



Land and Environment Court
New South Wales

Case Name: Merman Investments Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1582

Hearing Date(s): 7-9 September 2021

Date of Orders: 1 October 2021

Decision Date: 1 October 2021

Jurisdiction: Class 1

Before: O'Neill C

Decision: The orders of the Court are:
(1) The applicant is to pay the respondent's costs thrown away as a result of the amendment of the development application 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 No. 325/2020/1 for the demolition of all the existing structures, removal of existing vegetation, excavation to accommodate two levels of basement parking and construction of a three and four storey residential flat building comprising four apartments, a plunge pool for one apartment and associated landscaping, is approved, subject to the conditions of consent at Annexure A.
(4) The exhibits, other than Exhibit 1, are returned.

Catchwords: DEVELOPMENT APPLICATION – demolition of existing structures and construction of a residential flat building – exceedance of the height of buildings development standard – exceedance of the floor space ratio development standard – adjoining heritage items – exceedance of the numerical control for excavation –

amenity of adjoining properties – internal amenity

Legislation Cited:	Environmental Planning and Assessment Act 1979, s 4.16 Environmental Planning and Assessment Regulation 2000, cl 55 Land and Environment Court Act 1979, s 34 State Environmental Planning Policy No 55 – Remediation of Land, cl 7 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, cll 4, 30 Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005, cl 13 Woollahra Local Environmental Plan 2014, cll 4.1A, 4.3, 4.3A, 4.4, 6.1, 6.2
Cases Cited:	Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 Super Studio v Waverley Council (2004) 133 LGERA 363; [2004] NSWLEC 91 Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827
Texts Cited:	Apartment Design Guide Woollahra Development Control Plan 2015
Category:	Principal judgment
Parties:	Merman Investments Pty Ltd (Applicant) Woollahra Municipal Council (Respondent)
Representation:	Counsel: A Galasso SC (Applicant) D Le Breton (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) HWL Ebsworth Lawyers (Respondent)
File Number(s):	2020/327578
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application No. 325/2020/1 for the demolition of all existing structures, removal of existing vegetation, excavation to accommodate two levels of basement parking and construction of a three and four storey residential flat building comprising four apartments, a plunge pool for one apartment and associated landscaping (the proposal) at 3 Wiston Gardens, Double Bay (the site) by Woollahra Municipal Council (the Council).
- 2 The appeal was subject to conciliation on 11 May 2021, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached, the conciliation conference was terminated pursuant to s 34(4) of the LEC Act.

The development application is amended

- 3 The development application was amended by the applicant, with the consent of the Council, by the lodging of the amendment on the NSW planning portal on 13 September 2021, pursuant to cl 55 of the Environmental Planning and Assessment Regulation 2000. The schedule of amendments is attached to the Notice of Motion filed on 7 September 2021.
- 4 The amended architectural plans were admitted into evidence as Exhibit JJ and the amended landscape design report and landscape plans as Exhibit KK. The cl 4.6 written request to vary the floor space ratio (FSR) development standard was amended and dated 30 August 2021 (Ex G).
- 5 The applicant agreed to pay the Council's costs thrown away as a result of the amendment of the development application as agreed or assessed, in accordance with s 8.15(3) of the EPA Act.
- 6 The application was further amended, with the consent of the Council, by the lodging of the amendment on the NSW planning portal on 13 September 2021. The amended plans were filed with the Court on the final day of the hearing. The amendment extended the planter boxes on the eastern terraces of Levels 3 and 4 along the northern side of those terraces and relocated the acoustic

privacy screens to the inside wall of the planter boxes. This amendment made the architectural drawing set consistent with the image depicted in the photo montage (Ex A, Dwg 9001, view 2) showing landscaping cascading over the planter on the northern elevation.

- 7 The applicant was directed to file with the Court the amended development application following the lodging of the amended application on the NSW planning portal. The amended development application was filed with the Court on 15 September 2021.

Issues

- 8 The Council's contentions can be summarised as:
 - The proposal exceeds the height of buildings and floor space ratio (FSR) development standards for the site and the written requests to contravene the development standards are not well founded.
 - The proposal is an overdevelopment of the site and the bulk, form and scale of the proposal is inconsistent with the desired future character of the Darling Point residential precinct.
 - The proposal does not provide adequate internal amenity for future residents of the proposal because a number of rooms will not receive adequate direct natural light and ventilation.
 - The proposal has an unacceptable impact on the amenity of residents in the vicinity of the site. The excessive size of the trafficable open terrace areas, particularly Apartments 3 and 4, results in unacceptable adverse acoustic and visual privacy impacts on residents at 19A Eastbourne Road, 2 Wiston Gardens and 5A Wiston Gardens.
 - The proposal fails to conserve the heritage significance of the adjoining heritage items.
 - The proposal results in an excessive amount of excavation which is uncharacteristic of surrounding development, and there is no justification for the excavation proposed.
 - Approval of the proposal would set an undesirable precedent in the locality.

The site and its context

- 9 The site is on the north-western, high side of Wiston Gardens. The site has an area of 828.3m² with a frontage to Wiston Gardens of 20.575m.
- 10 The site slopes steeply from the rear, north-western boundary, which is on top of a cliff, with an overall fall to the front of the site of approximately 24m.

- 11 2 Wiston Gardens, known as the Taj Mahal, adjoins the site to the north-east, and 5A Wiston Gardens, known as Sea Dragon, adjoins the site to the south-west. 19A Eastbourne Road adjoins the rear portion of the site to the north-east and is directly behind 2 Wiston Gardens.

The proposal

- 12 The proposal is to demolish the existing residential flat building on the site and to construct a three and four storey residential flat building over two levels of basement parking.
- 13 The proposal is for 4 three-bedroom apartments. Apartment 1 is on Level 1, Apartment 2 is on Level 2, Apartment 3 is on Level 3, and Apartment 4 is on Level 4 and includes a roof terrace over with a cabana structure and swimming pool on the uppermost level, and some subterranean accommodation at the rear of Level 3. The proposal includes 2 lifts, one of which is to be dedicated to Apartment 4, but which can be used for access to all levels when the other lift is inoperable.
- 14 The proposal requires 5,962.5m³ of excavation.
- 15 The proposal is designed by the architectural firm, Tzannes.

Planning framework

- 16 The site is zoned R3 Medium Density Residential pursuant to the Land Use Table of Woollahra Local Environmental Plan 2014 (LEP 2014). A residential flat building is permissible with consent. The objectives of the R3 zone, to which regard must be had, are:
- To provide for the housing needs of the community within a medium density residential environment.
 - To provide a variety of housing types within a medium density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.
- 17 Pursuant to cl 4.1A of LEP 2012, the minimum lot size for residential flat buildings in the R3 zone is 700m². The site has an area of 828.3m².

18 The height of buildings development standard for the site is 10.5m (cl 4.3 and Height of Buildings Map Sheet HOB_002 of LEP 2014). The objectives of cl 4.3 are:

- (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.

19 Clause 4.3A of LEP 2014 applies to the site and the site is within an area identified as Area B (Height of Buildings Map Sheet HOB_002 of LEP 2014). Despite the height of buildings development standard, the height of a building to which cl 4.3A applies, is not to exceed 4m at the highest part of the land.

