Land and Environment Court

New South Wales

Case Name:	Nicholas Tang Holdings Pty Ltd v Woollahra Municipal Council
Medium Neutral Citation:	[2021] NSWLEC 1227
Hearing Date(s):	11-12 March 2021
Date of Orders:	05 May 2021
Decision Date:	5 May 2021
Jurisdiction:	Class 1
Before:	Dickson C
Decision:	See Orders at [63]
Catchwords:	DEVELOPMENT APPLICATION – new semi-detached dwellings – Torrens title subdivision – interpretation of minimum lot size development standard – whether the development requires a request to vary the development standard – whether the development impacts on trees proposed for retention – whether the private open space is satisfactory – appeal upheld
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 8.7, 4.15 Environmental Planning and Assessment Regulation 2000, cl 97A Interpretation Act 1987, s 34 Land and Environment Court Act, s 39 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy No 55—Remediation of Land, cl 7 State Regional Environmental Plan (Sydney Harbour Catchment) 2005, Part 1 Woollahra Local Environmental Plan 2014, cll 4.1, 4.1B,

	4.6, 5.10, 6.2
Cases Cited:	Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27; [2009] HCA 41 Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia (1932) 47 CLR 1; [1932] HCA 9 BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399 Cavanagh v Wollondilly Shire Council (No 2) [2019] NSWLEC 181 Central Coast Council v 40 Gindurra Road Somersby (No 2) (2019) 241 LGERA 133; [2019] NSWLEC 171 Cranbrook School v Woollahra Council (2006) 66 NSWLR 379; [2006] NSWCA 155 Cumberland Council v Tony Younan; Cumberland Council v Ronney Oueik; Cumberland Council v H & M Renovations Pty Ltd [2018] NSWLEC 145 Dickinson Property Group Pty Ltd v Wollondilly Shire Council [2019] NSWLEC 1220 Grant William Clarke v Shoalhaven City Council (No 2) [2021] NSWLEC 8 HP Subsidiary Pty Ltd v City of Parramatta Council [2020] NSWLEC 135 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 Smith v The Queen (1994) 181 CLR 338; [1994] HCA 60 Universal Property Group Pty Ltd v Blacktown City Council [2020] NSWCA 106
Texts Cited:	Woollahra Development Control Plan 2015
Category:	Principal judgment
Parties:	Nicholas Tang Holdings Pty Ltd (Applicant) Woollahra Municipal Council (Respondent)
Representation:	Counsel: A Pickles SC (Applicant) D Le Breton (Solicitor) (Respondent) Solicitors:

	Boskovitz Lawyers (Applicant) HWL Ebsworth Lawyers (Respondent)
File Number(s):	2020/79901
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER**: This is an appeal by the Applicant against the deemed refusal of their development application (DA 10/2020) by Woollahra Municipal Council (the Respondent). The Applicant filed a Class 1 Application, appealing the refusal, pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (the EPA Act). The development application seeks consent for the demolition of existing buildings, excavation of rock shelf and sandstone wall, tree removal, Torrens title subdivision of the site into four allotments and construction of a semi-detached dwelling on each new allotment. The development is proposed at 37 Edward Street, Woollahra (Lot 37 DP 1033494).

2 Since the filing of the appeal the Applicant has been granted leave to amend their development application, including with consent of the Respondent at the commencement of the hearing. The amended development application is the subject of this judgment.

Issues

3 The Respondent maintains that the development application should be refused on the following grounds:

(1) That the development application fails to meet the minimum lot size control at cl 4.1 of Woollahra Local Environmental Plan 2014 (LEP 2014) and that the written request to vary the standard pursuant to cl 4.6 of LEP 2014 should not be upheld by the Court.

(2) That the private open space provision for the proposed dwellings within the development is unsatisfactory.

(3) That the proposed development is not in the public interest for the reasons raised in the public submissions received.

Subject site and context

4 The subject site has a total area of 928.1m². It is irregular in shape as shown in the following aerial image of the subject site in context.

Figure 1: Aerial image of the subject site 37 Edward Street, Woollahra

5 The front portion of the site is relatively flat, however a rock shelf of some 15 metres in height exists at the rear of the site. The platform has previously been excavated for the installation of a swimming pool.

6 The rock shelf is listed as a contributory heritage item, listed in Woollahra Development Control Plan 2015 (DCP 2015): 'Rockshelf and sandstone walls at 37-43 Edward Street'. The subject site was historically utilised by Woollahra Council for quarrying activities, some evidence of which is visible within the site. Further excavation of the rock face was likely to have occurred to facilitate the construction of the dwelling currently located on the site. (Exhibit G)

7 The subject site sits in the bottom of the rock shelf and the adjoining sites to the east, west and south are significantly higher than the subject site.

8 The subject site is also located within the Fletcher Precinct of Woollahra Heritage Conservation Area (HCA) under the C2.3.6 of DCP 2015.

