



Land and Environment Court
New South Wales

Case Name: Jasrina Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1647

Hearing Date(s): 30 July 2021

Date of Orders: 25 October 2021

Decision Date: 25 October 2021

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:
(1) The Applicant's written request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 seeking a variation to the development standard for height of building is upheld.
(2) The appeal is upheld.
(3) Consent is granted to Development Application No. DA 10/2021 for alterations and additions to a three-storey residential apartment building above a basement level, comprising four x three bedroom units, one x four bedroom unit and with a flat roof form, at 1A Benelong Crescent, Bellevue Hill, subject to the conditions contained in Annexure A.
(4) The exhibits, other than 1, 3, B, G and H, are returned.

Catchwords: DEVELOPMENT APPLICATION – residential apartment development – alterations and additions – view impacts – cl 4.6 written request – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, s 8.7
Environmental Planning and Assessment Regulation 2000, cl 55
Land and Environment Court Act 1979, ss 34, 39

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 55—Remediation of Land, cl 7.1
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005
Woollahra Local Environmental Plan 2014, cll 4.3, 4.4, 4.6

Cases Cited: Tenacity Consulting Pty Ltd v Warringah Council (2004) 134 LGERA 23; [2004] NSWLEC 140
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

Texts Cited: Woollahra Development Control Plan 2015
Apartment Design Guide
Land and Environment Court, COVID-19 Pandemic Arrangements Policy (April 2021)

Category: Principal judgment

Parties: Jasrina Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
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S Patterson (Solicitor) (Respondent)

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File Number(s): 2021/74314

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JUDGMENT

1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application DA 10/2021 (the application) by Woollahra Municipal Council (the Respondent). The application sought consent for the construction of a three-storey residential apartment building above a

basement level, comprising four x three bedroom units, one x four bedroom unit and with a flat roof form, at 1A Benelong Crescent, Bellevue Hill (the site).

- 2 Prior to the hearing, on 9 June 2021, the Court granted leave to the Applicant to amend the Development Application and rely upon amended plans. This amended application was tendered as Exhibits D and E in these proceedings, and forms the subject of this appeal.
- 3 The key features of the amended application continue to comprise a three-storey residential apartment building above a basement level, consisting of four x three bedroom units, one x four bedroom unit and with a flat roof form. The various elements of the proposal include:
 - (1) A ground level and level one each containing two x three bedroom units (units A-D) and a level two containing one x four bedroom unit (penthouse).
 - (2) A main pedestrian entrance via the forward portion of the western side setback.
 - (3) A swimming pool proposed to the eastern section of the rear open space area associated exclusively with the rear ground level unit (unit B).
 - (4) A second swimming pool proposed at level two associated exclusively with the proposed penthouse.
- 4 Consistent with the Court's *COVID-19 Pandemic Arrangements Policy*, published on 6 April 2021, the matter was conducted by Microsoft Teams.
- 5 In lieu of the usual site view, the Court benefitted from a series of photographs and video footage obtained from a drone to describe the site, its context and various relationships between adjacent properties in the immediate vicinity.
- 6 Upon commencement of the hearing by MS Teams, the Court also benefitted from oral submissions made by two affected neighbours at Unit 5, 3 Benelong Crescent and at Unit 12, 46 Birriga Road, and via MS Teams with its video capability, I was able to better appreciate their substantive concerns for view loss from specific vantage points within each of the two dwellings.
- 7 In summary, the resident owner of Unit 5, 3 Benelong Crescent enjoys sweeping views from his upper level apartment and its associated balcony

terrace to the north towards the eastern extent of Sydney Harbour, and a view east towards Bondi, the ocean and the horizon.

- 8 The resident owner of Unit 12, 46 Birriga Road enjoys an outlook from her upper-level apartment to the north that offers a small, partial and filtered view towards Sydney Harbour, including (from some vantage points within the apartment) a portion of Shark Island.

