articulated building addressing the lane from the central triangular site.
- b) Retain and extend the 2m set back on the south-eastern side of Goldman Lane.
- c) Apply a 1m setback on the north-western side of Goldman Lane.”

- 98 The annotated street section for Goldman Lane contains guidance as to desired future character in the following terms:

“The building line is setback to expand the public domain at street level and improve pedestrian amenity

The use of roof terraces as open space is encouraged

Increase active retail frontage”

- 99 Chapter D5.5 of the WDCP contains what are termed control drawings that show, according to Section 5.5.1, building envelopes for every site in the Double Bay Centre which generally establish:

- four storey heights along streets;
- two storey heights along lanes; and
- lesser building depths above the first floor to achieve high amenity development flexible for residential or commercial uses.”

- 100 The control drawing most relevant to the site, showing levels 3 and above at Section 5.5.4, is re-produced below:



101 Section 5.6.3 reinforces the role played by control drawings in the desired urban character of Double Bay, relevantly as follows:

“Objectives

O1 Development should contribute to the desired future character of streetscapes with appropriate and consistent building forms.

...

Controls

C1 Development must occur within the building envelopes shown on the Built Form Envelopes: Control Drawings, Section 5.5.5—5.5.11.

C2 To create built form which is not reliant on artificial heating and cooling:

...

b) level 3-5 building depth is limited to 15.6m including the articulation zones. When this is difficult to achieve in the residential component of a development, Council will consider variations to the overall building depth providing a minimum 80% of dwellings have windows that can be opened and/or doors in walls with differing orientations, to facilitate cross ventilation.

...”

The Height Request adequately addresses the matters required to be demonstrated by cl 4.6(3)

102 I have considered whether the Height Request demonstrates that compliance with the height standard is unreasonable or unnecessary in accordance with cl 4.3(3)(a) of the WLEP. In doing so, I accept Ms Tai’s observation that the controls in the WLEP for height are not inconsistent with the guidance to be

drawn from Section D5.4 of the WDCP as to the desired future character of the streets and laneways in the immediate vicinity of the site.

- 103 The Height Request deals with the desired character as it is stated in Section D5.4 of the WDCP, and relies on the development consent granted for those sites at [62], all of which are within the New South Head Road character area, and within the visual catchment. Additionally, the development on the corner site to the north of the subject site, at 374-382 New South Head Road, is also identified in the Height Request as relevant, noting that it results from a site-specific planning proposal that nevertheless contributes to the desired future character.
- 104 I acknowledge the detailed consideration given by Ms Tai to the ten developments summarised by her under par 11 of the supplementary joint expert report (Exhibit 8). Of the ten developments Ms Tai identifies within the Double Bay area, four comply with the relevant height standard. Six contravene the height standard and eight contravene the height or FSR standard. However, not all of these sites are proximate to the subject site, and are located in different precincts and street contexts.
- 105 However, those sites at [62] are within the relevant precincts, as is the Cosmopolitan Apartments that also exceeds the height standard applicable to its site. As such, all depart from the controls applicable under the WLEP and help to shape the desired future character of the neighbourhood.
- 106 While the development at 374-382 New South Head Road complies with the terms of a planning proposal approved for the site, the consequential impact of the additional height is not insignificant when reference is had to the relevant control drawings at section 5.5.4 of the WDCP. The control drawing, reproduced at [100], depicts a consistency in the number of storeys for development on sites fronting New South Head Road and the site at 372-383 New South Head Road. A consistent height of four storeys is shown. This proposal does not seek to achieve that consistency, but one level lower than the height permitted at 374-382 New South Head Road as a result of the planning proposal, as I will shortly explain.

107 I am satisfied the Height Request adequately addresses that the height proposed on the subject site is consistent with the desired future character of the neighbourhood. The emerging character is one that exceeds the controls for height and FSR within the New South Head Road and Short Street character areas, and the proposal conforms to, or does not offend, any of the aspects of the four character area statements that apply to the site. In particular:

- (1) The proposed development accentuates the curved street geometry to New South Head Road with a four and five storey building. In my view, this achieves the intent of the character statement, and does so more effectively than the existing inclined façade that recedes from the street alignment above Level 1 of the existing building.
- (2) The predominant height of RL 23.72 at the parapet of Level 4 of the proposal retains a similar, but lower relationship to the site to the north of the site at 374-382 New South Head Road which has maximum height of RL 26.8. This would appear to mediate between the desired envelopes contained in the control drawings, and the desire at cl 4.4A of the WLEP for corner development to remain prominent.
- (3) The proposal presents a two-storey street frontage to Goldman Lane, that is depicted in the typical section diagram (folio 160), above which roof terraces are proposed. I note Ms Griffiths is comfortable with how the proposal presents to Goldman Lane and considers the lower four levels well designed given the complex geometry at the rear of the site.