20 The FSR development standard for the site is 0.65:1 (cl 4.4 and Floor Space Ratio Map Sheet FSR_002 of LEP 2014). The objectives of cl 4.4 for development in the R3 zone are:

- (i) to ensure the bulk and scale of new development is compatible with the desired future character of the area, and
- (ii) to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain, and
- (iii) to ensure that development allows adequate provision on the land for deep soil planting and areas of private open space,

21 Clause 5.10 Heritage Conservation of LEP 2014, at sub-cl (5)(c), permits the consent authority to require a heritage management document be prepared for any development on land that is within the vicinity of land on which a heritage item is located. The site is in the vicinity of the following heritage items:

- 5A Wiston Gardens, Double Bay (identified as number 4 in Sch 5 to LEP 2014 and the State Heritage Register) is a State heritage item (Sch 5 to LEP 2014, item 230) described as, "House and interiors, grounds, gardens". 5A Wiston Gardens was designed by Leslie Wilkinson.
- 6 Wiston Gardens, Double Bay is a State heritage item (sch 5 to LEP 2014, item 231) described as, "house and interiors, grounds, gardens". 6 Wiston Gardens was designed by Leslie Wilkinson.

- 2 Wiston Gardens, Double Bay is a local heritage item (Sch 5 to LEP 2014, item 229) described as, “Taj Mahal—house and interiors, terraced gardens, entrance terrace, steps and balustrade, wrought iron fences and balustrades”.
 - 15 Eastbourne Road, Darling Point is a local heritage item (Sch 5 to LEP 2014, item 118) described as, “Kendall Lodge—house, interiors and grounds”.
 - 21 Eastbourne Road, Darling Point is a local heritage item (Sch 5 to LEP 2014, item 119) described as, “Moreton Bay Fig”.
- 22 The site is identified as Class 5 and a small proportion of the site as Class 2 on the Acid Sulfate Soils Map. Development consent must not be granted under cl 6.1 Acid sulfate soils of LEP 2014 unless an acid sulfate soils management plan has been prepared for the proposed works in accordance with the Acid Sulfate Soils Manual and has been provided to the consent authority. The Council submitted that the report has been provided (Ex AA) and that no issue is raised in relation to cl 6.1 of LEP 2014.
- 23 Development consent is required for earthworks, pursuant to cl 6.2(2) of LEP 2014. In deciding whether to grant development consent for earthworks, the consent authority must consider the matters listed under sub-cl (3), as follows:
- (a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,
 - (b) the effect of the development on the likely future use or redevelopment of the land,
 - (c) the quality of the fill or the soil to be excavated, or both,
 - (d) the effect of the development on the existing and likely amenity of adjoining properties,
 - (e) the source of any fill material and the destination of any excavated material,
 - (f) the likelihood of disturbing relics,
 - (g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,
 - (h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.
- 24 Woollahra Development Control Plan 2015 (DCP 2015) applies to the site at B1.1.1 and to the development at B1.1.2. The site is within the Darling Point Precinct, at B1.2.
- 25 The Precinct character statement for Darling Point, at B1.2.1 of DCP 2015, includes the following description:

“A significant element of the heritage items and heritage conservation areas is the siting of buildings within a landscaped setting.”

- 26 The desired future character and streetscape character and the relevant key elements of the precinct and desired future character objectives, at B1.2.2, are:

“Desired future character

The Darling Point precinct is an established residential area with a rich mixture of architectural styles and forms. Development is to retain the visual prominence of the tree canopy, particularly along the ridgeline of Darling Point Road.

Most development is in the form of alterations and additions to the existing housing stock.

Where a building comprises historic or aesthetic values, it is important that development reflects the scale of the existing built form and retains the character of the original building particularly in regard to the roof form, massing, details, materials and finishes. For example, the groups of period terraces at New Beach Road, Ocean Avenue and Darling Point Road should be retained and enhanced.

Development adjoining a contributory item or heritage conservation area is to have regard to the architectural values of the building and establish a sympathetic interface.

Where an existing building does not comprise historic or aesthetic value, sympathetic contemporary design is permitted.

Where new development occurs, the buildings are to provide a height, bulk, and scale compatible with those buildings that are predominantly two to four storeys in height, and have regard to the visual impact of the development from the harbour.

Existing intrusive high rise and tower developments are not to be reproduced.

On the low side of streets where existing development predominantly presents as single or two storey, the height and scale of this built form to the street should be retained and the development designed to step down and follow the slope of the land. This will minimise cut and fill and also limit overshadowing and privacy impacts to neighbouring properties.

Attention must also be given to retaining views from the public domain and providing for view sharing from private properties; these can be achieved by providing suitable side boundary setbacks, roof forms and thoughtful distribution of building form across the site.

Streetscape character and key elements of the precinct

Development respects and enhances the existing elements of the character that contribute to the precinct including:

- a) the rich mixture of architectural styles;
- b) the stepping of development on the hillside to minimise visual impact and follow the landform;

c) the significance of heritage items and the adjacent heritage conservation areas of Darling Point Road, Etham Avenue, Mona Road and Loftus Road/Mona Road and individual heritage items;

d) well established gardens and trees;

e) remnant estate gardens;

f) historic stonewalls on private and public land;

...

j) the highly visible tree canopy providing a dense green backdrop to views from Sydney Harbour and surrounding lands;

...

Desired future character objectives

O1 To respect and enhance the streetscape character and key elements of the precinct.

...

O4 To maintain the heritage significance of heritage items and buildings in adjacent heritage conservation areas.

...

O8 To design and site buildings to respond to the topography and minimise cut and fill.

...

O11 To retain the landscape setting of the locality by maintaining landscaped areas around buildings and minimising hard stand areas."

27 The minimum side setback for residential flat buildings, at control 2 and figure 5B of B3.2.3 of DCP 2015, is 2m. The Council submitted that, while the 2m minimum setback is achieved by the proposal, the side setback is "relentless" and insufficient for this site.

28 The rear setback control, at control 1 and Figure 6 of B3.2.4 of DCP 2015, is 16m. The proposal has a rear setback of 6m. The relevant objectives for rear setback are:

"O1 To provide private open space and landscaped areas at the rear of buildings.

...

O3 To avoid an unreasonable sense of enclosure.

...

O5 To protect vegetation of landscape value and provide for landscaped area and deep soil planting."

29 Section B3.4 Excavation of DCP 2015 includes the following preamble:

“Excavation is an accepted part of development in the Woollahra Municipality where the topography varies. Excavation allows buildings on the sloping sites to be designed to step down and sit into the hillside, and it also enables cars and storage to be accommodated on site in an unobtrusive manner.

However, there are significant environmental impacts associated with extensive excavation, as well as external impacts, such as amenity impacts to adjoining properties during the excavation process.

Council has determined that the volume excavated from a given site should be limited to that which might reasonably be required for car parking and domestic storage requirements, and to allow the building to respond to the site topography in an appropriate manner.”

- 30 The maximum volume of excavation for a residential flat building, at control 2 and Figure 14B of B3.4, is 800m³. The proposal requires 5,962.5m³ of excavation. The relevant objectives for excavation are:

“O1 To allow buildings to be designed and sited to relate to the topography.

O2 To minimise excavation.

O3 To ensure the cumulative impacts of excavation do not adversely impact land stabilisation, ground water flows and vegetation.

O4 To minimise structural risks to adjoining structures.

O5 To minimise noise, vibration, dust and other amenity impacts to adjoining and adjacent properties.”

- 31 Control 4 of B3.4 is in the following terms:

“A variation to the volume shown in Figures 14A and 14B will be considered, however the maximum volume of excavation permitted will only be the amount needed to accommodate:

a) car parking to comply with the maximum rates in Part E1 of this DCP and any reasonable access thereto, if the maximum car parking rates are required by the Council; and

b) storage at a rate of 20m³ (cubic metres) per dwelling if for a dwelling house, dual occupancy, semi-detached dwelling or attached housing; or

c) storage at a rate of 8m³ (cubic metres) per dwelling if for a residential flat building, manor houses, multi dwelling housing or multi dwelling housing (terraces) development.”

- 32 The maximum car parking rate at E1.4.2 of DCP 2015 for a three-bedroom apartment in a residential flat building is 2 spaces; and 0.25 visitor spaces per apartment. The parties agreed that the maximum car parking rate for the proposal is 9 car parking spaces and this provision is met by the proposal.