The site and its context

- 9 The site is located at 1A Benelong Crescent, Bellevue Hill and is legally described as Lot 15 in DP 1273479.
- 10 The combined allotment is regular in shape. The site has a southern frontage to Benelong Crescent of 16.925m in length, a western side boundary of 63.9m in length, an eastern side boundary of 68.685m in length and a northern (rear) boundary of 15.715m in length. The site has a total area of 1,045sqm by survey.
- 11 The previous dwelling house has been demolished and a basement level has been partially constructed in accordance with an earlier consent granted by the Respondent on 3 November 2014, and then subsequently modified on 10 December 2020 (DA 143/2014/2).
- 12 The immediate vicinity of the site is characterised by steeper topography and an irregular, often curvilinear, street pattern influenced by the topography. The locality figures a reasonably consistent pattern of residential apartment buildings estimated to date from the inter-war period onwards, and including a number of more recent apartment developments.
- 13 To the east, the subject site boundary adjoins four separate properties, each comprising residential apartment buildings. These include 1 Benelong Crescent occupied by a six-storey residential apartment building, 44 Birriga Road occupied by a three-storey residential apartment building, 46 Birriga Road occupied by a three-storey residential apartment building, and 48-50 Birriga Road occupied by a three-storey residential apartment building.
- 14 To the west, the site boundary adjoins a single property, comprising a three-storey residential apartment building at 3 Benelong Crescent.

- 15 The site is situated on an elevated topographical spur that offers significant outlook and views - particularly north towards the eastern extent of Sydney Harbour and also east towards Bondi and the ocean.
- 16 The eastern boundary of the site is accompanied by a significant change in level of approximately two to three storeys, which results in the eastern neighbouring properties at 1 Benelong Crescent and 44, 46 and 48-50 Birriga Road being each sited lower than the subject property.

The planning controls

- 17 The site is zoned R3 Medium Density Residential pursuant to the Woollahra Local Environmental Plan 2014 (WLEP). Residential apartment development is permissible with consent.
- 18 The further relevant planning controls are as follows:
 - (1) State Environmental Planning Policy No 55—Remediation of Land (SEPP 55).
 - (2) State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65).
 - (3) State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (BASIX).
 - (4) Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005.
 - (5) WLEP.
 - (6) Woollahra Development Control Plan 2015 (WDCP).
 - (7) Apartment Design Guide (ADG).

History of the Development Application

- 19 The Respondent's Amended Statement of Facts and Contentions, dated 23 June 2021 and forming Exhibit 1 in these proceedings, sets out the history of the application. A concise summary follows.
- 20 The application was lodged with the Respondent on 7 January 2021.
- 21 The application was notified between 27 January and 11 February 2021.
- 22 The Respondent received 29 submissions in response to public notification, citing a range of planning issues, including - most relevantly - view loss, loss of

visual and acoustic privacy, inadequate setbacks to the front and rear of the lot, concerns for building height and floor space, bulk and scale.

- 23 On 16 March 2021, the Applicant filed a Class 1 appeal against the deemed refusal of the application.
- 24 On 26 May 2021, a s 34 conciliation conference was held where, on a without prejudice basis, amended documents were provided and discussed. The parties agree that the conference was terminated primarily due to the Respondent's view loss contention remaining unresolved.
- 25 By way of a Notice of Motion, the Applicant sought leave from the Court on 3 June 2021 to amend the Development Application and rely upon amended plans. Leave to amend the application was granted by the Court on 9 June 2021.
- 26 The Respondent notified owners of adjoining properties of the amended application between 15 and 23 June 2021. Four submissions were received in response, which generally reiterated the range of issues raised during the notification of the original application, and most relevantly, maintained concerns for view loss.
- 27 The Applicant's Amended Statement of Facts and Contentions in Reply, dated 30 June 2021 and forming Exhibit B in these proceedings, sets out some further clarification on the status of the amended application, and also the existing operational consent applying to the site.
- 28 On 3 November 2014, the Respondent issued a development consent for the site (DA 143/2014) for the demolition of the existing dwelling and construction of a three-storey residential apartment building with basement car parking and strata subdivision.
- 29 The 2014 consent has been rendered operational and works have commenced on the site in accordance with a Construction Certificate issued on 28 October 2019 (C190171-01).
- 30 In about October 2020, the existing dwelling on the site was demolished. In December 2020, piling works were undertaken.