108 I also accept the Height Request has demonstrated compliance with objective (c) by demonstrating the loss of solar access to adjoining buildings has been so minimised that a loss, that I regard to be negligible, is limited to a period of around 30 minutes to a portion of the upper level of a commercial building at 401-407 New South Head Road.

109 Likewise, I accept the agreement of the experts that the view loss from Unit 5H is negligible, and is minor from Units 6G and 7F. Furthermore, whether or not what is seen from those apartments may be described as a view or an outlook, I accept the proposal has taken steps to minimise the impact of the development on the Cosmopolitan apartments in terms of view loss and visual disruption, in accordance with objective (d) of the height standard. These steps include the setback of upper floors from the rear of the site, where the view is more vulnerable to an impact. At Level 3, the setback from the rear boundary in Goldman Lane is 9,305mm. At Level 4, the setback is 10,980mm. The

photomontages from Vantage Point 1 and 5 that have been hand-marked by agreement between the experts satisfies me that generous areas of sky, vegetation and urban development remains a characteristic of the views enjoyed from these apartments that, it must be said, are located centrally within the Double Bay Commercial Centre. When the entirety of the views enjoyed from Apartments 6G and 7F are considered, I note the views and solar access available to those apartments from their northern terraces may be regarded as the primary or preferred locations, directly accessible from living, dining and kitchen areas, over those southern views that are enjoyed from bedrooms.

- 110 The Height Request states windows at level 4 of the proposal are a minimum of 18.5m from units in the Cosmopolitan Apartments, with vertical blades at regular intervals, shown on the architectural plans at 600mm deep, that I accept serve to minimise a lateral sightline between properties.
- 111 I also accept the position advanced in the Height Request as to the steps taken to minimise the visual disruption of the proposal when viewed from the Cosmopolitan Apartments. The upper levels are substantially setback from Goldman Lane, and Units 5H, 6G and 7F enjoy district views accessed from numerous vantage points in a multitude of directions, taking in a wide range of different aspects that will not be overwhelmed by the limited form of the uppermost level, that is also softened by landscape planting and a highly modulated built form.
- 112 For the reasons set out above, I am satisfied the proposal demonstrates compliance with the height standard is unreasonable or unnecessary because the proposal is consistent with the objectives of the height standard, notwithstanding the non-compliance.
- 113 I am also satisfied that the height request demonstrates that there are sufficient environmental planning grounds to justify the contravention for the reasons as follows:
- 114 Firstly, I accept there are three environmental planning grounds that derive from the alteration and addition of an existing building.
- (1) The first of these grounds is founded on the retention of the existing ground floor arcade that establishes a floor-to-floor height of 5730mm

between ground floor and level 1. This height is greater than the floor-to-floor height in Control C4 of Section 5.6.3.2 of the WDCP for retail use, and is for a purpose that serves a public benefit by virtue of the through-site link, identified in the relevant character area statement as an aspect of existing character in Goldman Lane. The generous height of the ground floor arcade unquestionably contributes to the overall height of the proposal. Furthermore, while it is referred to as a 'double height volume', it is not. Rather, when the note at section 5.6.3.2, Control 4, is read, it is more accurately the height of one-and-a-half levels. As such it is not of a height into which a level can be inserted, as a substitute for floor space contained within the exceedance, for instance.