- 33 Section E1.15 of DCP 2015 addresses mechanical parking installations. The terms of the provision state that mechanical parking installations are not

desirable and will only be considered in exceptional circumstances. In the case of residential development, the installations are for resident rather than visitor parking.

- 34 A building is to be consistent with the desired future character of the area set out in the precinct controls in Parts B1 and B2 of DCP 2015, at control 1 of B3.5.1. The Council submitted that the future character of Wiston Gardens is dictated by the existing heritage items in the street. The objectives for streetscape and local character are:

“O1 To ensure that the built form is compatible with the streetscape and the desired future character of the area.

O2 To ensure that development is of high visual quality and enhances the street.

O3 To maintain the evolution of residential building styles through the introduction of well-designed contemporary buildings.”

- 35 The objectives for acoustic and visual privacy, at B3.5.4 of DCP 2015, are to ensure adequate acoustic privacy for occupants and neighbours; to ensure adequate visual privacy for occupants and neighbours while balancing the need to provide for reasonable levels of environmental amenity, including access to sunlight and ventilation, and good architectural outcomes; and to minimise the impacts of private open space.

- 36 All habitable rooms must have at least one external wall primarily above the existing ground level which provides unobstructed window opening, at control 1 of B3.5.5 of DCP 2015. All habitable rooms and sanitary compartments in a dwelling must have direct natural light and direct natural ventilation, at control 2 of B3.5.5 of DCP 2015. The objectives for internal amenity, at B3.5.5, are:

“O1 To encourage high levels of internal amenity through the provision of direct natural light and direct natural ventilation.

O2 To encourage buildings that are designed to maximise natural light provision in habitable rooms.”

- 37 The objective of B3.7.1 of DCP 2015, is to ensure that the areas outside the floorplate contribute to the desired future character of the location.

- 38 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, at control C15 of B3.7.1 of DCP 2015. The

objective for this control is to ensure that private open space areas are well-designed.

- 39 The site is within the Sydney Harbour Catchment, pursuant to cl 3(1) of the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP). Clause 20 of the SREP requires the matters referred to in Pt 3, Div 2 to be taken into consideration by the consent authority (or the Court exercising the functions of the consent authority) before granting consent to development under Pt 4 of the EPA Act.
- 40 State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) applies to the proposal at cl 4(1)(a)(i). Development consent must not be granted to the proposal if the development does not demonstrate adequate regard has been given the design quality principles and the objectives specified in the Apartment Design Guide (ADG), at cl 30(2). The relevant objectives in the ADG are:
- The objectives for natural ventilation, at 4B, include that all habitable rooms are naturally ventilated, and the layout and design of single aspect apartments maximises natural ventilation.
 - The objectives for private open space and balconies, at 4E, are for apartments to provide appropriately sized private open space and balconies to enhance residential amenity and for apartments at ground level to have private open space instead of a balcony with a minimum area of 15m².
 - The objective for acoustic privacy, at 4H, is for noise transfer to be minimised through the siting of buildings and building layout.
 - The objective for apartment mix, at 4K, is a range of apartment types and sizes be provided to cater for different household types now and into the future. The proposal is for 4 three-bedroom apartments.
- 41 The Council submitted that, pursuant to cl 7(1) of State Environmental Planning Policy No 55 – Remediation of Land, the Council is satisfied that the land will be remediated before the proposal is carried out, consistent with the applicant's Remediation Action Plan (Ex Z) and Hazardous Materials Survey (Ex BB), by the imposition of conditions of consent.

Public submissions

- 42 Three objectors gave evidence via MS Teams on the first day of the hearing. Their concerns can be summarised as:

- The proposal is an overdevelopment of the site;
- Occupants in the proposed pool cabana and on the uppermost level will overlook the swimming pool area of 19A Eastbourne Road;
- The solar panels on the roof of the proposed cabana will reflect light towards 19A Eastbourne Road;
- The amount of excavation proposed is excessive and may compromise the structural integrity of the swimming pool at 19A Eastbourne Road;
- The 2m setback to the northern boundary will compromise the amenity of the northern neighbours;
- The bulk and scale of the proposal have an unacceptable impact on the amenity of the southern neighbour, including overshadowing, and acoustic and visual impacts; and
- There is no privacy treatment on the southern façade of the proposal.

43 I have had regard to the written objections contained in the Council's bundle (Ex 3) and the further written objection filed by the respondent on behalf of an objector who was unavailable to give evidence during the hearing.

Expert evidence

44 The applicant relied on the expert evidence of Stephen Kerr (planning), Alec Tzannes (architect of the proposal and urban design), Stephen Davies (heritage), George Wei (acoustic) and Craig McLaren (traffic).

45 The Council relied on the expert evidence of Brett McIntyre (planning), Gabrielle Morrish (urban design), John Oultram (heritage), Richard Haydon (acoustic) and Ever Fang (traffic).

46 The planning and urban design experts prepared a joint report (Ex 7) and gave oral evidence. The heritage experts prepared a joint report (Ex 6) and gave oral evidence. The acoustic experts prepared a joint report (Ex 4) and gave oral evidence. The traffic experts prepared a joint report (Ex 5) and gave oral evidence.

Excavation

47 A key issue in this appeal is the volume of excavation proposed.

48 The significant volume of excavation is required to provide the applicant's preferred configuration for basement car parking (located at Ground Level and Basement Level). The basement car park over two levels is entered at Ground

Level via a garage door to the street. The Ground Level includes the entry lobby and double garages for Apartments 3 and 4 at the western end of the Ground Level. The Basement Level is accessed via a ramp adjacent to the garage door on the northern side of the basement, and includes double garages for Apartments 1 and 2 at the western end of the Basement Level, and a visitor parking space. The ground level is reduced to RL – 0.5 beneath the basement level, with the lift pit extending below that level to an unnominate level.

- 49 The proposal has a rear setback of 6.555m from the north-western corner of the site and 11.427m from the south-western corner of the site. The western extent of the building envelope at the rear of the site is determined by the basement car parking layout. The significant volume of excavation required is a function of the location of the western extent of the building envelope, at the bottom of the existing natural rock cliff face towards the rear of the site; and the steep slope of the site from the bottom of the cliff face, RL 20.0, to the street, RL 3.0, over a distance of approximately 40m. There are six storeys below existing ground level at the western extent of the building envelope, including the basement parking on the Ground Level and Basement Level.
- 50 The parties agreed that the proposal provides the maximum number of car parking spaces consistent with the requirements of Section E1.4.2 of DCP 2015. The traffic experts agreed that it is appropriate that the proposal meets the maximum provision of car parking because on-street parking is in the area is constrained (Ex 5, par 1.4.1).
- 51 The traffic experts agreed that the proposal results in two additional on-street parking spaces directly in front of the site, because the existing residential flat building has 5 garages and a cross-over for the length of the site's frontage to Wiston Gardens, whereas the proposal has a garage door entry and the cross-over to Wiston Gardens for vehicular access is 5.5m. One on-street parking space is 6.8m and the other is 5.6m for a small car. The experts agreed both on-street parking spaces meet the numerical requirements of the applicable Australian Standard, because the smaller car parking space is unconstrained.