9 The locality is predominantly characterised by a mixture of two and three storey attached dwellings with varying architectural periods as well as contemporary dwellings of various style and scale.

Public submissions

10 The development application in its original form was notified to adjoining and adjacent property owners between 29 January 2020 and 12 February 2020. A

total of 41 submissions were received. The submissions received by Council since the lodgement of the development application were tendered in the proceedings as part of the Respondent's evidence. I have read and considered those submissions.

11 At the commencement of the hearing the Court was addressed onsite by concerned parties.

12 The objections of the residents to the proposed development application can be summarised as follows:

- Excavation of the rock face will result in instability of properties at View Street and poses risk to the properties located on the northern end of Edward Street;
- impact of excavation upon the foundation of adjoining properties, all recommendations of the submitted geotechnical report should be adopted, including the recommended 1m setback;
- excessive removal of trees and impact on the health of significant fig tree located in front of the site;
- increasing traffic and parking arising from the development will pose a risk to both pedestrians and children;
- height, bulk and scale - the proposed development is 3 storeys and is an overdevelopment of the site. The surrounding properties have a consistent two storey presentation to Edward Street;
- the proposal exceeds the maximum height limit, it will dominate Edward Street and is out of character;
- acoustic and visual privacy impacts for neighbours will arise from the street facing balconies;
- the proposed development will impact sunlight to the bedrooms of 33 Edward Street and their privacy;
- non-compliant front setback: The development is proposed significantly closer to the street than the existing building;
- impact on the heritage value of the rock shelf and sandstone wall, which is a contributory item to Fletcher Precinct of Woollahra HCA;
- loss of all public views of the heritage rock shelf and sandstone wall;
- the proposal is unsympathetic to the streetscape and surrounding locality;
- the proposed lot width of 8m is uncharacteristic;
- the impacts arising during construction have not been quantified or assessed;
- it is unclear how large construction traffic will safely enter and exit the site and gain access up Edward Street given the streets limited width;

- noise impacts from the proposed roof top open space are unreasonable;
- a smaller and less impactful development has previously been rejected;
- inconsistency of building material with the characteristics of the precinct;
- lack of infrastructure, such as drainage and gutters within the street to accommodate increased density of development;
- the various arboricultural reports provided as part of the development application are inconsistent in the delineation of the tree protection zone (TPZ) and structural root zone (SRZ) of the fig tree that is proposed to be retained;
- streetscape presentation of the proposed development is poor;
- a more sympathetic density of development would be two detached dwellings on the subject site.

The planning framework

13 Prior to the consideration of the merits of the proposed development the Court, as consent authority, must determine whether the relevant preconditions to consent are met: *HP Subsidiary Pty Ltd v City of Parramatta Council* [2020] NSWLEC 135 at [16].

14 Clause 7 of State Environmental Planning Policy No 55—Remediation of Land (SEPP 55) imposes preconditions to the determination of a development application by the grant of consent to development on land that is contaminated. I accept the agreed position of the parties, as detailed in the Statement of Environmental Effects (Exhibit K), that the potential for contamination is low, and further investigations are unwarranted in the circumstances that the subject site has a long history of residential use and that there is no indication that a purpose referred to in Table 1 to the contaminated land planning guidelines has been carried out on the subject site. I am satisfied that the requirement of cl 7 of SEPP 55 is met.

15 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the development. A BASIX Certificate has been provided to satisfy the requirements of the instrument. A condition of consent will require fulfilment of the commitments listed in the BASIX Certificate for the development, as required by cl 97A of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation).

16 State Regional Environmental Plan (Sydney Harbour Catchment) 2005 applies to the subject site as it is identified on the Sydney Harbour Catchment Map. The site is not identified as land within the Foreshores and Waterways area, as a strategic foreshore site, as a heritage item or as land within the wetlands protection area, as a result only Part 1 of the instrument is applicable. In determining the development application, I have given consideration to planning principles for the Sydney Harbour Catchment.

17 As noted at [6] the rock shelf is a contributory heritage item. The site is located within the Fletcher Precinct of the Woollahra Heritage Precinct. Heritage impact assessments were prepared as part of the development application. (Exhibit G, L) Following the joint conference of the parties heritage experts, their agreed evidence is that:

> "… the Experts agree that the proposed excavation of the existing 'Rockshelf and Sandstone Walls' will not impact adversely on its role within the Fletcher Precinct. In addition, the proposed excavation will have no unacceptable or adverse impact on the heritage significance of the Woollahra Heritage Conservation Area."
>
> (Exhibit 5)

18 The subject site is zoned R3 – Medium Density Residential Development, subdivision and semi-detached dwellings are permissible with consent in the zone.

19 Pursuant to cl 5.10(4) of LEP 2014 the consent authority, or the Court exercising the functions of the consent authority, is to consider the effect of the proposal on the significance of a heritage conservation area, before granting consent. I accept the agreed evidence of the heritage experts. I am satisfied that the proposed development will not have a detrimental impact on the Fletcher Precinct of the Woollahra Heritage Precinct.

