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## Redelman v Woollahra Municipal Council [2021] NSWLEC 1089 (22 February 2021)

Last Updated: 22 February 2021

Land and Environment Court  
New South Wales

Case Name:	Redelman v Woollahra Municipal Council
Medium Neutral Citation:	[2021] NSWLEC 1089
Hearing Date(s):	10 February 2021
Date of Orders:	22 February 2021
Decision Date:	22 February 2021
Jurisdiction:	Class 1
Before:	Dickson C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development consent DA/354/2016 originally granted on 20 January 2017 for a 3 storey seniors housing development with basement car park at 24 Northland Road, Bellevue Hill (being Lot 9 Section 1 DP 13285) is modified pursuant to <a href="#">s 4.56(1)</a> of the <a href="#">Environmental Planning and Assessment Act 1979</a>. As a consequence, Development Consent No. DA354/2016/3 is approved and is subject to the conditions of consent set out at Annexure A.</p> <p>(3) The exhibits are returned with the exception of Exhibits A, 2 and 3.</p>
Catchwords:	MODIFICATION APPLICATION – New roof top terrace proposed – modification is substantially the same development – whether the necessity of the open space is a relevant consideration – agreement of experts no impact arises from roof top terrace – appeal upheld
Legislation Cited:	<a href="#">Architects Act 2003</a> <a href="#">Environmental Planning and Assessment Act 1979</a> , <a href="#">ss 4.15</a> ,

	<a href="#">4.56, 8.9</a> <a href="#">Environmental Planning and Assessment Regulation 2000</a> , Sch 1, cl 3, 50 <a href="#">Land and Environment Court Act 1979</a> , s 34 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004, cl 4, 26, 30 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, cl 28 Woollahra Local Environmental Plan 2014
Cases Cited:	Davies v Penrith City Council <a href="#">[2013] NSWLEC 1141</a> Parker Logan Property Pty Ltd v Woollahra Municipal Council <a href="#">[2017] NSWLEC 1153</a> Super Studio v Waverley Council <a href="#">(2004) 133 LGERA 363</a> ; <a href="#">[2004] NSWLEC 91</a> Wehbe v Pittwater Council <a href="#">(2007) 156 LGERA 446</a> ; <a href="#">[2007] NSWLEC 827</a>
Texts Cited:	Apartment Design Guide Woollahra Development Control Plan 2015
Category:	Principal judgment
Parties:	Joel Isaac Redelman (Applicant) Woollahra Municipal Council (Respondent)
Representation:	Counsel: A Boskovitz (Solicitor) (Applicant) P Rigg (Solicitor) (Respondent)  Solicitors: Boskovitz Lawyers (Applicant) Peter R Rigg (Respondent)
File Number(s):	2020/7348
Publication Restriction:	Nil

## JUDGMENT

1. **COMMISSIONER:** This is an appeal by the Applicant against the actual refusal of their modification application (DA/354/2016/3) by Woollahra Municipal Council (the Respondent). The Applicant filed a Class 1 Application, appealing the refusal of the modification pursuant to [s 8.9](#) of the [Environmental Planning and Assessment Act 1979](#) (the EPA Act). The approved development application, which the Applicant seeks to modify, provides consent for a 3 storey seniors housing development with basement car park at 24 Northland Road, Bellevue Hill. The modification application seeks to amend that consent to provide for a new roof top terrace, new access to the rear garden, new skylights and window modifications.
2. By Notice of Motion the Applicant was granted leave of the Court on 8 September 2020 and again on 1 December 2020 to amend their application. Those changes to the modification application include the reduction in the size of the proposed roof top terrace, the addition of privacy screens and landscape planters, as well as an abandonment of the previous amendment to convert the communal open space into an area of private open space for two of the units. The amended plans have also addressed the issue previously raised by the Respondent in relation to the retention of the existing Jacaranda tree.



3. Despite the amendments and provision of additional information, the Respondent maintains the modification application warrants refusal on the basis that it results in an overprovision of private open space. The Respondent contends that 'the addition of the roof terrace, together with the approved private open spaces areas to Unit 4, is excessive'. (Exhibit A)
4. The Respondent raises no objection to the remaining amendments to the proposed in the modification application, pressing only that the roof top terrace ought to be refused by the Court.