- 31 On 7 January 2021, the application subject of these proceedings was lodged with the Respondent. Later in January 2021, excavation for the basement commenced.
- 32 The Applicant notes that since the grant of consent in 2014, certain planning controls applicable to the site have changed. The earlier 1995 WLEP has been amended, resulting in changes to two key development standards.
- 33 The development standard for height of buildings set out in cl 4.3 of the WLEP was increased to 10.5m having previously been 9.5m.
- 34 The development standard for floor space ratio set out in cl 4.4 of the WLEP was increased to 1:1 having previously been 0.75:1.
- 35 The 1995 WLEP was also amended to remove an earlier lot frontage control, which is no longer a relevant planning consideration.
- 36 The 2014 consent relied on the favourable consideration of a SEPP 1 objection (which was a relevant planning instrument at the time) to grant consent for development with a:
- (1) Height of building of 10m.
 - (2) Floor space ratio of 1.03:1 when measured using the definition of Gross Floor Area (GFA) relevant at the time, or of 0.83:1 when measured using the definition of GFA set out in the current WLEP.
- 37 Although ultimately not material to my decision in this matter, I note that the Development Application for which consent is sought in these proceedings must be characterised as alterations and additions to the residential apartment building the subject of the operational development consent granted in 2014.

The issues

- 38 The contentions set out by the Respondent can be found in the Amended Statement of Facts and Contentions forming Exhibit 1 in these proceedings.
- 39 These contentions are summarised as follows:
- (1) Inaccurate gross floor area calculations.
 - (2) View impacts upon adjoining properties.
 - (3) Acoustic and visual privacy impacts upon adjacent side properties.
 - (4) Visual privacy impact upon the private open space to Unit B.

- (5) Public interest.
 - (6) Any additional issues of contention resulting from a determination of the development application by the Local Planning Panel.
 - (7) Broadleaf Paperbark trees.
 - (8) Insufficient documentation of the proposed deletion of the Basement Level from the proposal.
 - (9) Potential height of building non-compliance.
 - (10) Insufficient site drainage information.
 - (11) Inadequate view analysis.
 - (12) Inadequate cl 4.6 written statement to vary the 10.5m the height of building development standard.
- 40 The parties and their experts now agree the amended application - Exhibits D and E in these proceedings, being the architectural plans and a revised basement plan - incorporates clarifications and design changes that collectively work towards resolving a series of the contentions.
- 41 To that end, it is agreed between the parties that the amended application resolves Contentions 1, 3, 4, 6, 7, 8, 9 and 10, and hence these are no longer pressed by the Respondent.
- 42 It is helpful to group the remaining live contentions into a series of planning and merit issues as follows:
- (1) Whether the amended application should be refused as it results in unreasonable view impacts to Units 4 and 5 at 3 Benelong Crescent and Unit 12 at 46 Birriga Road.
 - (2) In considering these view impacts, making an assessment of view loss against the planning principle established by *Tenacity Consulting Pty Ltd v Warringah Council* (2004) 134 LGERA 23; [2004] NSWLEC 140 (*Tenacity*).
 - (3) In considering these view impacts, making an assessment against the relevant objectives and controls set out in the WDCP, which seek to achieve view sharing, and in doing so make specific reference to the planning principle established by *Tenacity*.
 - (4) In considering these view impacts, whether the Applicant's visual impact assessment is adequate so far as the extent of view impacts incurred at Unit 12, 46 Birriga Road.
 - (5) Merit considerations relating to the proposed rear setback adopted in the amended application, when assessed against the objectives and

controls as set out in the WDCP, including any associated impacts upon view loss.

- (6) Whether the amended application is in the public interest having regard to the matters raised in submissions.
- (7) The adequacy or otherwise of the Applicant's cl 4.6 written request seeking to justify a proposed variation to the height of building development standard as set out at cl 4.3 of the WLEP.