- 52 The Council contended that the extent of excavation could be reduced by reconfiguring the basement car park to incorporate mechanical parking installations; and/or by reducing the number of apartments/bedrooms to reduce the demand for car parking on-site. The Council also queried the location of the lift core, on the basis that if the lift core is relocated to the east and closer to Wiston Gardens, the double garages at the western end of the Ground and Basement Levels could possibly be moved to the east, to reduce the western extent of the building envelope.
- 53 The applicant cited Section E1.15 of DCP 2015 as demonstrating the Council's discouragement of mechanical parking installations.
- 54 The traffic experts considered sketches provided by the architect (Ex HH) illustrating two options for mechanical parking installations and the consequent reduction in excavation, as follows:
- Option A includes a turntable and a car lift accessing three basement levels (Ground Level, Basement 1 Level and Basement 2 Level) so that ground level is reduced to RL – 2.7 and – 4.4 at the lift core.
 - Option B includes a turntable and a car shuffler, which requires two basement car parking levels and a shuffler pit in the front portion of the site, so that ground level is reduced to RL 2.3 in the rear portion of the building envelope and RL – 1.1 in the front portion under the shuffler pit.
- 55 Both options reduce the western extent of the building envelope. Option A would result in an estimated reduction in the volume of excavation of 6%. Option B would result in an estimated reduction in the volume of excavation of 31%. Mr McLaren noted that Option B would require additional excavation to accommodate motorbike parking.
- 56 In Mr McLaren's view, mechanical parking installations are inconvenient and problematic. The shuffler system creates queuing. It does not include electric vehicle charging stations. The cycle time is 4 minutes to retrieve a car. It is not easy to use for visitors or people with a disability, or the elderly or children when getting into and out of a car as it does not provide adequate opportunity to load and unload. The available headroom is typically 1.8m and this is a hazard for users. The bike storage would have to be accessed via the entry lobby, which is undesirable and would require the lobby to be widened. The car shuffler system requires a turntable, which adds a further operational

inconvenience for users and in Mr McLaren's opinion, two mechanical devices are very inconvenient. It is Mr McLaren's evidence that the shuffler system is unsuitable for the requirements of the proposal.

- 57 According to Mr Tzannes, the position of the lift core is dictated by the constraint of minimising overshadowing of 5A Wiston Gardens. If the lift core is moved to the east, the lift core will overshadow the living room and bedroom windows of 5A Wiston Gardens at certain times. It is Mr Tzannes' evidence that an extensive study was undertaken to locate the lift core and the location proposed is ideal in order to minimise amenity impacts on 5A Wiston Gardens and retain the northern façade for the proposal's habitable rooms. Furthermore, two lifts are required according to Mr Tzannes, not only to provide a dedicated lift to Apartment 4, but to provide an operating lift to all apartments when one lift is not working. Mr McLaren noted that the position of the lift core accommodates the length of the ramps and the ramp to the Basement Level requires the length of the lift core to accommodate the descent.
- 58 It is Mr Kerr's evidence that the number of truck movements required to dispose of the excavated material, according to the Construction Management Plan, is 497, because each truck accommodates 12m³ of spoil (Ex 7, par 323). The applicant submitted that the difference between the proposal and Option B is two additional weeks of truck movements, which is minor in the overall scheme. The applicant further submitted that once the proposal is constructed, the extent of the excavation is not evident, whereas the inconvenience of the turntable car and shuffler will have to be permanently endured by residents, visitors and neighbours.
- 59 I accept and prefer the applicant's evidence and submissions and I am satisfied that the extent of excavation proposed to provide two levels of basement parking without mechanical parking installations, and meet the maximum parking rate for the proposal, is acceptable for the reasons that follow.
- 60 The minimal reduction of 6% in excavation for Option A is outweighed by the inconvenience of the mechanical parking installations.

- 61 I have carefully considered Option B, as the reduction of 31% in excavation (minus the additional volume necessary for motorbike parking) is a significant advantage of using a shuffler system. However, I am satisfied on the basis of the evidence before me that in this instance, the advantage of the reduction in excavation is outweighed by the disadvantages of the shuffler system. I accept Mr McLaren's evidence that there are many shortcomings associated with mechanical parking installations, not least of which is the system would result in cars queuing in Wiston Gardens. I accept that mechanical parking installations are discouraged by the Council, at Section E1.15 of DCP 2015 as "not desirable" and should "only be considered in exceptional circumstances" and mechanical parking installations are not suitable for visitor parking. Option B includes the visitor parking space within the shuffler system. I accept the applicant's submission that the basement car parking is a well-considered, reasonable and efficient layout and that once the proposal is constructed, the topography of the site will be broadly restored. I acknowledge that the volume of excavation proposed will result in amenity impacts to adjoining properties during the excavation process, however, the excavation for the Option B alternative would also result in amenity impacts to adjoining properties during the excavation process as well as long-term amenity impacts, including cars queuing in Wiston Gardens.
- 62 A reduction in the number of apartments or bedrooms proposed would not substantially change the volume of excavation required. For example, the deletion of 2 car parking spaces (by making two apartments two-bedroom apartments instead of three-bedrooms; or by deleting one apartment) would result in one double garage being removed on the Basement Level, but the remaining double garage would remain and still require the same access ramp and corridor, and the visitor parking space would be required, so that the reduction in excavation would be the volume of one double garage. Only a radical reduction in the accommodation on the site would meaningfully reduce the volume of excavation required for basement car parking.
- 63 Two parking spaces per apartment and one visitor parking space is not excessive. I accept the uncontested findings of the Demographic Study (Ex L)

that the likely future occupiers will be seniors who have a high rate of car ownership and a preference for cars as a mode of transport.

- 64 I accept Mr Tzannes' evidence that the position of the lift core has been carefully considered and that maximising and maintaining solar access to 5A Wiston Gardens, to the south of the site, was a priority. I accept that relocating the lift core to the northern side of the building envelope is undesirable because it would occupy the prized northern orientation and form a backdrop to 2 Wiston Gardens when viewed from the north-east.
- 65 The proposal results in two additional on-street car parking spaces being restored to Wiston Gardens.
- 66 The permitted excavation volume in Figure 14B of B3.4 of DCP 2015 is determined by the development and site area; and does not account for the topography of the site. There is no variable in the formula for a sloping site. The excavation for basement car park has been minimised by placing one level of parking on grade with the street, so that only one basement level below street level is required. The significant volume of excavation required is not as a result of the depth of the basement vertically, but of the steep slope of the site. I am satisfied that it is appropriate to vary the volume of excavation pursuant to control 4 of B3.4 of DCP 2015, to accommodate the maximum and compliant car parking rate in Part E1 of DCP 2015.
- 67 The excavation of the site to provide basement car park enables cars and storage to be accommodated on the site in an unobtrusive manner, and in a manner that is convenient for future residents. The proposal is consistent with the objectives for excavation at B3.4 of DCP 2015, because the proposal is designed and sited to relate to the topography once constructed, by being stepped and terraced down the steeply sloping site; the excavation is necessary to provide the maximum parking rate on the site; there is no contention raised or evidence adduced regarding detrimental cumulative impacts or effects on drainage or soil stability and there are conditions of consent imposed to address the temporary dewatering of the site (Condition A7); and the side setbacks to the basement car parking of 1.5m mitigates

impacts on adjoining properties. I am satisfied that the proposal is consistent with the objectives for earthworks at cl 6.2 of LEP 2014.

Contravention of height of buildings development standard

- 68 The height of buildings development standard for the site is 10.5m.
- 69 The applicant submitted that the proposal is compliant with the height of buildings development standard when the existing ground level on the site, outside of the footprint of the existing building, is used to determine the height of buildings development standard plane overlaid above the site. A portion of the site was excavated for the construction of the existing building and the ground level was lowered by the excavation within the footprint of the existing building. The proposal is greater than 10.5m above the excavated ground level within the footprint of the existing building. The excavation creates an anomaly in the height of buildings development standard plane overlaid above the site, so that there is a step or a dip in that plane that does not reflect in the overall topography of the hill.
- 70 According to Mr McIntyre, the existing ground level is the existing ground level which currently exists on the site, and not the former “natural” ground level that existed prior to the excavation and construction of the existing building. In his opinion, the proposal exceeds the height of buildings development standard.
- 71 The definition of building height in the dictionary of LEP 2014 is:
- building height (or height of building) means—
- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building
- 72 The definition of ground level (existing) in the dictionary of LEP 2014 is:
- ground level (existing) means the existing level of a site at any point.
- 73 The existing level of the site at a point beneath the existing building is the level of the land at that point. I agree with Mr McIntyre that the ground level (existing) within the footprint of the existing building is the extant excavated ground level on the site and the proposal exceeds the height of buildings development standard in those locations where the vertical distance, measured from the excavated ground level within the footprint of the existing building, to

the highest point of the proposal directly above, is greater than 10.5m. The maximum exceedance is 2.01m at the north-eastern corner of the Level 3 balcony awning.