20 Clause 6.2 Earthworks of LEP 2014 applies to the proposed development. In determining the development application, I have given consideration to the matters listed at subcl (3). I note that the proposed excavation is the subject of recommendations of JK Geotechnics which have prepared two reports in relation to the proposed development (the JK Geotechnics Reports). The recommendations of these reports have been adopted in the amended plans and are reflected in the proposed conditions of consent.

21 In relation to the relevant considerations, the JK Geotechnics Reports conclude that groundwater is unlikely to be encountered. A due diligence report in relation to indigenous artefacts has been completed, which concludes the likelihood of disturbing relics is low. As noted in the preceding, the heritage experts agree that the proposed development will not have a detrimental impact on the heritage significance of the precinct. A stormwater design has been prepared to ensure that site drainage is appropriately managed. Other than impacts arising from construction, the earthworks are not considered to have an ongoing effect on the amenity of adjoining properties. A draft construction management plan has been prepared, with a more detailed plan required as a condition of any consent. Further, any sandstone excavated that is capable of reuse will be required to be utilised on site or on-sold rather than sent to landfill (Exhibit P). I am satisfied that appropriate consideration has been given to the matters listed at cl 6.2(3) of LEP 2014.

Does the development application rely on a variation to the minimum lot size standard?

22 The remaining precondition to consent is detailed in the Respondent's first contention, the satisfaction of the minimum lot size control, at cl 4.1 of LEP 2014. The provision is as follows:

> **4.1 Minimum subdivision lot size**
>
> (1) The objectives of this clause are as follows—
>
> (a) to establish a minimum subdivision lot size that is consistent with the desired future character of the neighbourhood,
>
> (b) to ensure that lot sizes support development envisaged under this Plan,
>
> (c) to ensure that lots have a minimum size to retain or enhance amenity by providing useable areas for building and landscaping,
>
> (d) to identify locations suitable for increased development density,
>
> (e) to ensure that development complies with the desired future character of the area.
>
> (2) This clause applies to a subdivision of any land shown on the Lot Size Map that requires development consent and that is carried out after the commencement of this Plan.
>
> (3) The size of any lot resulting from a subdivision of land to which this clause applies is not to be less than the minimum size shown on the Lot Size Map in relation to that land.

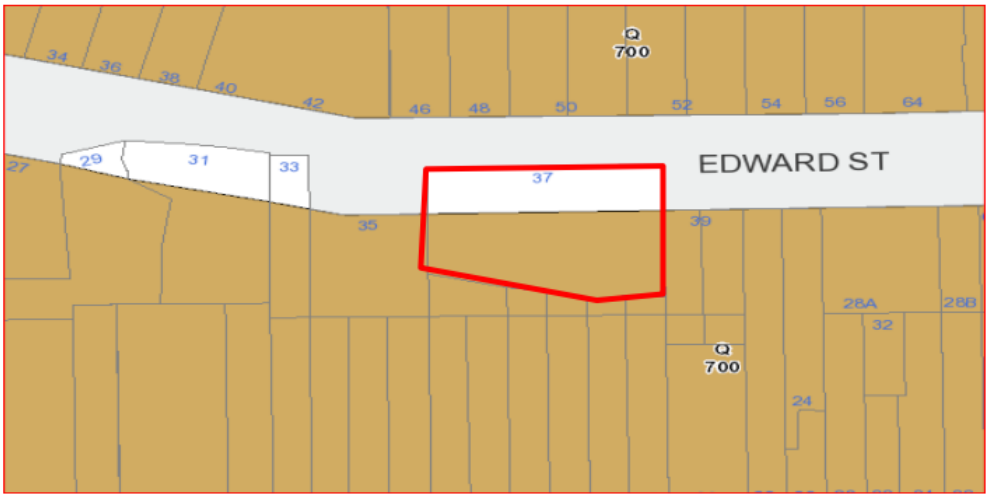
(3A) If a lot is a battle-axe lot or other lot with an access handle, the area of the access handle is not to be included in calculating the lot size.

(4) This clause does not apply in relation to the subdivision of any land—

(a) by the registration of a strata plan or strata plan of subdivision under the *Strata Schemes Development Act 2015*, or

(b) by any kind of subdivision under the *Community Land Development Act 1989*.

23 The relevant Lot Size Map indicates that the relevant minimum subdivision lot size for the majority of the subject site, pursuant to cl 4.1, is 700m². I note that the Lot Size Map does not map the entirety of the site, with the remaining portion having no designated lot size:



24 The proposed development seeks subdivision of the subject site to create four new allotments as follows:

- Lot 1: 230m²
- Lot 2: 233m²
- Lot 3: 232m²
- Lot 4: 232m²

(Exhibit 4)

25 The Respondent argues that in order for the Court to have power to grant consent to the proposed development, given that it does not meet the minimum subdivision lot size at cl 4.1 of LEP 2014, the Court would need consider a written request to vary the standard and be satisfied such a request meets the states of satisfaction at cl 4.6(4) of LEP 2014.