- (2) The second and related ground that I accept flows from the decision to retain and reuse a portion of the existing structure, by retaining the floor slabs at Levels 1-3. The Height Request argues that the decision to reuse these slabs, that have a lower floor to floor height than the height of 3.4m for a commercial use (see section 5.6.3.2, Control 4 of the WDCP), reduces the exceedance that would otherwise result if a conventional floor to floor height was adopted by full redevelopment of the site. What I understand from this argument is that a four-storey development on the site above the existing through site link, adopting a more conventional floor to floor dimension would exceed the 14.7m height standard. Reuse of the slabs at Levels 1-3 minimises the impact of the proposal on adjoining and nearby properties, which is an objective of the height standard.
- (3) The third, also related, ground is that adaptive reuse of the existing structure, inclusive of the through site link and slabs at Levels 1-3, is consistent with the aims, of the WLEP for the management, development, conservation and economic use of property (cl 1.2(2)(b)), and the objects of the EPA Act, to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources (s 1.3(a)). I accept that the retention and reuse of existing built fabric, which is now widely understood to embody carbon that would otherwise be directed to landfill is a form of development consistent with an aim that seeks the development, conservation and economic use of property.

115 Secondly, I accept that the proposal achieves a scale that is consistent with the scale of its context when those developments at [62], Cosmopolitan Apartments and the site to the north at 374-382 New South Head Road are understood as contributing to that context. The consistency takes the following form:

- (1) The proposal presents a three-storey street wall fronting New South Head Road, consistent with the adjoining site to the north, and with the

control drawings at section D5.4.3 of the WDCP, and a two-storey street wall to Short Street and Goldman Lane.

- (2) The built form of the proposed development is around 3m lower than the built form at 374-382 New South Head Road, and so the prominence of development on the corner site will be retained. Such a relationship is more consistent with the desired future character of the height standard than in the control drawings at section 5.5.4 of the WDCP, at [100], that envisages four storeys on the subject site and the site to the north at 374-382 New South Head Road, absent any of the prominence encouraged by cl 4.4A of the WLEP.
- (3) While I accept the Draft Strategy is not yet imminent or certain, that Council has now engaged sufficiently with the Draft Strategy to deviate from the recommendation for six storeys on the subject site, to direct a height of five storeys, supports the Applicant's submission at [27] that the endorsement of the Draft Strategy is a clear statement of intent as to the character desired in future development on the site. Given the chronology contained in the December Affidavit, and the endorsement at [23], I accept the Draft Strategy is deserving of weight and I note the Height Request cites the potential for a six-storey form on the site in proposing a five storey built form (p 32).

116 Thirdly, I accept that the three-storey street wall to New South Head Road, with setbacks to upper levels is a form that accentuates the curved street geometry of New South Head Road with four and five-storey buildings that is the desired future character at section 5.4.3 of the WDCP. There is no inconsistency in the proposal. The endorsement by the Council of the Draft Strategy only lends further weight to the argument that, should a planning proposal for the Review sites be adopted, the proposed development will be substantially consistent with the desired future character of this side of New South Head Road.

117 For completeness, I do not consider the letters at [35] to be sufficiently supported by independent material or reasoning to establish an environmental planning ground. None of the letters rise to the level of a cost-benefit analysis that might otherwise consolidate, in one document, consideration of the potential tenant mix, rental returns and the like that is benchmarked against similar developments in the area, alongside development costs. Furthermore, the letters do not assist by using the terms 'full redevelopment' and 'adaptive reuse' seemingly interchangeably, and by citing the unreasonable cost of refurbishing the existing structure, even though this is the proposal advanced in the Height Request.

- 118 However, on the basis of those grounds at [114]-[116], I am satisfied that the Height Request has adequately addressed the matters required to be demonstrated by cl 4.6(3) of the WLEP.
- 119 I am also satisfied the proposed development is in the public interest because it is consistent with the objectives of the height standard, and with the objectives for development within the E1 zone, re-produced at [46], for the reasons set out in the Height Request, summarised as follows:
- (1) While the exceedance occurs at the upper most levels of the proposal, the ground floor retail tenancies will serve the needs of people who live, work and visit the area (first objective), encourage retail, community and non-residential uses on the ground floor (fourth objective) and ensure diverse and active ground floor uses, including retaining the through-site link at the ground floor (eighth objective).
 - (2) The pre-dominantly commercial use proposed encourages investment in local commercial development that generates employment (second objective) on a major road that maximises public transport patronage and in an area popular for cycling and walking (ninth objective).
 - (3) For reasons stated earlier, the proposed development is of a scale and type that is compatible with the amenity of the surrounding residential area to the rear of the site (fifth objective), is of a height and scale that achieves the desired future character of the neighbourhood (sixth objective), and is compatible with the local centre's position in the centres hierarchy (seventh objective).
 - (4) Finally, while the proposal does not propose the planting of trees, other vegetation is proposed on upper level terraces that is consistent with the tenth objective to minimise the urban heat island effect and improve the microclimate; particular of Goldman Lane and Short Street.
- 120 I have considered also those matters listed at cl 4.6(5) of the WLEP and conclude that there are no grounds on which the secretary's concurrence should not be assumed.
- 121 As I am satisfied that the written request has adequately addressed the matters required to be demonstrated pursuant to cl 4.6(4)(a)(i) and the public interest in accordance with cl 4.6(4)(a)(ii) of the WLEP, I find the written request in respect of cl 4.3 of the WLEP should be upheld.