- 74 The prior excavation of the site within the footprint of the existing building, which distorts the height of buildings development standard plane overlaid above the site when compared to the topography of the hill, can properly be described as an environmental planning ground within the meaning of cl 4.6(3)(b) of LEP 2014.
- 75 The applicant provided a written request seeking to justify the contravention of the height of buildings development standard (Ex H).
- 76 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 consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a). As these preconditions are expressed in terms of the opinion or satisfaction of a decision-maker, they are a “jurisdictional fact of a special kind”, because the formation of the opinion of satisfaction enlivens the power of the consent authority to grant development consent (*Initial Action* [14]). The consent authority, or the Court on appeal, must be satisfied that the applicant’s written request has adequately addressed the matters required to be addressed by cl 4.6(3) and that the proposed development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4), as follows:

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

(a) the consent authority is satisfied that:

(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for

development within the zone in which the development is proposed to be carried out, and

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

- 77 On appeal, the Court has the power under cl 4.6(2) 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 the LEC Act, but should still consider the matters in cl 4.6(5) of LEP 2014 (*Initial Action* at [29]).

The applicant's written request to contravene the height of buildings development standard

- 78 The first opinion of satisfaction required by cl 4.6(4)(a)(i) is that the applicant's written request seeking to justify the contravention of a development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3) (see *Initial Action* at [15]), as follows:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard

- 79 The applicant bears the onus to demonstrate that the matters in cl 4.6(3) have been adequately addressed by the written request in order to enable the Court, exercising the functions of the consent authority, to form the requisite opinion of satisfaction (*Initial Action* at [25]). The consent authority has to be satisfied that the applicant's written request has in fact demonstrated those matters required to be demonstrated by cl 4.6(3) and not simply that the applicant has addressed those matters (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [4]).

- 80 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42]-[51] ("*Wehbe*") and repeated in *Initial Action* [17]-[21]:

- the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
- the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;
- the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
- the development standard has been abandoned by the council;
- the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

- 81 The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).
- 82 The applicant's written request justifies the contravention of the height of buildings development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the development standard and the zone are achieved, notwithstanding the non-compliance with the numerical standard.
- 83 The grounds relied on by the applicant in the written request under cl 4.6 must be environmental planning grounds by their nature, and environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* at [23]). I am satisfied that the prior excavation of the site and the consequent distortion of the height of buildings plane over the site, when compared to the topography of the hill, is an environmental planning ground sufficient to justify contravening the development standard. I am satisfied that the focus is on the aspect of the development that contravenes the development standard, being the areas of the building envelope that are directly above the former excavation of the site, and not the development as a whole (*Initial Action* at [24]). I am satisfied that the environmental planning grounds advanced in the written request justify the contravention of the

development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

- 84 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone

- 85 The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest (*Initial Action* at [27]). The consent authority must be directly satisfied about the matters in cl 4.6(4)(a)(ii) (*Initial Action* at [26]).

- 86 The Council submitted that the exceedance of the height of buildings development standard is not in itself problematic; and the impact of the height of the proposal, considered in isolation, is acceptable. However, it is the Council's position that the bulk and scale of the proposal is not consistent with the zone objective to ensure that development is of a height and scale that achieves the desired future character of the neighbourhood, nor the development standard objective to minimise the impact of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion, because the proposal is an overdevelopment of the site.

- 87 I am satisfied that the height of the proposal is consistent with the objectives of the R3 zone and the height of building development standard, for the following reasons:

- The proposal will contribute to providing for the housing needs of the community, with 4 three-bedroom apartments.
- The Demographic Study (Ex L) states that the key demographic change likely to influence the local housing market demand in the future is the significant increase in residents aged over 60 (p 8) and that couples without children make up approximately 30% of the market for apartments in the Woollahra

Local Government Area. The proposal will contribute to the variety of housing in the locality by providing four luxury apartments suitable for seniors, and other household types.

- The proposal is of a height that achieves the desired future character of the area because the proposal is consistent with the height of buildings development standard plane overlaid above the site when the anomaly in that plane, created by the prior excavation of the site, is disregarded. For this reason, I am satisfied that the proposal is within 10.5m above the natural topography of the hill on which the site is located.
- The proposal minimises the loss of solar access to existing buildings by locating the building envelope so that it minimises overshadowing of the windows to living rooms and bedrooms and the private open space of 5A Wiston Gardens.
- The impact on adjoining or nearby properties from disruption of views, loss of privacy and overshadowing and visual intrusion is minimised by the proposal.
- The proposal does not interfere with public views of the harbour and surrounding areas.

Contravention of the FSR development standard

- 88 The FSR development standard for the site is 0.65:1 which represents a gross floor area (GFA) of 538.4m². The proposal has a GFA of 932.07m², which results in a FSR of 1.21:1. The applicant provided a written request seeking to justify the contravention of the FSR development standard (Ex G).

The applicant's written request to contravene the FSR development standard

- 89 The applicant's written request justifies the contravention of the FSR development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the development standard and the zone are achieved, notwithstanding the non-compliance with the numerical standard.
- 90 According to the written request, the design principle of the proposal has been to create a building which has less environmental impact when compared to the impacts on adjoining properties caused by the existing building, or an otherwise complying development, and which positively contributes to the streetscape and is consistent with the desired future character of the locality. The written request claims that the proposal is a better planning outcome on the site, when compared to a compliant building envelope, for the following reasons:

- The proposal has less impact on the views from adjoining properties when compared to the impact on views by the existing building and a compliant building envelope, particularly the views from 5A Wiston Gardens. A compliant building envelope would deliver greater bulk in the south-eastern corner of the site, in the location of the primary view corridor from 5A Wiston Gardens;
- The proposal, with a substantial subterranean portion of the building envelope, has a smaller building envelope located above natural ground level than a compliant building envelope would permit;
- The deep soil landscaped area of the site is compliant with the controls under DCP 2015 and improves the presentation of the site with 40.2m² of deep soil landscaping in the front setback where there is currently no landscaping;
- The materials, colours and terraced form of the proposal result in a proposal that is deferential to the heritage items on either side of the site.

91 The exceedance of the FSR development standard is, according to the written request, a consequence of the excavation required for the basement car park and the steep slope of the site. The apartments will sit directly over the basement, maintaining the rear, western extent of the basement, and therefore some of the rooms at the rear of the apartments are subterranean. It is those subterranean rooms, generally bathrooms and laundries (as well as some bedrooms which open onto a terrace recessed into the building envelope on either side of the proposal) that make up the portion of the GFA that causes the exceedance of the FSR development standard. The portion of the building envelope that is above the natural ground level of the steep slope of the site, according to the applicant, is the portion of the GFA that is compliant with the FSR development standard and makes up the visible bulk of the building envelope on the site. The applicant's written request argues that the deletion of those subterranean rooms, located over the excavated basement dug into the slope of the hill, would not materially change the visible bulk of the building, nor would it reduce the volume of the excavation required because that volume is necessary for the construction of the basement car park.