26 In the alterative the Applicant relies on satisfaction of cl 4.1B of LEP 2014, which it argues acts as an exception to cl 4.1 of LEP 2014. The clause is in the following terms:

> **4.1B Exceptions to minimum subdivision lot sizes for certain residential development**
>
> (1) The objective of this clause is to encourage housing diversity without adversely impacting on residential amenity.
>
> (2) This clause applies to development on land in Zone R3 Medium Density Residential.
>
> (3) Development consent may be granted to a single development application for development to which this clause applies that is—
>
> (a) the subdivision of land into 3 or more lots, and
>
> (b) the erection of a dwelling house, an attached dwelling or a semi-detached dwelling on each lot resulting from the subdivision, if the size of each lot is equal to or greater than—
>
> (i) for the erection of a dwelling house—230 square metres, or
>
> (ii) for the erection of an attached dwelling—230 square metres, or
>
> (iii) for the erection of a semi-detached dwelling—230 square metres.

27 The difference between the approach of the Applicant and Respondent in the interpretation of the two clauses that relate to minimum lot size provisions in LEP 2014 is summarised in the following. Broadly, the Respondent argues that the application relies on satisfaction of the facultative provisions of cl 4.6 as the means to allow any variation to the mapped minimum lot size provisions at cl 4.1 of LEP 2014, which it argues works together with cl 4.1B of LEP 2014. The Respondent submits that the Applicant must satisfy both provisions, cll 4.1 and 4.1B of LEP 2014. Alternatively, the Applicant submits that cl 4.1B is a standalone provision, of which the development standard is met by the proposed development. The Applicant submits that the development satisfied the minimum lot size standard and no variation pursuant to cl 4.6 of LEP 2014 is required.

28 Mr Pickles and Ms Le Breton agree that the initial approach to the interpretation of LEP 2014 is as follows:

- As LEP 2014 is a species of delegated legislation, the ordinary principles and rules associated with statutory construction apply: *Cranbrook School v Woollahra Council* (2006) 66 NSWLR 379; [2006] NSWCA 155 at [36].
- That statutory construction must begin with the text and the literal meaning of the text itself: *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27; [2009] HCA 41.
- Where there is ambiguity in the text, regard must be had to the object and the purpose of the provision: *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 (*Project Blue Sky*).

29 From this point the approach of Mr Pickles and Ms Le Breton diverged.

30 Mr Pickles submits that the Court should then proceed with interpretation of cl 4.1 and 4.1B of LEP 2014 as follows:

- That where the literal interpretation of the clauses give rise to a conflict, the conflicting provisions should be reconciled as far as possible so that it is consistent with the object and the purpose: *Project Blue Sky* at [69]. It is Mr Pickles submission that cl 4.1(3) and cl 4.1B(3) of LEP 2014 are in conflict as cl 4.1 prohibits the subdivision of land below 700m², whereas cl 4.1B allows for subdivision of land in the R3 Medium Density Residential zone for certain residential development to 230m². He submits therefore the clauses are inconsistent.
- That the more particular provision prevails over the general provision: *Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1; [1932] HCA 9 at [7] and *Smith v The Queen* (1994) 181 CLR 338; [1994] HCA 60 at [348]. Applying this to LEP 2014, Mr Pickles submits that cl 4.1B, being directed to specific types of development in a specific zone, is more particular that the general provision at cl 4.1 which provides minimum lot sizes for subdivision of any land shown on the Lot Size Map.
- That whilst the heading of the provision does not form part of LEP 2014, s 34 of the *Interpretation Act 1987* permits the use of extrinsic materials to either confirm the ordinary meaning of the provision or to determine the meaning of a provision which is ambiguous. Mr Pickles argues that the Court should make reference to the heading of cl 4.1B, namely 'Exceptions to minimum subdivision lot sizes for certain residential development', in confirming the meaning of the provision – that it is an exception to cl 4.1 of LEP 2014.

31 Finally, Mr Pickles relies on two recent decisions of the Court to support his approach to the construction of cll 4.1 and 4.1B of LEP 2014: *Cavanagh v Wollondilly Shire Council (No 2)* [2019] NSWLEC 181; *Grant William Clarke v Shoalhaven City Council (No 2)* [2021] NSWLEC 8. I have read and considered those decisions.