The FSR standard is exceeded

- 122 The proposed development also exceeds the FSR permitted on the site, and a written request prepared by GSA Planning, dated 19 September 2023 (Exhibit

N) seeks to justify the contravention, pursuant to cl 4.6 of the WLEP (FSR Request).

- 123 The relevant map at cl 4.4(2) of the WLEP provides for an FSR expressed as 2.5:1, and the proposed development comprises a gross floor area of 1,370m², resulting in an FSR expressed as 3.01:1.
- 124 The FSR Request relies on the first test as it is expressed in Wehbe and asserts compliance with the height standard is unreasonable and unnecessary as the objective of the standard is achieved notwithstanding the non-compliance with the standard.
- 125 The objective of the FSR standard at cl 4.4 of the WLEP applicable to development proposed in the E1 zone is to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.
- 126 The argument advanced in the FSR is virtually identical to that advanced in the Height Request, including advancing two approaches to defining 'the area' by, in the first instance, the E1 zone and, in the second instance, the precincts as defined in section D5.4 of the WDCP.
- 127 While I consider the reference to an 'area' in the objective at cl 4.4 to be more expansive than a 'neighbourhood' that is the focus of the objective in cl 4.3 of the WLEP, as the text of both objectives are virtually indistinguishable, I adopt the same reasons set out at [107] as to why the proposal is consistent or compatible with the desired future character of the area.
- 128 In so doing, I note the substitution of arguments as to height, with similar arguments as to the FSR envisaged in the area by reference to exceedances evidence in recent development consents, and the proposed uplift of FSR in the Draft Strategy to 3.5:1 on the subject site.
- 129 The environmental planning grounds advanced in the FSR Request are also similar, but not identical to those advanced in respect of the height standard. For the reasons set out in [114]-[116], I also accept there are sufficient environmental planning grounds, and for the reasons set out at [119], I am also satisfied that the proposed development is in the public interest because it is

consistent with the objectives of the FSR standard and the objectives for development in the E1 zone. In arriving at this conclusion, I note the exceedance represents a quantum of floor space expressed as 18.68% on p 3 of the FSR Request, that is owed, in part, to the retention of a large proportion of the existing building. As the existing building does not have a basement, storage for waste, amounting to 11% of the floor space, is at ground floor and storage for bicycles, amounting to 10% of the floor space is accommodated within commercial levels.

- 130 While the Draft Strategy is not imminent or certain, I note the considerable chronology set out in the December Affidavit that has led to the endorsement by the Council of an FSR control of 3.5:1 on the subject site. It is not wholly irrelevant that the proposal has a FSR of less than that for which the Council has directed should apply to the site through its endorsement at [23].
- 131 I have considered those matters listed at cl 4.6(5) of the WLEP and conclude that there are no grounds on which the secretary's concurrence should not be assumed.
- 132 As I am satisfied that the written request has adequately addressed the matters required to be demonstrated pursuant to cl 4.6(4)(a)(i) and the public interest in accordance with cl 4.6(4)(a)(ii) of the WLEP, I find the written request in respect of cl 4.4 of the WLEP should also be upheld.

Internal amenity

- 133 As stated at [101], section D5.6.3.1 of the WDCP, at Control 2(b) limits the depth of buildings at Levels 3-5 to 15.6m. The control is exceeded on Levels 1-3.
- 134 Control C2 is in the following terms:

“To create built form which is not reliant on artificial heating and cooling:

a) habitable rooms should generally achieve a minimum floor to ceiling height of 2.7m; and

b) level 3-5 building depth is limited to 15.6m including the articulation zones. When this is difficult to achieve in the residential component of a development, Council will consider variations to the overall building depth providing a minimum 80% of dwellings have windows that can be opened and/or doors in walls with differing orientations, to facilitate cross ventilation.”