The evidence

- 43 The Court was assisted by experts in planning and visual impacts, who conferred to prepare a joint expert report. The experts are Mr David Booth (planner) for the Respondent, and Ms Larissa Brennan (planner) and Mr John Aspinall (architect) for the Applicant. Their joint expert report forms Exhibit 3 in these proceedings.
- 44 At par 7 of the joint report, the experts identify their general areas of agreement. Central to this agreement, and relevant to this matter, are the following points:
 - (1) Agreement that the extent of view loss from the kitchen of Unit 5, 3 Benelong Crescent is reasonable.
 - (2) View sharing should be achieved with regard to the objectives and controls set out at B3.5.3 of the WDCP.
 - (3) The rear setback of the amended application does not comply with the numeric controls (determined at 60% of the site depth) as set out at B3.2.4 of the WDCP.
 - (4) Despite this non-compliance, the proposed rear setback is generally greater than the rear setbacks of neighbouring properties at 3, 5, 7 and 9 Benelong Crescent.
- 45 The experts commenced oral evidence with reference to the drone footage forming Exhibit K in these proceedings. This footage was useful to indicate the various relationships between the subject site and the affected immediate neighbouring properties.
- 46 Under cross examination, Mr Aspinall was taken to two versions of his Visual Impact Assessment, dated June and July 2021 respectively. These reports form Exhibits G and J in these proceedings.
- 47 Mr Aspinall noted that his assessment of the reasonableness of view impacts resulting from the amended application upon the three affected neighbouring

properties has been guided by applying the planning principle derived from *Tenacity*.

- 48 In further forming this opinion, Mr Aspinall noted that view loss resulting from the amended application occurs only across side boundaries of neighbouring properties, and similarly occurs on a basis where the amended application complies with the principal development standards for height of building and floor space ratio as set out in cll 4.3 and 4.4 of the WLEP.
- 49 Mr Aspinall accepted however, that in forming this view he had not explicitly considered the WDCP rear setback non-compliance as a contributor to view loss, instead generally limiting his assessment to view impacts attributable to a proposal that complies with the WLEP principal development standards.
- 50 Mr Aspinall also accepted that although some level of view loss arises as a consequence of non-compliance with the rear setback controls of the WDCP, this is “not fundamental” to the steps set out in *Tenacity*.
- 51 In a summary of his oral evidence, Mr Aspinall set out at high level - guided by the planning principle established in *Tenacity* - the basis for his overall assessment of the acceptability of view impacts:
- (1) Views across a side boundary are assessed as being more difficult to protect than those across a front or rear boundary.
 - (2) The easterly views towards the ocean available from Units 4 and 5, 3 Benelong Crescent do not represent the primary views from these apartments.
 - (3) The northerly view to water from Unit 12, 46 Birriga Road represents a “tiny” proportion of the overall arc of view available.
 - (4) Despite the “personal value” attributed to this view by the resident objector, application of the *Tenacity* principle obliges an objective assessment of value.
- 52 In his oral evidence, Mr Booth noted that both the ADG and WDCP establish a basis for determining an appropriate rear setback for any proposed development, and indicated his view that both should be read together.
- 53 Mr Booth accepted that the objectives of the rear setback control, as set out at B3.2.4 of the WDCP, do not include view sharing. Rather, Mr Booth accepted that the objectives of rear setback controls is to achieve acceptable privacy

along with other planning considerations including for open space and solar access.