### **The site and locality**

5. The locality surrounding the subject site is characterised by two and three storey single detached dwellings. Cooper Park is located to the south of the subject site, on the opposite side of Northland Road.

### **Public Submissions**

6. The original form of the modification application was advertised and notified to surrounding properties in March 2020. Ten submissions were received. These objections raise concerns with the modification application including:
  - The impact of the proposed terrace on the adjoining neighbour's visual privacy. In particular the residents at 16 Holland Road and 26 Holland Road are concerned that people will congregate on the terrace and will be able to overlook their property and garden.
  - Sight line diagrams should be provided by the Application to allow an assessment compliance with the development controls in the Woollahra Development Control Plan 2015 (DCP 2015) and to confirm the extent of overlooking.
  - Landscaping should not be relied on to achieve the mitigation of any overlooking arising from the roof top terrace proposed.
  - The potential for noise impacts arising from the use of the terrace, both the voices of people on the terrace and the potential for it to be used for entertaining. The residents note that the terrace is large (100sqm approx.), which provides the potential for it to accommodate many people.
  - The Applicant should submit an acoustic report to assess the likely impact from the roof top terrace.
  - There is potential for light spill from the roof top terrace to impact adjoining resident's amenity.
  - Concern that the roof top terrace will reduce solar access or create overshadowing for adjoining properties.
  - Concern that the modification seeking a roof top terrace will ultimately result in the development achieving a fourth storey, and or the request for lift access to the roof top terrace.
  - Given the roof top terrace will have attractive views it will be a desirable location for the residents and will likely have extensive usage.
  - The proposed solar panels and the roof top terrace add to the height of the building, adversely impacting on the neighbouring properties. There is potential these structures will result in view loss for 26 Northland Road.
  - Confirmation is required as to whether the balustrade proposed breaches the Height of Buildings standard.
  - The proposed roof top terrace is non-compliant with the applicable planning controls.

### **Planning controls**

7. Prior to considering the contention raised by the Respondent in support of the refusal of the modification application, and undertaking a consideration of the merit of it, it is necessary to address the relevant preconditions to the grant of consent under the relevant environmental



planning instruments.

8. As the original consent was issued by the Court, the modification application is made pursuant to s 4.56 of the EPA Act. In order to grant consent to the modification application, at subcl (a), the Court is required to be satisfied “that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all)”, at subcl (b) that the modification application has been notified, at (c) that people who made submissions to the original development application are notified, and at subcl (d) any submission have been considered.
9. The Respondent does not contend that the precondition at s 4.56(1)(a) of the EPA Act is not met. I am satisfied that the development to which the consent as modified relates is substantially the same as the development for which the consent was originally granted. Further, the modification application was notified by the Respondent. . The requirements of s 4.56(1)(b) and (c) of the EPA Act are met. In determining the modification application, I have given consideration to the submissions received from members of the public.
10. Further, at s 4.56(1A) in determining an application for modification of a consent, I am required to take into consideration such of the matters referred to in s 4.15(1) as are of relevance to the development the subject of the application. Those matters are detailed in the following.
11. The proposed modification is permissible under the provisions of State Environmental Planning Policy (Housing for Seniors and People with a Disability) 2004 (SEPP HSPD). The instrument applies to the land: cl 4(1)(a) of SEPP HSPD. I am satisfied that the Applicant has taken into account a site analysis prepared in accordance with cl 30 of SEPP HSPD. Further, I am satisfied that the proposed development has had adequate regard to the principles set out in Division 2 of SEPP HSPD. I accept the agreement of the parties that the provisions of cl 26 were satisfied in the grant of the original consent. The proposed development is compliant with the development standards at cl 40 of SEPP HSPD.
12. The subject site is zoned R2 Low Density Residential under the Woollahra Local Environmental Plan 2014 (LEP 2014). The objectives of the 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 development that is compatible with the character and amenity of the surrounding neighbourhood.
  - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.
13. In determining the modification application, I have taken into consideration the objectives of the R2 Low Density Residential zone. The application is compliant with the remaining relevant provisions and development standards of LEP 2014.
14. The modification application does not affect any components of the development that are matters to be considered under State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. The current BASIX Certificate remains satisfactory and meets the requirements of Schedule 1 of the [Environmental Planning and Assessment Regulation 2000](#) (the Regulation).
15. Where an application relates to residential apartment development, cl 50(1A) of the Regulation requires that the application must be accompanied by a statement by a qualified designer, defined at cl 3 as a person registered as an architect in accordance with the [Architects Act 2003](#). The statement must conform to the provisions of cl 50(1AB) of the Regulation. Such a statement has been provided by Nicholas Tang (Reg No.7363), dated 8 February 2021. (Exhibit 4)
16. I have taken into consideration the design quality of the proposed development (as amended), when evaluated in accordance with the design quality principles, and the Apartment Design Guide (ADG) (as required by cl 28(2) of State Environmental Planning Policy No 65—Design Quality of