92 I accept the applicant's justification of the exceedance of the FSR development standard. Once it is accepted that the volume of excavation on the site is reasonable to provide the basement car park, it follows that providing subterranean accommodation over the basement (that meets internal amenity requirements) will not result in additional amenity impacts on adjoining properties, once the development is complete and the landscaping is

established. This circumstance is a sufficient environmental planning ground to account for the exceedance of the FSR development standard. I accept that the building envelope proposed, above the natural ground level of the steep slope of the site, is consistent with the building envelope envisaged by the development standards.

- 93 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone

- 94 I am satisfied that the bulk and scale of the proposal is consistent with the objectives of the R3 zone and the FSR development standard, for the following reasons:

- The bulk and scale of the proposal is compatible with the desired future character of the area, for the reasons that follow.
- I am satisfied that the proposal has minimised adverse environmental effects on the use or enjoyment of adjoining properties.
- The proposal provides adequate provision on the land for deep soil planting and areas of private open space.

Desired future character of the Darling Point residential precinct

- 95 The Council contends that the proposal is an overdevelopment of the site and the bulk, form and scale of the proposal is inconsistent with the desired future character of the Darling Point residential precinct.
- 96 In Mr McIntyre's opinion, "the cumulative non-compliances result in a built form which is excessive in height, bulk and scale and represents an overdevelopment of the site in its context when compared to the existing streetscape character" (Ex 7, par 29). In his view, "the integrity of the 'green belt' at the rear of the subject site, and adjoining properties, is compromised by the substantial encroachment of the proposed development into the rear setback" (Ex 7, par 31).

- 97 According to Mr Tzannes:

"the proposal achieves a scale, bulk and height appropriate to the existing or desired future character of the street and surrounding buildings. The proposal is designed taking into account building alignments, proportions, building type,

articulation, and the manipulation of building elements. The design achieves a high level of articulation, is well proportioned... the proposal improves the public domain by enhancing the appreciation of adjacent and nearby heritage buildings as the architecture is recessive in character and extends landscaping as well as the adjacent stone boundary walls” (Ex 7, pars 32-34).

- 98 The non-compliances of the proposal, primarily the volume of excavation and the FSR development standard, do not result in a building which is excessive in height, bulk and scale. The Council accepted that the exceedance of the height of buildings development standard was not in itself problematic; and that the impact of the height of the proposal, considered in isolation, was acceptable. The non-compliances are a consequence of the excavation necessary for the proposed configuration of the basement car park and the steep slope of the site. The portion of the building envelope that is above the natural ground level of the steep slope of the site, that makes up the visible bulk of the building envelope on the site, is broadly consistent with the building envelope envisaged by the height of buildings and FSR development standard.
- 99 Wiston Gardens does not have the vegetated rear setbacks typical of low density residential development, because the development in the locality is varied and dense and the topography on the high side is part amphitheatre cascading down from the ridge of Darling Point, including the cliff face at the rear of the site. The existing four-storey hip-roofed residential flat building on the site conceals the vegetation at the rear of the site, below the cliff face, when viewed from Steyne Park. The backyard of 5A Wiston Gardens is not a landscaped garden, it is fully built upon to the base of the cliff. The rear of 5A Wiston Gardens includes a small paved terrace at the rear of the dwelling and a contemporary structure in the rear setback, including an office, a discrete landscaped planter over and a swimming pool and cabana positioned above the dwelling at the base of the cliff.
- 100 Wiston Gardens contains a wide range of building types and forms that work together to give the street its unique and pleasing character, framed by the tier of buildings above. The heritage items, the Taj Mahal and the two Leslie Wilkinson houses, make a strong contribution to the streetscape because they are positioned on the high side of Wiston Gardens, well above the road level, and are each unique in their style and presentation. I accept that the future

character of Wiston Gardens is predominately established by the existing buildings in the street, including the existing residential flat buildings and the houses that are heritage listed. However, the zoning of all the properties in Wiston Gardens as R3 Medium Density Residential anticipates the likelihood of non-heritage items being replaced with residential flat buildings. The proposal introduces a contemporary and sufficiently deferential new building into the existing context, that will, once established, contribute positively to the collective quality of diverse architectural works in Wiston Gardens.

- 101 I am satisfied that the proposal, once constructed, will maintain, protect and enhance the unique visual qualities of Sydney Harbour, consistent with cl 25(b) of the SREP.

Internal amenity of apartments

- 102 The Council contends that the proposal does not provide adequate internal amenity for future residents of the proposal because a number of rooms will not receive adequate direct natural light and ventilation.
- 103 I am satisfied that the proposal does provides adequate internal amenity for future occupants and that the subterranean bedrooms (bedroom 2 of Apartment 1, bedroom 3 of Apartment 2, bedroom 2 of Apartment 3 and bedroom 3 of Apartment 4) will receive adequate direct natural light and ventilation because each bedroom includes a façade that opens onto a terrace recessed into the side elevations of the building envelope. Each of these bedrooms has good amenity, with a pleasant outlook, because the bedrooms, although dug into the hill, are orientated to the north or east, towards the fall of the hill. Bedroom 1 of Apartment 3 opens onto a landscaped court created by retaining the ground level at the boundary, giving this bedroom a full façade of glazing that is private and provides good amenity, direct natural light and ventilation.
- 104 The bedrooms at the rear of apartments have high levels of internal amenity through the provision of direct natural light and natural ventilation, via the small terraces recessed into the side elevations, consistent with the objectives of B3.5.5 of DCP 2015. Although some non-habitable rooms, including bathrooms, do not have a window, they are spacious and will be mechanically

ventilated, as required by Australian Standards (Condition C.23). The proposal is consistent with the diagram at Figure 19A of B3.5.5 of DCP 2015, because no habitable room is orientated to the excavated face of the hill.

- 105 The size and location of the roof terrace and cabana structure meet the requirements C15 of B3.7.1 of DCP 2015 because the roof terrace is well-designed and it is consistent with the position on the hill and amenity of the elevated outdoor entertaining areas of the adjoining properties at 19A Eastbourne Street and 5A Wiston Gardens.

Impact on the amenity of adjoining properties

- 106 The Council contends that the proposal has an unacceptable impact on the amenity of residents in the vicinity of the site because of the excessive size of the trafficable open terrace areas, particularly Apartments 3 and 4, which result in unacceptable adverse acoustic and visual privacy impacts on residents at 19A Eastbourne Road, 2 Wiston Gardens and 5A Wiston Gardens.
- 107 The spatial layout of the proposed apartments is orientated to the site's southern boundary. The terraces are on the eastern side of each apartment, and are approximately triangular, so that each terrace has an orientation to the north and south-east to Wiston Gardens, with the bulk of the area of the terrace located in the north-eastern corner of each terrace. The proposal includes acoustic barrier on the eastern side of the terraces, 1.8m above the finished floor level (FFL), on Levels 3 and 4. The proposal includes laminated glazing and acoustic seals to the windows in the northern façade of the proposal.
- 108 The roof terrace is located on the northern side of the uppermost level, with a swimming pool on the southern side. The roof terrace includes an acoustic barrier on the northern and southern sides of the terrace, 1.8m above FFL.
- 109 The acoustic experts agreed that the ADG does not stipulate numeric acoustic criteria for compliance. The experts broadly agreed that building separation between habitable rooms and balconies is an effective means of achieving acoustic amenity between dwellings.
- 110 According to Mr Wei, the noise generated by occupants of the proposal will be "neighbourhood noise". In his opinion, in a typical backyard scenario, two

properties are commonly separated by a 1.8m dividing fence, and the noise reduction of the fence is approximately 10dB (Ex S, p 3). Mr Wei recommended, as an acoustic mitigation measure, a similar acoustic separation performance for northern side of the eastern terraces in the form of acoustic barriers.