32 Ms Le Breton disagrees with Mr Pickles' conclusion firstly that cll 4.1 and 4.1B are in conflict and secondly that one provision is specific, and one is general. Ms Le Breton argues that cll 4.1 and 4.1B are both development standards that relate to minimum subdivision lot size, that operate concurrently, and are both capable of variation pursuant to cl 4.6 of LEP 2014. In support of her interpretation Ms Le Breton cites C*umberland Council v Tony Younan*; *Cumberland Council v Ronney Oueik*; *Cumberland Council v H & M Renovations Pty Ltd* [2018] NSWLEC 145 at [71]–[72] as follows:

> "In resolving the meaning of s 127(5A), the ordinary approach to statutory interpretation applies. The now well-accepted approach was recently considered in Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the Late Ryan Messenger [2018] NSWCA 178, where Payne JA, with whom Basten and Gleeson JJA, Sackville AJA, and Simpson AJA agreed, said at [57]:
>
> > The relevant principles of statutory construction were not controversial. The parties referred to Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; [2009] HCA 41 at [47], where the plurality emphasised that construction must begin with a consideration of the text itself and while the language employed is the surest guide, its meaning may require consideration of the context, which includes the general purpose and policy of the provision, in particular the mischief it is seeking to remedy. The importance of context, including the general purpose and policy of the provision has subsequently been emphasised by the High Court: Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500; [2012] HCA 32 at [41]; Federal Commissioner of Taxation v Consolidated Media Holding Ltd (2012) 250 CLR 503; [2012] HCA 55 at [39]; SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; 91 ALJR 936 at [14] and [25]-[39].
>
> However, the importance of context does not detract from the centrality of the text and the principle that each word should be given work to do: Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 ('Project Blue Sky') at 381-382. Where the clear words of a statute demand a particular outcome, the fact that the outcome may appear inconvenient will not, in itself, be determinative."

33 Ms Le Breton argues that the plain and ordinary meaning of cl 4.1(3) is that the size of any lot resulting from the subdivision of land to which the clause applies is not to be less than the minimum size shown on the lot size map, in this case 700sqm. It is a restrictive clause. However, cl 4.1B is a permissive clause – it provides that development consent may be granted to a development application where it meets certain requirements, in this case: it is zoned R3 Medium Density Residential; is a subdivision into 3 or more lots; for the

purposes of a semi-detached dwelling; and has a resulting lot size equal or greater than 230sqm. In her submission Ms Le Breton argues these clauses can operate together if the resulting lot is 700sqm. She concludes:

> "So, we say there's no conflict or ambiguity in the clear words of both of these provisions and that the restrictive clause in 4.1(3) can apply to restrict the subdivision of land notwithstanding that the development could also satisfy the facultative provisions in 4.1B. Then, as I said, even where a conflict does arise the principles of statutory construction require that the provisions of the instrument should be construed on the basis that the instrument was intended to operate harmoniously to avoid an inconsistency. And the authority for that is the decision of the Court of Appeal in Universal Property Group Pty Ltd v Blacktown City Council [2020] NSWCA 106."
>
> (Transcript 12 March 2021, p 20)

34 Given on Ms Le Breton's submission there is no inconsistency, she argues it is not necessary to apply the maxim of a specific provision prevailing over a general provision.

35 Ms Le Breton concludes that the development application relies on a variation to cl 4.1 of LEP 2014, which is facilitated by cl 4.6 of the instrument. In relation to the Applicant's written variation request she argues it should not be upheld by the Court on the following grounds:

- It fails to focus on the clause in LEP 2014 to which the variation is sought;
- It presents insufficient environmental planning grounds to support the variation;
- The environmental planning grounds are not tethered to the variation;
- The Respondent disagrees that the massing of the proposed development will be compatible with the character of the surrounding area. But even if the Court held that it was compatible, that is irrelevant to a variation to the lot size standard;
- The variation request asserts that the development will further the orderly and economic development of the land but draws no specific connection to the lot size variation.

36 Ms Le Breton concludes that the correct interpretation of LEP 2014 is that the development application requires a variation pursuant to cl 4.6 to the minimum lot size provisions cl 4.1 of LEP 2014. In relation to variation request she concludes that it should not be upheld and as such the Court has no power to approve the development application.

Findings

37 Applying the agreed approach to the statutory interpretation detailed at [28], I am satisfied that cl 4.1B applies to the subject development: the development is development for the purpose of a semi-detached dwelling: cl 4.1B(3)(b)(iii), the subject site is in the R3 Medium Density Residential zone: cl 4.1B(2). The objective of cl 4.1B is in part stated as being to encourage housing diversity. Considering cl 4.1B in context, I agree with Ms Le Breton that it is a permissive clause. It provides a smaller lot size in specific circumstances, those being that the subject site is zoned R3 Medium Density Residential and is for the purpose of either a dwelling house, attached dwellings or for semi-detached dwellings.

38 Having considered the submissions of Mr Pickles and Ms Le Breton, I agree with and adopt the submissions of Mr Pickles in regards to the interpretation of cll 4.1 and 4.1B of LEP 2014 for the reasons summarised at [28]–[31]. I am not persuaded by Ms Le Breton's submissions on behalf of the Respondent that there is no inconsistency between the provisions meaning therefore that the Applicant relies on satisfaction of cl 4.6 of LEP 2014 to support a variation to cl 4.1 of LEP 2014. My reasons follow.