Residential Apartment Development). I am satisfied that the proposed development demonstrates that adequate regard has been given to the design quality principles and the objectives specified in the ADG for the relevant design criteria (as required by cl 30(2)).

17. I have given consideration to the remaining matters at s 4.15(1) of the EPA Act concerning the likely impacts of the development, the suitability of the site, the submissions and the public interest, which I detail later in the judgment.
18. Section 4.56(1A) of the EPA Act further requires the Court to take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified. In the current matter, no reasons were given for the grant of consent as the matter was subject to an agreement under s 34 of the *Land and Environment Court Act 1979*: *Parker Logan Property Pty Ltd v Woollahra Municipal Council* [2017] NSWLEC 1153.

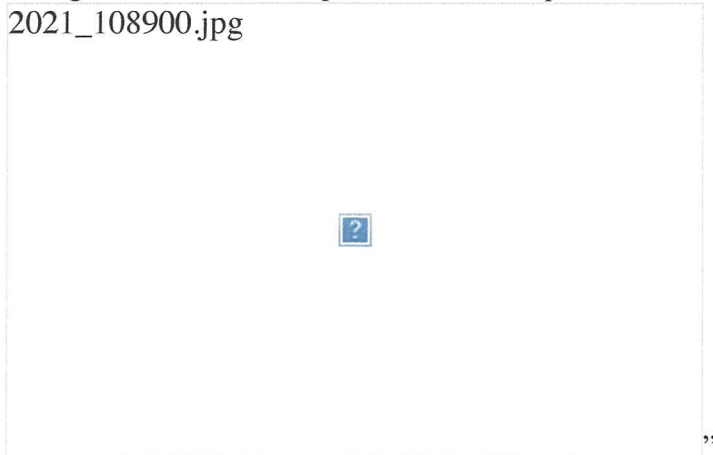
### Should the roof top terrace be approved?

19. In his opening Mr Rigg, for the Respondent, confirmed that the Council argues that the roof top terrace should be refused on the basis that: firstly, in combination with the approved open space to Unit 4, the private open space provided to the unit is excessive in area; secondly, that the roof top terrace is inappropriate in the context of the site; and finally, that the necessity of the roof top terrace has not been justified.
20. The Respondent submits that the planning controls relevant to the modification application are:
  - The ADG, [Part 4E](#): Private Open Space and Balconies. In particular:

“Objective 4E-1: Apartments provide appropriately sized private open space and balconies to enhance residential amenity.

Design Criteria 1: All apartments are required to have primary balconies as follows:

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- Clause 2(1)(c) of SEPP HSPD:

### 2 Aims of Policy

(1) This Policy aims to encourage the provision of housing (including residential care facilities) that will —

- (a) increase the supply and diversity of residences that meet the needs of seniors or people with a disability, and
- (b) make efficient use of existing infrastructure and services, and
- (c) be of good design.

- DCP 2015, Part B3.7.1 - Landscaped Areas and Private Open Space, Objective 06:

“To ensure that private open space areas are well-designed.”



- Relevantly, the controls applicable at Part B3.7.1 of DCP 2015 are:

“C12 Development takes advantage of opportunities to provide north facing private open space to achieve comfortable year round use.

C13 Private open space is clearly defined for private use through planting, fencing or landscape features.

C14 The location of private open space:

- (a) takes advantage of the outlook and natural features of the site;
- (b) reduces the adverse privacy and overshadowing impacts; and
- (c) addresses surveillance and privacy where private open space abuts public space.