- 135 According to the Respondent, the purpose of the control is found at section D5.6.3.6 of the WDCP, at Control 11, which requires commercial space to be designed to permit maximum flexibility for future uses.
- 136 As stated at [41], the site has a depth of around 34m. When the set back to Goldman Lane at the rear is factored, the depth of building at Level 1 is around 32m, and is around 28m at Level 2.
- 137 According to the Applicant, a constraint within the WDCP on a use that is otherwise permissible under the WLEP is inconsistent with the terms of s 4.15(3A)(b) of the EPA Act.
- 138 The objectives of section 5.6.3.2 of the WDCP are:
- “O1 Development should contribute to the desired future character of streetscapes with appropriate and consistent building forms.
 - O2 Encourage courtyards and light wells at ground and first floor level of deep blocks to allow natural lighting and ventilation.
 - O3 Enable the provision of through-site links and arcades.
 - O4 Encourage a variety of interior volumes, i.e. split levels, double height spaces and arcades. Planning framework”
- 139 As I find the proposal is consistent with the desired future character of the neighbourhood, it provides a through site link and demonstrates a variety of interior volumes by reference to the through site link and those levels above that reuse existing slabs, I consider it appropriate to apply Control C2 flexibly.
- 140 I also note here that the extent of glazing proposed lends itself to adaptation in the event of a future residential use, that would presumably be subject to development assessment but which is not currently proposed.

Roof design

- 141 Section D5.6.3.7 deals with roof design and provides, relevantly:

“Objectives

...

O4 Discourage the provision of air conditioning plant and equipment on the roofs of buildings to minimise visual impact of these services

...

Controls

...

C6 Air conditioning plant and equipment must be concealed from the exterior and be within the building. When roof plant is proposed it must be screened from neighbours and be integrated with the design of the roof and the composition of the building.”

- 142 It is also relevant to note Control C3 requires buildings along New South Head Road to provide a parapet and, at Control C4, for the profile and silhouette of parapets to be considered in roof design and, at C5, for roof design to minimise building bulk and overshadowing.
- 143 Given the setback of the upper most level from New South Head Road, and from the rear of the site, I consider objective O4 to minimise the visual impact of services to be achieved. Furthermore, given the primary plant and equipment is predominantly located in the centre of the roof, it will not be visible from the public domain.

Public submissions

- 144 Public submissions in respect of this proposal, take three forms:
- (1) Public submissions received in response to the DA are contained at behind Tab 14 of the Respondents Bundle (Exhibit 4).
 - (2) Public submissions received in response to the amendments cited at [7(1)] are contained behind Tab 15 of the Respondents Bundle.
 - (3) Public submissions received in response to the amendments cited at [7(2)], and notes of oral submissions heard at the onsite view are contained in Exhibit 3.
- 145 Residents of the Cosmopolitan Apartments enjoy a wide arc of views ranging from those units with the benefit of a north facing terrace, such as Units 6G and 7F, to predominantly south facing district views, such as in Unit 5H.
- 146 The test required to be undertaken by the Court, among others, is not whether those views are retained in the state they are enjoyed today, but whether any impact imposed by the proposed development on nearby properties is minimised.
- 147 For the reasons stated earlier, I find any loss of views or potential loss of privacy to be minimised by certain steps taken to moderate the impact of the development on the amenity currently enjoyed by residents of the Cosmopolitan Apartments.

148 I have considered the public submissions and conclude there are no grounds to warrant refusal of the proposed development.

Jurisdictional preconditions

Woollahra Local Environmental Plan 2015

149 A Flood Impact and Risk Management Report prepared by Integrated Group Services dated 5 August 2022 (Flood Report) (Exhibit C) assesses the site to be subject to a low flood risk, and considers the ground floor level of the proposal to be approximately equal to the Probable Maximum Flood (PMF) level, and well above the PMF storm event level at the rear of the site, when the flood planning levels from the Double Bay Catchment Flood Study, June 2008, are adopted.