- 111 Mr Haydon is concerned that the large terraces can each accommodate “a reasonably significant number of people at any one time” and “each doubling [of the number of people on a terrace] could reasonably be estimated to add 3 dB to the received sound level of the neighbours”. Mr Haydon, in the experts’ joint report, is critical of the mitigation measures proposed by the applicant, including the “large gap... between the top of the recommended 1.8m acoustic screen and the soffit above, in addition to noise reflected off any ceiling above the terrace areas”, and raised the issues of “potential canyoning effects” and “build-up of reverberant noise within any undercroft areas”. In his opinion, the terrace areas should be reduced and the setbacks of the terraces increased; the number of people on the terraces and the hours of use should be limited; adequate acoustic screening of the terraces should be included; and the use of amplified music should be restricted on the terraces.
- 112 The recessed terraces along the northern and southern sides of the proposal are small and off a bedroom, located to provide the subterranean rooms with an outlook and opportunity for ventilation and solar access, and will not unreasonably impact on the acoustic amenity of adjoining properties.
- 113 I am satisfied that the eastern terraces are well designed and proportionate to the internal areas of the apartments. They are not excessive in size. The proposed apartments provide appropriately sized private open space to enhance residential amenity, consistent with objective 4E-1 of the ADG. The ADG at 4E stipulates minimum areas for balconies, not maximum areas, and includes images of balconies and terraces that are significantly larger than the minimum area for a 3+ bedroom apartment of 12m², including Figure 4E.8. A larger terrace does not necessarily result in increased noise levels, because the dwelling houses the same number of occupants regardless of the size of the terrace. I accept that the occupants of each apartment may occasionally

use their eastern terrace for entertaining guests. The acoustic screens to the eastern side of the terraces on Levels 3 and 4 will reasonably protect the acoustic amenity of 2 Wiston Gardens (and Condition I.9 addresses noise control) and the privacy screens on the northern elevation will protect the visual amenity of 2 Wiston Gardens. The terraces are an important architectural element in the design of the proposal as they contribute to the form and articulation of the building, by orientating the built form to align with the street boundary and by creating the terracing effect up the hill. The eastern terraces overlook Wiston Gardens and do not unreasonably impact on the privacy of adjoining properties.

- 114 The swimming pool terrace of 19A Eastbourne Road is RL20.29 (Ex E). The FFL of the proposed cabana is RL 19.2. There is currently a feature wall and fence at the southern end of the swimming pool terrace of 19A Eastbourne Road. The roof terrace of the proposal is over 1m lower than the pool terrace of 19A Eastbourne Road, and it is adjacent to the far end of the swimming pool terrace of 19A Eastbourne Road. Only the roof of the cabana will be visible from the swimming pool terrace of 19A Eastbourne Road above the wall and pool fence, other than when standing at the far southern end of the swimming pool terrace and overlooking the shared boundary. There are privacy louvres and an acoustic screen at the northern boundary of the proposed roof terrace. A condition of consent requires the solar panels on the roof of the cabana to be angled to reduce reflectivity (Condition C.1(b)). I am satisfied that the proposed cabana and roof terrace and will not unreasonably impact on the amenity of the swimming pool area of 19A Eastbourne Road.
- 115 The elevated swimming pool terrace of 5A Wiston Gardens is at RL16.79. The existing ground level between the site and 5A Wiston Gardens, at the base of the cliff, is RL20.66 (Ex S). There is no terrace area adjacent to the shared boundary in the location of the existing swimming pool terrace of 5A Wiston Gardens. The southern side setback of the site is landscaped and there is currently dense vegetation along the northern side of 5A Wiston Gardens towards the rear of the property. I am satisfied that the roof terrace and cabana of the proposal will not unreasonably impact on the amenity of the cabana and swimming pool of 5A Wiston Gardens.

- 116 The proposal is consistent with the objectives for acoustic and visual privacy under B3.5.4 of DCP 2015. The proposal, including the acoustic mitigation measures, provides adequate acoustic privacy for occupants and neighbours; provides adequate visual privacy for occupants and neighbours; and ensures good levels of environmental amenity for the occupants of the proposal. Acoustic certification of the mechanical plant and equipment is required by Conditions C.19-C.21.
- 117 The siting, orientation and spatial layout of the proposal reasonably protects against sound transmission between external and internal spaces, and between apartments, and between apartments and adjoining properties, consistent with objective 4H-1 of the ADG.
- 118 The side setbacks are consistent with the minimum side setbacks for residential flat buildings, at control 2 and figure 5B of B3.2.3 of DCP 2015. The side setbacks are articulated by recessed terraces within the building envelope. As the proposal complies with the control above ground level, the consent authority, or the Court exercising the functions of the consent authority, is not to require a more onerous standard with respect to that aspect of the development, pursuant to s 4.15(3A)(a) of the EPA Act.

Super Studio planning principle

- 119 The Council raised the Court's planning principle in *Super Studio v Waverley Council* (2004) 133 LGERA 363; [2004] NSWLEC 91 (*Super Studio*) as being relevant to the determination of this appeal.
- 120 *Super Studio* has become shorthand for a presumption in planning appeals that the benefit of landscaping in providing any visual privacy between properties must be disregarded. *Super Studio* concerned an application for a roof terrace in Bronte which was on the roof of a semi-detached dwelling in an area where there were no other roof terraces. The issue was overlooking of adjoining backyards from the roof terrace. The roof terrace was to include a planter box as the sole means of providing visual privacy to affected neighbours. The [then] Senior Commissioner held that landscaping, when it was proposed as the main safeguard against overlooking, should be given minor weight (at [6]). The decision was specific to those facts and although it

has been adopted as a planning principle, it should not be expanded and simplified to an assumption that landscaping should be universally disregarded as a means of providing visual privacy between properties, particularly when the private open space on each property is at a comparable level, there is ample deep soil adjacent to shared boundaries and a landscaping plan forms part of the application.

- 121 The proposal includes deep soil landscaping in the side setbacks, at the rear of the property, on the roof terrace and in the front setback. The proposal includes generous planter boxes on the northern and eastern sides of the eastern terraces. The proposal includes the preservation of trees and landscaping (Conditions B.3-B.4 and E.9-E.12). Landscaping is not proposed as the main safeguard against overlooking of adjacent properties. The spatial layout and orientation of the apartments, the privacy louvres and acoustic screens, and the landscaping, all contribute to a decorous proposal that is sufficiently responsive to the opportunities and constraints of the site.

Impact on the heritage significance of the adjoining heritage items

- 122 The Council contends that the proposal fails to conserve the heritage significance of the adjoining heritage items.
- 123 I accept the agreement of the heritage experts that it is acceptable for the existing building on the site to be demolished.
- 124 I accept the agreement of the heritage experts that the proposal will have no impact on the heritage items at 15 Eastbourne Road and 21 Eastbourne Road.
- 125 In Mr Oultram's view, the proposal, "introduces a contemporary element between the adjoining heritage items that is over-scaled, larger than the current building on the site and that is out of kilter with the Inter War character of the area". In his opinion, the design of the proposal is well articulated at the front, but less so at the side elevations and it will dominate the adjoining heritage items and provide for largely unarticulated facades along the side boundaries. According to Mr Oultram, the curvature of the corners of the proposal is a weak gesture, and the design could have better responded to the established Inter War character of Wiston Gardens. He is concerned that the proposal occupies the rear portion of the site and replaces the garden with built form, where the

adjoining heritage items include a break in built form at the rear of both dwellings. In Mr Oultram's view, the proposal will form an unacceptable backdrop to the adjoining Taj Mahal at 2 Wiston Gardens and it will impact on the setting of the adjoining Sea Dragon at 5A Wiston Gardens. In his view, the proposal is considerably larger than the existing building and is less articulated.