C15 A roof terrace and associated structures will only be considered where the size, location and design of the terrace meets the requirements in Section 3.5.4 Acoustic and visual privacy.”

21. The contention was the subject of joint conferencing by the parties town planning experts: Mr Brett McIntyre, for the Respondent and Mr George Karavanas, for the Applicant. Both experts note their agreement to the following:

“- The Woollahra DCP does not limit the size of roof terraces;  
 - The location of the proposed roof top terrace would afford the residents of Unit 4 views of the City skyline and the Harbour Bridge; and  
 - Woollahra Council has approved development applications and Section 4.55 modifications for roof terraces in Bellevue Hill and the surrounding suburbs, with a trafficable area similar to the proposed roof top terrace.”  
 (Exhibit B)

22. The agreed evidence of the planning experts is that the modification application complies with all of the provisions of the DCP 2015 Section 3.5.4: Acoustic and Visual Privacy. In particular they agree that the roof top terrace complies with the requirement at C10:

“C10 The trafficable area of a roof terrace (above the second storey) (refer to Figure 19) is setback so that there is no direct line of sight, from that part of the building where the terrace or deck is, to:

- (a) neighbouring private open space within 12m; or
- (b) windows of habitable rooms in neighbouring dwellings within 12m”

23. However, Mr McIntyre maintains that the modification application should be refused on the following grounds:

- (1) That, in his view, the roof top terrace represents an over provision of private open space. He states:

“The approved development makes provision for more than the required private open space area, which has been provided in the form of a rear terrace (15m<sup>2</sup>) and two front balconies (12m<sup>2</sup> and 18m<sup>2</sup>), totally 45m<sup>2</sup> of private open space. The proposed roof terrace will increase the private open space of Unit 4 by 40m<sup>2</sup> to a total of 85m<sup>2</sup>, representing over seven (7) times the required 12m<sup>2</sup> minimum requirement.”

(Exhibit B)

- (2) Relevant to the compatibility of the proposed roof top terrace, the approved development, resembling

the scale of a Residential Flat Building, is uncharacteristic of development in the locality. Further, its unique location and site characteristics make it distinguishable from the examples of other roof top terraces relied on by the Applicant, which in his view are irrelevant. He argues:

“... the circumstances of the site are unique in that a Residential Flat Building on a site zoned R2 Low Density Residential Zone is not an expected form of development in the R2 Low Density Residential Zone. In addition, the subject site is immediately surrounded by properties zoned R2 Low Density Residential zone which are all occupied by single dwellings. The examples referenced below by GK are not a like for like comparison to the unique circumstances associated with the subject site.”  
(Exhibit B)

(3) That the amenity afforded to the owners of Unit 4 by the roof top terrace could be either achieved by a smaller terrace, or from the rear of the existing approved communal open space.

(4) That the terrace does not meet Objective 4E1 of the ADG as the terrace is not ‘appropriately sized’ and is inconsistent with cl 2(1)(c) of SEPP HSPD as it is ‘not of good design’.

24. In his oral evidence Mr McIntyre accepted:

- Firstly, that the proposed modification is compliant with the relevant development controls in both the ADG, SEPP HSPD, LEP 2014 and DCP 2015;
- Secondly, that there are no relevant planning controls either the ADG, SEPP HSPD, LEP 2014 nor DCP 2015 that provide a maximum limit to the size of a roof top terrace or require an Applicant to justify the size of a proposed terrace; and
- Finally, that there are no unreasonable amenity impacts arising from the proposed roof top terrace.

25. Mr Karavanas argues that the proposed roof top terrace will provide new amenity to the owners of Unit 4 through the provision of views to the Harbour Bridge and the city skyline that are not available from the currently approved private open spaces in the development. Further, he argues that the roof top terrace provides this amenity without impacting on the amenity of the adjoining properties. He states:

“It is my opinion that the proposed terrace is well located and designed to minimise any potential impacts. There is agreement by both experts that there are no significant privacy issues arising from the proposed roof terrace. In my opinion, the proposed roof terrace has been sited and designed to ensure it complies with Council’s sightline privacy controls and maintains the privacy of neighbours. In this regard, it [is] my opinion that the roof terrace is well designed.”  
(Exhibit B)

26. Mr Karavanas also accepts that the proposed modification is compliant with the relevant development controls in both the ADG, SEPP HSPD, LEP 2014 and DCP 2015.