150 On the basis of the Flood Report, and certain conditions of consent, I have considered those matters at cl 5.21(3) of the WLEP and I am satisfied of those matters at cl 5.21(2) of the WLEP.

151 According to statements made in the Structural Feasibility Report, prepared by PMI engineers (Exhibit A, Tab 23), earthworks are proposed to be limited to an area in the vicinity of the proposed lift and for the purposes of footings for new columns. As such, I accept the works may involve the disturbance of less than 1 tonne of soil. On the basis of the statement at p 3 of the Geotechnical Assessment prepared by JK Geotechnics (Exhibit A, Tab 22), to the effect that groundwater was encountered at depths of 2.5m-2.9m, I also accept the extent of earthworks are unlikely to lower the watertable on, or in the vicinity of the site.

152 Accordingly, I accept consent is not required in respect of Acid Sulfate Soils at cl 6.1 of the WLEP and, relatedly, that the proposed earthworks are acceptable when those matters at cl 6.2(3) are considered.

State Environmental Planning Policy (Resilience and Hazards) 2021

153 The proposal is supported by a Preliminary Site Investigation and Detailed Site Investigation, authored by JK Geotechnics, and a letter of the same author dated 28 March 2023 (Exhibit E).

- 154 The conclusion of the reports listed above is that the concentration of contaminants in soil, soil vapour and groundwater are low, so as not to pose a risk when the proposed development is considered, subject to certain provisions being made in the event of unexpected finds.
- 155 Provision is made in the proposed conditions of consent for the same, and so I find the site suitable for the purpose for which the development is proposed to be carried out in accordance with s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021.

Conditions are disputed

- 156 At the close of the hearing, the Court directed parties to confer on without prejudice conditions of consent and, if possible, file an agreed set of conditions within 7 days.
- 157 The Court granted a request of the parties for an extension, and conditions were filed on 6 October, with four conditions in dispute.
- 158 In the first instance, the Applicant submits that a requirement to seek clarification of the intent of a condition of consent in writing is unlawful as that is properly the preserve of the Courts.
- 159 I accept the Respondent's submission that, at its highest, the notation proposed by the Respondent merely requires a certifier to seek clarification in writing should the intent of the condition be unclear.
- 160 In the second instance, the Applicant seeks to remove from Condition F.6 the requirement for Australia Post to provide its satisfaction as to the construction and location of letterboxes that are otherwise to conform to the requirements of Australian Standard AS/NZ 4253:1994.
- 161 AS 4253:1994 is not the current version of the standard. AS 4253:2019 is the current version of the Standard.
- 162 The Scope of AS 4253:2019 (the Standard) is defined on p1 of the Standard as follows:

“This Standard specifies requirements for the design, construction and performance of mailboxes in both commercial and residential applications.”

163 The Application of the Standard is also set out on p1 of the Standard in the following terms:

“This Standard is intended for use by regulatory authorities and all persons concerned with the manufacture, installation, and general requirements of mailboxes.

NOTE The size and requirements of mailboxes were derived from the size of the C4 envelope as determined by ISO. This Standard takes into account the changing trends, volumes and types of Australian postal articles for delivery and provides useful information for manufacturers, regulatory bodies and consumers on aspects of the design, construction and installation of mailboxes.”

164 Section 5 of the Standard proceeds to set out the shape, size, thickness and weight categories of Australian postal articles, including letters and parcels.

165 Section 6 of the Standard sets out design and construction standards for mailboxes.

166 Section 7 of the Standard sets out performance requirements, including standard templates.

167 Section 8 of the Standard deals with mail security, including such things as the minimum thickness of the tail cam of the cam lock.

168 Appendix A of the Standard deals with Positioning and Numbering of mailboxes.

169 I consider the Standard sufficiently clear in scope, and detailed in the guidance provided as to the design, construction, location and positioning of mailboxes as to relieve Australia Post from an obligation to separately and independently provide concurrence that would appear to derive from the Application of the Standard set out at [163]. The Applicant’s preferred form of the Condition is adopted.

170 In the third instance, the Applicant seeks to remove from Condition H.3, a requirement to indemnify the Respondent in respect of encroachments into the public domain, and relies on *Hutchinson 3G Australia Pty Limited v Waverley Council* (2002) 123 LGERA 75; [2002] NSWLEC 151 (Hutchinson 3G) in which such terms were found to be other than for a planning purpose.