39 As stated by Pain J in *Central Coast Council v 40 Gindurra Road Somersby (No 2)* (2019) 241 LGERA 133; [2019] NSWLEC 171 at [52] where "words are plain and unambiguous they should be given their ordinary and grammatical meaning". The ordinary meaning of cll 4.1 and 4.1B are clear. Clause 4.1(3), the operative provision, provides that subdivision of land is permitted where the resulting lot is in compliance with the Lot Size Map, in this case 700m^2. Clause 4.1B provides that for development for the purpose of semi-detached dwellings in the R3 Medium Density zone, subdivision of land is permitted where the resulting lot is equal or greater than 230m^2.

40 When LEP 2014 is considered as a whole, I accept that cl 4.1 is a restrictive provision, the minimum lot size must be achieved for the precondition to be met and consent granted. In contrast, consistent with *Grant William Clarke v Shoalhaven City Council (No 2)* at [34], cl 4.1B is a permissive provision which specifies specific circumstances (R3 Medium Density Residential zone, semi-detached dwelling) that must be met to overcome the restriction. I accept and

adopt the reasoning of Duggan J, that for the purposes of cl 4.1 the lot size restriction can be overcome either by identifying an expressed permission (such as by cl 4.1B) or by application of the power to vary development standards in cl 4.6.

41 The question of inconsistency between instruments was considered by the Court of Appeal in *Universal Property Group Pty Ltd v Blacktown City Council* [2020] NSWCA 106 (*UPG v Blacktown*). The decision states in interpreting legislation it is appropriate to assume consistency unless there is a clear contrary intention expressed in the legislative text, and further at [13]: "The principle of harmonious operation gives preference to a reasonable construction of a statutory instrument if the result is consistent with the operation of another, where a different interpretation would create inconsistency."

42 Applying *UPG v Blacktown* I am satisfied that the text of LEP 2014 identifies an intention that cl 4.1 and cl 4.1B are inconsistent. When constructed in accordance with the words of the clause the provisions are in conflict, the subject matter of the clauses overlaps.

43 I accept Mr Pickles submissions at [30]. For these reasons I find that the proposed development is permissible by the express terms of cl 4.1B of LEP 2014. Clause 4.1 contains a precondition to enliven the Courts power to grant consent which is either met by meeting the minimum lot size in the map, or by the satisfaction of cl 4.6 of LEP 2014 to permit a variation to that lot size. In contrast, cl 4.1B varies the minimum lot size for a development if it meets the criteria contained within cl 4.1B. The criteria in cl 4.1B are met by the development. The development application does not rely on cl 4.1 but rather cl 4.1B provides a separate path for subdivision of land in the R3 zone for three specific types of residential development.

44 Accordingly, it is not necessary to address the relevance, if any, of the Lot Size Map (pursuant to cl 4.1 of LEP 2014) providing no designated lot size for a portion of the subject site.

45 Notwithstanding the preceding findings, if I am wrong in the interpretation of cll 4.1 and 4.1B of LEP 2014, I am also satisfied that the Applicant's written

request pursuant to cl 4.6 of LEP 2014 should be upheld for the following reasons:

- Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority or the Court exercising the functions of a consent authority can exercise the power to grant development consent (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [13] (*Initial Action*);
- The development application seeks a variation to cl 4.1 of LEP 2014, to the applicable lot size (700sqm) shown on the Lot Size Map for a portion of the subject site;
- The Applicant has prepared and tendered a written request prepared by Planning Ingenuity Pty Ltd dated 2 March 2021 (the written request);
- The objectives of the clause are reproduced at [22]. I am satisfied that the objectives of this standard are met by the development, notwithstanding the variation. Giving weight to the zoning of the land and the list of permitted uses, I am satisfied the development will be compatible with the desired future character and the subject site is suitable for increased density. Further, on the evidence, I am satisfied that the proposed lots are of sufficient size to provide useable area for building and are of appropriate amenity;
- I am satisfied that the written request establishes that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case. I am persuaded by and adopt the reasoning in the written request that the objectives of the standard are met notwithstanding the variation (cl 4.6(3)(a) of LEP 2014);
- Further, I am satisfied that the written request advances sufficient environmental planning grounds that justify the breach of the standard (cl 4.6(3)(b) of LEP 2014). In particular, I am satisfied that the variation sought is directly related to the promotion of the orderly and economic development of the subject site and the promotion of good design, both objects of the EPA Act. I am satisfied these grounds, along with those detailed in the written request, are sufficient;
- On the preceding basis I am satisfied that the requirements of cl 4.6(4)(a)(i) of LEP 2014 are met;
- For the reasons outlined in the written request I am satisfied that the development is in the public interest as it is consistent with the objectives of the R3 Medium Density Residential zone and the development standard. I accept that the proposed development is compatible with the provision of housing within a medium density residential environment, it will add to the variety of housing and is of a height and scale that achieves the desired future character detailed in the planning instruments. On this basis I am satisfied that the requirements of cl 4.6(4)(a)(ii) of LEP 2014 are met;
- On appeal, the Court has the power under cl 4.6(2) of LEP 2014 to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of

Planning and Environment, pursuant to s 39(6) of *Land and Environment Court Act* (LEC Act), but should still consider the matters in cl 4.6(5) of LEP 2014: *Initial Action* at [29];

- Pursuant to cl 4.6(5) of LEP 2014 I am satisfied the proposal is not considered to raise any matter of significance for State or regional development.