27. In response to Mr McIntyre’s evidence about Objective 4E of the ADG, Mr Karavanas argues that the statement ‘appropriately sized’ is directed to private open spaces being large enough to provide an appropriate level of amenity. He notes that the ADG provides no guidance or controls directed to a maximum design requirement. Mr Karavanas provides similar reasoning in response to Mr McIntyre’s evidence about Part B3.7.1 of DCP 2015.

28. Finally, in his evidence Mr Karavanas applies the Court’s planning principle in *Super Studio v Waverley Council* ([\(2004\) 133 LGERA 363](#); [\[2004\] NSWLEC 91](#) (*Super Studio*) at [5] which states:

“[5] Several planning principles are relevant to the determination of this appeal. The first is that the acceptability of an impact depends not only on the extent of the impact but also on reasonableness of, and necessity for, the development that causes it. For example, the privacy



impact of a second-storey side window in an area of two-storey buildings should be accorded a higher threshold of acceptability than the impact of a second-storey balcony in a house that already has three other balconies. Applying this principle to the present case, I note that the approved proposal already has three outdoor areas. The surrounding houses do not have roof terraces, so a roof terrace would be a new element in the area. This does not mean that it is inappropriate, only that its impact should be assessed with heightened sensitivity. A roof terrace would be acceptable only if its impact were minor or negligible.

[6] The second principle is that where proposed landscaping is the main safeguard against overlooking, it should be given minor weight. The effectiveness of landscaping as a privacy screen depends on continued maintenance, good climatic conditions and good luck. While it is theoretically possible for a council to compel an applicant to maintain landscaping to achieve the height and density proposed in an application, in practice this rarely happens.

[7] The third principle relates to the extent to which an approval for this application would be used as a precedent in favour of approving other applications for roof terraces. The possibility that an approval may constitute a precedent has not been a factor in my decision. Other roof terraces would have different impacts from those of the current proposal.”

29. In applying *Super Studio* he concludes that “whether or not the proposal (in this case the subject unit) has other outdoor areas, this does not mean the roof top terrace is inappropriate. The impact of the proposed roof top terrace has been assessed and found to be minor or negligible as all other contentions have been satisfied by both experts. Therefore, irrespective of its size, it is my opinion, that the proposed roof top terrace is appropriate and consistent with the planning principle...”. Mr Karavanas concludes that the modification application warrants approval.
30. Consistent with the evidence of Mr McIntyre, Mr Rigg submits that R2 Low Density Residential zone does not expect the form of development sought by the modification application which is relevant to the question of the compatibility of the proposed roof top terrace.
31. Mr Rigg submits that in addition to *Super Studio* the planning principle in *Davies v Penrith City Council* [2013] NSWLEC 1141 (*Davies v Penrith*) at [121] is relevant to the assessment of the modification application. It states:

“[121] I have, therefore, undertaken the internal consultation process for consideration of the establishment of a new planning principle or the revision of an existing planning principle. As a result of that consultation, it is appropriate to refine the published planning principle to delete the words "necessary and/or" so that the revised planning principle will, in future, read:

**Revised planning principle: criteria for assessing impact on neighbouring properties**

The following questions are relevant to the assessment of impacts on neighbouring properties:

- How does the impact change the amenity of the affected property? How much sunlight, view or privacy is lost as well as how much is retained?
- How reasonable is the proposal causing the impact?
- How vulnerable to the impact is the property receiving the impact? Would it require the loss of reasonable development potential to avoid the impact?
- Does the impact arise out of poor design? Could the same amount of floor space and amenity be achieved for the proponent while reducing the impact on neighbours?
- Does the proposal comply with the planning controls? If not, how much of the impact is due to the non-complying elements of the proposal?”