- 126 In Mr Oultram's opinion, the proposed front setback and stepping balconies will improve views to and from Sea Dragon at 5A Wiston Gardens, but this does not compensate for the increased bulk and scale elsewhere on the site. According to Mr Oultram, although the existing building overshadows the northern courtyard and dwelling at 5A Wiston Gardens, the additional areas of overshadowing of 5A Wiston Gardens is not justified and will impact detrimentally on the heritage significance of the place.
- 127 According to Mr Davies, Wiston Gardens has a mixed diversity of styles and scale. The proposal, in his view, achieves a better relationship with its neighbours than the existing building because the ground level façade of the existing building is five garages and the form of the existing building dominates the heritage items on either side. In Mr Davies' opinion, the rear yards of the adjoining dwellings do not provide unbuilt upon landscaped open space at the rear of the dwellings because Sea Dragon at 5A Wiston Gardens has a pool and cabana structure at a higher level than the dwelling, and the pool area of 19A Eastbourne Avenue is at a higher level behind the Taj Mahal at 2 Wiston Gardens. The proposal retains the mature vegetation that frames the site and achieves a redistribution of form that is complementary to its context.
- 128 The proposal will not form a backdrop to the Taj Mahal at 2 Wiston Gardens. The site can only be seen from the portion of Steyne Park closest to the sea wall, and the backdrop to 2 Wiston Gardens when viewed from Steyne Park is part of the grassy hill to the north-west behind the Taj Mahal, and the elevated swimming pool structure of 19A Eastbourne Road. This is because the Taj Mahal is orientated south towards the street and its southern boundary rises up the hill in a north-westerly direction, away from the Taj Mahal, so that the rear part of the site does not form a backdrop to the street front elevation Taj Mahal when viewed from any position in Steyne Park.

129 I am satisfied by Mr Tzannes' evidence that the architectural form of the proposal is appropriate to the context and I accept that he has sought to subtly acknowledge the Inter-War character of Sea Dragon by curving the corners of the cantilevered terraces, rather than mimicking elements of the historic styles of nearby buildings. Mr Tzannes cited the terracing of the proposal, the dark colour scheme and the extensive use of landscaping elements, as the means by which the proposal fits appropriately into the context and does not compete with the adjoining heritage items. Wiston Gardens is comprised of a diverse mix of typologies and styles, and together the existing buildings, combined with the coastal topography, make up the unique and varied character of the streetscape. The proposal introduces a contemporary and sufficiently deferential new building into the existing context.

130 I accept the agreement of the planning experts that the overshadowing of Sea Dragon at 5A Wiston Gardens has been minimised and is consistent with the relevant controls of DCP 2015. I am satisfied that the more recessive form of the proposal, when compared to the scale, form and siting of the existing building, represents an overall improved relationship with 5A Wiston Gardens.

Apartment mix

131 The Council contends that the proposal is inconsistent with the objectives of Section 4K Apartment mix in the ADG. Apartment mix refers to the percentage of apartments with different numbers of bedrooms in a development.

132 The proposal does offer a range of three-bedroom apartments, because the four apartments differ in floor area and amenity, from Apartment 1 to the house-like proportions and facilities of Apartment 4. As the proposal is for luxury apartments in an ideal geographic location, an apartment with three-bedrooms is just as likely to be occupied by a smaller household in this location. A reduction in the number of bedrooms proposed would not substantially change the volume of excavation required. For these reasons, I am satisfied that the proposal does cater for different household types, at the upper end of the market, now and into the future, and that there is not a substantive benefit in reducing the number of bedrooms in any one or more apartments.

Conditions of consent

133 The parties disagreed on the imposition of condition C.1(d), as follows:

“d) Acoustic screening to the north-facing side of the roof terrace is to be obscure glazing to ensure visual privacy impacts to adjoining properties are mitigated.”

134 Council's position is that the condition should be imposed because acoustic screening with obscure glazing must be provided to the north-facing side of the roof terrace to mitigate impacts on the visual privacy of 19A Eastbourne Road and 2 Wiston Gardens. There is a large section of the roof terrace which proposes no obscure glazing or privacy screening. Landscaping cannot be relied upon to mitigate privacy impacts, but in any event, the area of the terrace which is not proposed to contain privacy screening or obscure glazing is in close proximity to the pool area of 19A Eastbourne and provides only a 650mm wide planter containing *pandorea pandorana* which is a climbing vine and will not provide any visual privacy to 19A Eastbourne Road or 2 Wiston Gardens.

135 The applicant's position is that condition C.1(d) should not be included because there is no need for obscure glazing of the acoustic screen to the north-facing side of the roof terrace because the proposed development already provides for frosted/obscured glazing for the bathroom and kitchenette of the rooftop cabana. The proposal also includes privacy louvres and a clear glazed acoustic screen to the northern boundary. The acoustic screen is setback 2.65m from the boundary and also separated from the boundary by landscaping. This setback and landscaping is adequate to mitigate visual privacy impacts to adjoining properties, given the topography and locality.

136 I accept the applicant's position for the reasons given and condition C.1(d) is deleted.

137 The parties agreed to conditions being imposed on the consent requiring the design architect's firm, Tzannes, to remain engaged as the project's architect until the issue of an occupation certificate, in order to ensure the design excellence promised by the application is realised in the built project (Conditions C.25, E.34 and F.9).

Conclusion

- 138 The granting of consent to the proposal does not create a planning precedent, because the characteristics of the site and the merits of the proposal are unique.
- 139 I accept the reasoning of the written requests to vary the height of buildings and FSR development standards for the site and I am satisfied that the variations are explained by environmental planning grounds that are sufficient to justify those variations, and that the proposal is consistent with the R3 Medium Density Residential zone objectives and the height of buildings and FSR development standard objectives.
- 140 I am satisfied that the proposal is consistent with the objectives for earthworks under cl 6.2 of LEP 2014 because the proposal is designed and sited to relate to the topography, by being stepped and terraced down the steeply sloping site, and the volume of excavation proposed is required to provide the maximum parking rate in a basement car park on the site.
- 141 I am satisfied that the proposal is consistent with the desired future character for the Darling Point Precinct, because the proposal is of a height, bulk and scale that is compatible with the surrounding buildings and provides for view sharing from the adjoining property at 5A Wiston Gardens. The proposal introduces a contemporary and sufficiently deferential new building into the existing context, that will, once established, contribute positively to the collective quality of diverse and pleasing architecture of Wiston Gardens.
- 142 The proposal is consistent with the objectives for the rear setback control of B3.2.4 of DCP 2015. The proposal provides private open space to each apartment in the form of terraces that are well designed and proportionate to the internal areas of the apartments, and they do not unreasonably impact on the privacy of adjoining properties. The proposal does not result in an unreasonable sense of enclosure at the rear of the site. The proposal includes deep soil areas for landscaping along the side boundaries, at the rear of the site and in the front setback.
- 143 I am satisfied that adequate regard has been given to the design quality principles and the objectives specified in the ADG.

Orders

144 The Court notes:

- (1) That Woollahra Municipal Council as the relevant consent authority agreed, pursuant to cl 55 of the Environmental Planning and Assessment Regulation 2000, to the applicant amending Development Application No. 325/2020/1.
- (2) That Woollahra Municipal Council has lodged the amended development application on the NSW planning portal on 13 September 2021.
- (3) The applicant filed the amended application with the Court on 15 September 2021.

145 The orders of the Court are:

- (1) The applicant is to pay the respondent's costs thrown away as a result of the amendment of the development application 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 No. 325/2020/1 for the demolition of all the existing structures, removal of existing vegetation, excavation to accommodate two levels of basement parking and construction of a three and four storey residential flat building comprising four apartments, a plunge pool for one apartment and associated landscaping, is approved, subject to the conditions of consent at Annexure A.
- (4) The exhibits, other than Exhibit 1, are returned.

Susan O'Neill

Commissioner of the Court

Annexure A (888910, pdf)

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