- 54 Mr Booth agreed under cross examination, that the amended application did not result in privacy or overshadowing concerns.
- 55 Mr Booth also agreed that the existing 2014 consent does not comply with the rear setback control, noting that the amended application sought to further reduce the rear setback by approximately 900mm.
- 56 Again under cross examination, it was put to Mr Booth that since the amended application met the relevant objectives of B3.2.4 as set out in the WDCP, that application of the numeric controls for the rear setbacks are therefore not required.
- 57 Finally, Mr Booth accepted that the planning principle set out in *Tenacity* suggests that any non-compliance with a building envelope established by the planning controls is “a consideration” in the assessment of view impacts.
- 58 Turning then to the question of the adequacy of the Applicant’s cl 4.6 written request - seeking to vary the height of building development standard set out at cl 4.3 of the WLEP - the planning experts, Ms Brennan and Mr Booth, agreed that the exceedance of the height of building development standard is technical in nature, relatively minor in its extent, and capable of being supported.
- 59 Based on the oral evidence provided by Ms Brennan and Mr Booth, I granted leave to the Applicant to further amend the cl 4.6 written request, which was subsequently filed with the Court during the hearing and tendered as Exhibit L.

Findings

- 60 I am satisfied the Development Application, as amended, may be granted consent, subject to conditions. My reasons for this determination are set out in the following paragraphs.
- 61 As noted earlier in this judgment, it has been helpful to group the various live contentions in this case. I now further distill the remaining issues into three key planning and merit matters as follows:
- (1) Whether the amended application should be refused as it results in view impacts to Units 4 and 5 at 3 Benelong Crescent and Unit 12 at 46

Birrigha Road. In considering these view impacts, making an assessment against the planning principle established by *Tenacity* and also against the relevant objectives and controls set out in the WDCP, which seek to achieve view sharing.

- (2) Whether the amended application satisfies merit considerations relating to the proposed rear setback when assessed against the objectives and controls as set out in the WDCP, and including any associated impacts upon view loss.
- (3) The adequacy or otherwise of the Applicant's cl 4.6 written request seeking to justify a proposed variation to the height of building development standard as set out at cl 4.3 of the WLEP.

62 Firstly, on the question of view impacts, view sharing and the reasonableness of any view loss, the parties directed the Court to the planning principle established by *Tenacity*. At [25]-[29], Senior Commissioner Roseth states:

“25 The notion of view sharing is invoked when a property enjoys existing views and a proposed development would share that view by taking some of it away for its own enjoyment. (Taking it all away cannot be called view sharing, although it may, in some circumstances, be quite reasonable.) To decide whether or not view sharing is reasonable, I have adopted a four-step assessment.

26 The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

27 The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

28 The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

29 The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more

skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable.”

- 63 The next consideration in the assessment of view impacts is described at B3.5.3 of the WDCP - public and private views - which relevantly states:

“Private views

View sharing concerns the equitable distribution of views between properties. The view sharing controls in this DCP seek to strike a balance between accommodating new development while providing, where practical, reasonable access to views from surrounding properties.

Development should be designed to reflect the view sharing principles in *Tenacity Consulting v Warringah Council [2004] NSWLEC 140*.”

- 64 This same section of the WDCP then goes on to detail a series of objectives and controls for the sharing of private views. In the context of this particular case, the relevant objective and control are as follows:

“[Objective] O3

To encourage view sharing as a means of ensuring equitable access to views from private property.

[Control] C5

Development is sited and designed to enable a sharing of views with surrounding private properties, particularly from the habitable rooms (refer to Figures 17 and 18).”

- 65 Hence, I next apply this relevant section of the WDCP, along with the planning principle established by *Tenacity*, to determine the acceptability or otherwise of view impacts upon the three affected neighbouring properties.
- 66 Initially, considering Unit 4, 3 Benelong Crescent, the first step in *Tenacity* requires an assessment of the value of the view to be affected.
- 67 I characterise the views available from Unit 4 to be in two parts, a sweeping view, generally to the north across Sydney Harbour and to the north shore, and a more tightly focused easterly view to the coast in the vicinity of Bondi, where the ocean and horizon are visible, but not the shoreline or beach, which are obstructed by the intervening topography.
- 68 I assess the northerly view to be highly valuable and the easterly view to be of considerable value.