34. After considering the evidence and submissions of the parties and undertaking the required assessment under the EPA Act, for the following reasons I am satisfied that the proposed modification application warrants approval. My reasoning is as follows.
35. The proposed modification application is compliant with all the relevant development controls. Whilst Mr McIntyre raises concern that the proposed development does not comply with two specific objectives of relevant planning controls, in my view his reasoning is inconsistent with both s 4.15(3A)(a) of the EPA Act and the decision of the Court in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [43].
36. I accept the oral evidence of Mr McIntyre at [24] that firstly, the proposed modification is compliant with the relevant development controls in both the ADG, SEPP HSPD, LEP 2014 and DCP 2015. Secondly, that there are no relevant planning controls in either the ADG, SEPP HSPD, LEP 2014 and DCP 2015 that provide a maximum limit to the size of a roof top terrace or require an Applicant to justify the size of a proposed terrace.
37. Additionally, I accept the agreed evidence of the planners that there are no unreasonable amenity impacts arising from the proposed roof top terrace, or the modification application as a whole.
38. Further, in my view it is relevant that the Respondent, in amending its contentions, removed the previous contentions that alleged the proposed roof top terrace would result in adverse acoustic impacts and visual privacy impacts arising from overlooking. These contentions were resolved prior to the hearing by provision of additional information (acoustics) and the design of the roof top terrace (overlooking). The amended Statement of Facts and Contentions removed any contentions that the modification, and in particular the proposed roof top terrace, had any unreasonable impact on the adjoining properties.
39. I am not persuaded that Mr McIntyre's assertion that the fact that, the view available on the proposed roof top terrace may be available at the rear of property, is relevant to the assessment of the acceptability of the proposed roof top terrace. I accept the evidence of Mr Karavanas at [25]–[29] as being the preferred approach to the assessment of the modification application.
40. Finally, I note that the submissions received from members of the public related to an earlier iteration of the modification application. A number of amendments have been made to the modification application since notification. The planning experts now agree that the amended design of the roof top terrace will not adversely impact the adjoining neighbours. However, in giving consideration to the issues raised by the submissions, I note that the agreed conditions of consent also include the following conditions, in part addressing issues raised:

#### **“1.8 Outdoor Lighting – Roof Terraces**

Outdoor lighting must comply with AS/NZS 4282:2019: Control of the obtrusive effects of outdoor lighting. The maximum luminous intensity from each luminare and threshold limits must not exceed the level 1 control relevant under tables in AS/NZS 4282:2019.

All lighting to be installed on the roof terrace will be recessed lights or will be surface wall/balustrade mounted lights at a maximum height of 600mm above the finished floor level of the roof terrace.

Note: This condition has been imposed to protect the amenity of neighbours and limit the obtrusive effects of outdoor lighting.

Note: Council may consider, subject to an appropriate Section 4.55 Application, relaxation of this condition where it can be demonstrated, by expert report, that the level of lighting in the existing area already exceeds the above criteria, where physical shielding is present or physical shielding is reasonably possible.

#### **1.9 No fixed or portable speakers/devices permitted on the roof top terrace**

No fixed or portable speakers/devices with the ability to play amplified noise will be permitted on the roof top terrace.”

(Exhibit 3)

41. I further note that, despite concerns raised by the submissions, I am satisfied that the visual privacy

outcomes achieved in the amended design for the roof top terrace to resolve overlooking do not rely on the success of landscaping. I am satisfied it is achieved by the setback and design of the roof top terrace itself.

42. In conclusion I find that the development satisfies the relevant preconditions to consent and that, for the reasons outlined in the preceding, the application is acceptable after a merit assessment under s 4.15 of the EPA Act. Development consent is granted on a conditional basis.

## Orders

43. The Court orders that:

(1) The appeal is upheld.

(2) Development consent DA/354/2016 originally granted on 20 January 2017 for a 3 storey seniors housing development with basement car park at 24 Northland Road, Bellevue Hill (being Lot 9 Section 1 DP 13285) is modified pursuant to [s 4.56\(1\)](#) of the *Environmental Planning and Assessment Act 1979*. As a consequence, Development Consent No. DA354/2016/3 is approved and is subject to the conditions of consent set out at Annexure A.

(3) The exhibits are returned with the exception of Exhibits A, 2 and 3.

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**D M Dickson**

**Commissioner of the Court**

[Annexure A \(193561,.pdf\)](#)

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