46 The states of satisfaction required by cl 4.6 of the LEP 2014 have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the lot size control at cl 4.1 of LEP 2014.

Is the private open space provision for the proposed dwellings satisfactory?

47 The Respondent argues that the proposed development makes unsatisfactory provision for private open space for the proposed semi-detached dwellings. The merit of the private open space was the subject of expert evidence by Mr Jeff Mead (for the Applicant) and Ms Jillian Sneyd (for the Respondent).

48 The relevant development control for the provision of private open space is contained in the DCP 2015 at C2.5.6 as follows:

> "Objectives:
>
> O1 To ensure that adequate provision is made for accessible and useable private open space.
>
> O2 To retain important existing mature trees, vegetation and other landscape features.
>
> O3 To ensure the provision of permeable and semi-permeable areas of open space to assist with stormwater management.
>
> O4 To ensure that swimming pools, spa pools and tennis courts are located where they are not visible from the public domain.
>
> O5 To ensure that private open space areas, plantings, swimming pools, spa pools and tennis courts are designed to minimise adverse impacts on the heritage significance of the area, services infrastructure, the fabric of buildings and the amenity of neighbours.
>
> Controls:

C4 The minimum private open space area requirements are:

TABLE 4 Minimum private open space

Residential type	Allotment size	Minimum private open space required
Dwelling houses, semi-detached dwellings, dual occupancies and attached dwellings.	Less 130m²	▸ 10% of site area ▸ Principal rear area to have a minimum dimension of 10m²
	More than 130m² and less than 225m²	▸ 16% of site area ▸ Principal rear area to have minimum dimension of 12m²
	More than 225m²	▸ Minimum of 35m² ▸ Principal rear area to have minimum dimension of 16m²

Note: For the principal rear area, only those areas that can accommodate a 3m diameter circle may be calculated principal rear area.

…

C8 Part of the private open space must be directly accessible from the main living area and capable of serving as an extension of the dwelling for relaxation, dining, entertainment, recreation or children's play."

49 Each of the proposed lots will have an area greater than 225sqm. Applying the controls, an area of 35sqm is required, with a principal area that has a minimum dimension of 16sqm.

50 The planning experts agree that the minimum area control is met by the development.

51 Mr Mead's evidence states that:

> "In my opinion, there can be no debate that the proposal meets the private open space requirements. Each dwelling has well in excess of 35sqm in total area and included in this area is a principal rear area of more than 16sqm (counting areas with a 3m diameter circle). In my opinion, pursuant to s 4.15(3A)(a) [of the EPA Act] a more onerous standard than that set in the DCP should not be applied."
>
> (Exhibit 4)

52 Mr Mead goes on to argue that further to being compliant with the numeric requirements of the DCP 2015, the private open space will be of high amenity. He argues that:

- The upper levels will enjoy expansive views to the Sydney CBD and Sydney Harbour.

- The provision of private open space in a number of locations for each dwelling provides a diversity of spaces in terms of design, orientation, solar access, size and privacy.
- Each dwelling has a private open space accessed from the living areas, whether through a short corridor to the rear private open space or via stairs to a roof terrace.

  (Exhibit 4)

53 In conclusion Mr Mean argues that the proposal not only meets the prescriptive controls in DCP 2015, but "takes a logical approach to the site characteristics that will ensure high amenity outdoor spaces". (Exhibit 4)

54 In the alternative Ms Sneyd, whilst agreeing that the control at C2.5.6 of DCP 2015 is met, argues that the quality and useability of the proposed private open spaces require improvement. She raises the following concerns:

- The private open spaces are not directly accessible from the living areas of the dwellings.
- The principal private open space has limited visual surveillance from the Kitchen/ Living areas.
- The amenity of the private open spaces which face the sandstone wall at the rear of the units will be poor. In particular Ms Sneyd raises concern in relation to the limited solar access to the rear yards.
- That the "development controls for private open space seek to provide minimum standards for the development of both new and existing development within the Heritage Conservation Areas which in part reflect older subdivision and development patterns. The proposed development seeks to achieve the maximum density achievable on a site whilst meeting minimum requirements, the quality of those spaces will compromise the attractiveness of those spaces for future residents". (Exhibit 4)

55 Mr Pickles submits that the evidence of Mr Mead should be preferred by the Court. Firstly, the proposed development provides for several high quality private open spaces providing flexibility to the residents. Secondly, given the numerical controls are met by the development, s 4.15(3A)(a) of the EPA Act means the Court cannot require a more onerous standard and that the adequacy of private open space could not be a reason for refusal.