- 171 Unlike Hutchinson 3G, the encroachment the subject of Condition H.3 is the encroachment of the awning over the footpath to New South Head Road.
- 172 The Respondent submits the circumstances of an awning encroaching on a public footpath are factually distinct from those in Hutchinson 3G, and conditions regulating the terms on which the Respondent may permit such an encroachment are common.
- 173 Section 5.6.4.1 of the WDCP deals with awnings but is silent on the terms on which the Respondent permits such encroachments.
- 174 I accept the Respondent's argument that the indemnification sought in Hutchinson 3G is for a planning purpose and is directed to the interests of the public safety. Unlike Hutchinson 3G in which the Council sought to be indemnified for all liability in the event of a claim against it for damages relating to the effects of electro-magnetic radiation, in the circumstances of this case, the Respondent proposes a condition requiring the ongoing maintenance of structures that overhang the public footpath. It is appropriate that such structures are maintained throughout their life so as to protect the public using the footpath below from failure of a part or parts of that structure.
- 175 Accordingly, the Court imposes the following condition, directed at the maintenance of the awning and any signage:

“A positive covenant pursuant to s88E of the Conveyancing Act 1919 must be created on the title of the subject property providing for the ongoing maintenance of the awning and any signage for which consent has been given and that overhangs the council's footpath together with the indemnification of the council from any claims or actions arising from the overhanging awning and any signage.”

- 176 Not unrelatedly, the Applicant also seeks to remove a similarly worded requirement to indemnify the Respondent in respect of stormwater systems at Condition H.4.
- 177 The indemnity in Condition H.4 is directed to the on-going maintenance of the on-site detention system and any pumps and sumps incorporated in the development. The system is described in Stormwater Management Plans before the Court, prepared by FJA Consulting Engineers, and Condition C.13

requires the Applicant to submit detailed stormwater management plans prior to issue of the Construction Certificate.

- 178 As such, the condition as proposed by the Respondent is directed to a system that is defined in the plans and documents listed at Condition A.3 of the agreed without prejudice conditions of consent and is for the purpose of imposing an obligation on the owner of the land to ensure ongoing maintenance of a stormwater system on private land that connects to public infrastructure. I consider such a condition to be for a planning purpose, and to relate in a fair and reasonable manner to the proposed development.
- 179 In the fourth instance, the Applicant seeks to amend the conditions proposed by the Respondent as to the use of external terraces on Level 3 (Condition I.11A) and Level 4 (Condition I.11B) in respect of noise.
- 180 The Applicant agrees to the conditions proposed to the Level 3 terrace, except to qualify that functions and events held on the terrace should be permitted for staff working at the premises, and to remove the condition that prohibits the consumption of alcohol.
- 181 I accept the Applicant's preferred form of Condition I.11A for three reasons:
- (1) Firstly, I consider it reasonable to expect that those working at the premises will be familiar with the environs of the site, including the interface with surrounding properties.
 - (2) Secondly, I do not consider it reasonable or necessary to prohibit the consumption of alcohol on a terrace that is limited to ten people only at one time, during the hours of 7am-10pm, Monday to Friday, and where the premises is located in the E1 zone.
 - (3) The parties agree that an Operational Management Plan is to be prepared to regulate access and use within the hours stated above.
- 182 I also accept the Applicant's position in respect of Condition I.11B proposed by the Respondent that seeks to impose constraints in respect of the use of the Level 4 terrace fronting New South Head Road. I accept the terrace is a greater distance from residential receivers and is predominantly sheltered from exposure to residential properties in the Cosmopolitan Apartments by the built form of Level 4 itself, which provides acoustic protection.

Conclusion

183 For the reasons stated earlier, I find the proposed development warrants the grant of consent, pursuant to s 4.16 of the EPA Act.

Orders

184 The Court orders that:

- (1) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- (2) The appeal is upheld.
- (3) Development Application DA279/2022 for the substantial demolition of the existing structure and alterations and additions to an existing four storey commercial building at 356-366 New South Head Road is determined by the grant of consent, subject to conditions of consent at Annexure A.
- (4) All Exhibits are returned, except for Exhibits A, L, M, N, P, Q, 3 and 9.

.....

T Horton

Commissioner of the Court

[Annexure A \(654360, pdf\)](#)

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