56 In the alternative Ms Le Breton argues that the evidence of Ms Sneyd on the amenity of the private open spaces of the proposed dwellings should be preferred by the Court. She submits that the poor provision of open space at

the rear of the development is a symptom of the development being 'sandwiched' between the constraints arising from the retention of the fig tree in the front setback of the site and the rock face at the rear. Further, she submits that the quantum of private open space is insufficient for dwellings with four bedrooms.

Findings

57 The planning experts agree that the private open space area controls in DCP 2015 require:

- a minimum area of 35m² for each semi-detached dwelling;
- That the principle rear area is to have a minimum dimension of 16m² (including in the calculation only those areas which can accommodate a 3m diameter circle); and
- That part of the private open space "must be directly accessible from the main living area and [be] capable of serving as an extension of the dwelling ...".

58 As noted at [52] the experts agree that the numeric provisions of DCP 2015 are met.

59 I do not accept the submission of Ms Le Breton that the quantum of private open space is insufficient for dwellings with four bedrooms. I concur with the findings of Gray C in *Dickinson Property Group Pty Ltd v Wollondilly Shire Council* [2019] NSWLEC 1220 at [49]. Consistent with s 4.15(3A) of the EPA Act, I am satisfied that there is no legal basis in these proceedings to warrant a more onerous standard for the quantum of private open space than that which is detailed in DCP 2015.

60 On the evidence I am satisfied that the private open space provision in the proposed development is also satisfactory in qualitative terms. My reasoning is as follows:

- I am satisfied that the open space provided is adequate in both respects required by DCP 2015, namely part of the open space is directly accessible from living areas and the private open space is useable for relaxation, dining, entertainment, recreation or children's play.
- I am not persuaded by the evidence of Ms Sneyd that the quality of the private open space provided, in particular lack in proximity to the rock face, is poor. I accept and prefer the evidence of Mr Mead that the design of the development results in future residents having a choice of spaces in terms of design, orientation, solar access, size and privacy.

Public Interest

61 As noted at [12] members of the public raised a number of concerns about the proposed development application. As required by s 4.15(1)(d) and (e) of the EPA Act I have given consideration to the submissions and the public interest in determining the development application. I am satisfied that none of the issues raised warrant refusal of the application. My reasoning is as follows:

- LEP 2014 provides specific provisions relevant to the R3 Medium Residential zone and semi-detached dwellings. Relevantly, an objective of the R3 Medium Density zone is to provide a variety of housing types. It is appropriate to give weight to the zoning in determining the appropriate development site: *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399 at [117].
- I am satisfied that the Applicant has adopted the recommendations of JK Geotechnics in the amended plans. Additional requirements are incorporated in the proposed conditions of consent.
- At the conclusion of the hearing it was the agreed position of the Applicant's and Respondent's arboricultural experts that the impacts from the proposed development were acceptable subject to conditions.
- Despite the concerns of the residents, it is the agreed position of the planning and urban design experts that the streetscape presentation of the development is acceptable (Exhibit 4). I accept this evidence.
- I am satisfied that the separation between the proposed dwellings and the existing adjoining properties is sufficient to ensure acceptable acoustic and visual privacy. I note that the planning experts agree that the amended plans have resolved the Respondent's concerns in relation to visual privacy. (Exhibit 4)
- I note that the residents raise concerns about the construction impacts from the excavation and construction that would arise from approval of the development application. During the proceedings the Applicant submitted further information about the proposed work zone, the excavation zones, proposed truck sizes and a draft construction management plan. This additional information was tendered without objection from the Respondent. I am satisfied that the impacts arising from construction are sufficiently particularised to allow them to be considered in the assessment of the application. I acknowledge that there is likely to be disturbance of neighbours during construction of the proposed development, but I am satisfied that this impact is insufficient to warrant the refusal of the application. I note the following agreed evidence of the town planning experts:

> "… it is agreed that the degree of excavation (ie. Material to be removed from the site) could be compared to development sites that incorporate basement level car parking which are not uncommon in the R3 zone in Woollahra. Subject to any development consent incorporating standard conditions of consent in relation to hours of construction and noise/vibration restrictions

during construction, impacts of construction could be managed in a similar manner to any other development site within a residential area."

(Exhibit 4)

62 I am satisfied after a careful evaluation of the evidence and the submissions that the application is acceptable on its merits: s 4.15(1) of the EPA Act and should be granted approval, subject to conditions which are agreed between the parties.

Orders

63 The Court orders that:

(1) The Appeal is upheld;

(2) Development Application DA 10/2020 for demolition of existing buildings, excavation of rock shelf and sandstone wall, tree removal, Torrens title subdivision of the site into four allotments and construction of a semi-detached dwelling on each allotment including landscaped works at 37 Edward Street, Woollahra (Lot 37 DP 1033494) is approved subject to the conditions of consent at Annexure A;

(3) The exhibits are returned with the exception of Exhibits 1, A, B, C, D and K.

……

D M Dickson

Commissioner of the Court

Annexure A (661300, pdf)

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