- 69 It is agreed by the parties' experts - and I am satisfied - that the amended application will not affect the northerly Harbour view and therefore I do not consider this component of the view further.
- 70 The second step in *Tenacity* is to consider where within the property these views are obtained. In the case of Unit 4, views to the east are available from within two habitable rooms - a bedroom and a study - and also from the rear terrace.
- 71 The view available from the bedroom and study is inherently more constrained than the same view when appreciated from the rear terrace. This is a consequence of the size and proportion of the windows and the existence of external operable screens, which to some extent filter the view.
- 72 The view available from the bedroom, study and terrace is not particularly altered by sitting or standing.
- 73 In all instances, the easterly view available from the bedroom, study and terrace is obtained across the side boundary of 3 Benelong Crescent, and then also across the opposite side boundary of 1A Benelong Crescent (the property subject of this appeal).
- 74 The third step in *Tenacity* is to assess the extent of the impact upon views, and in doing so to consider the whole of the property and to generally consider any impact in qualitative terms as well as quantitative terms.
- 75 While the impact upon the view available from the bedroom and study is "devastating" (a term deployed in *Tenacity*) in that it is no longer available, I accept that from the rear terrace the easterly view impact is moderate, so far as the features of the ocean and horizon will continue to be available, albeit to a reduced extent.
- 76 On balance, I consider the view impacts resulting from the amended application, upon the whole of Unit 4, to be moderate in nature.
- 77 The fourth step in *Tenacity* is to assess the reasonableness of the proposal that is causing the impact upon the view.

- 78 The amended application is generally compliant with the principal development standards for height of building and floor space ratio as set out in WLEP at cl 4.3 and 4.4. I note the Applicant's cl 4.6 written request seeking to justify a technical and relatively minor non-compliance within a small portion of the amended application. It is agreed, this height of building non-compliance does not contribute to any relevant view impacts.
- 79 Similarly, the amended application is generally consistent with the various building envelope controls set out in the WDCP, with the exception of the rear setback.
- 80 The experts agree - at par 7(f) of the joint report - that a strict application of the rear setback control (60% of site depth) would result in setbacks of 19.86m at the western rear boundary and 21.9m at the eastern rear boundary. A rear setback of 13.24m-14.24 (to the western side) and 12.17m-13.17 (to the eastern side) is proposed. The extent of the numeric non-compliance is 5.62-6.62m (to the west) and 8.73-9.73m (to the east).
- 81 Notwithstanding this non-compliance, the rear setback provided by the amended application is greater than the prevailing pattern of rear setbacks evident in the adjacent properties at 3, 5, 7 and 9 Benelong Crescent.
- 82 Additionally, the operational consent dating from 2014, establishes approval for a non-compliant rear setback. I accept the amended application now seeks to further reduce the rear setback, relative to the 2014 consent, by approximately 900mm.
- 83 Ms Brennan states, at par 10(a)-(k) of the joint report, that the objectives of the rear setback control (as set out at WDCP B3.2.4) have been met despite the numeric non-compliance. This point was also generally agreed by the experts during oral evidence.
- 84 The objectives of the rear setback controls include for the provision of private open space, and acoustic and visual privacy; the avoidance of any unreasonable sense of enclosure; the provision of adequate building separation to facilitate solar access; and the protection of vegetation and landscape, provision of deep soil and consolidated open space.

- 85 On balance, I am satisfied the amended application represents a reasonable proposal. In coming to this decision, I place some emphasis upon the phrase contained at B3.5.3 of the WDCP, dealing with view sharing, which seeks to “strike a balance between accommodating new development while providing, where practical, reasonable access to views from surrounding properties.”
- 86 Then, to summarise my assessment of view impacts from Unit 4, I determine that a view of considerable value towards the ocean (step 1), across a side boundary (step 2), will suffer an overall moderate impact (step 3) as a consequence of a reasonable development proposal (step 4).
- 87 I am satisfied this assessment of view impacts from Unit 4 - in isolation - is not sufficient to warrant refusal of the amended application.
- 88 Next, considering Unit 5, 3 Benelong Crescent, the first step in *Tenacity* requires an assessment of the value of the view to be affected.
- 89 Similar to Unit 4, I characterise the views available from Unit 5 to be in two parts, a sweeping view, generally to the north across Sydney Harbour and to the north shore, and a more tightly focused easterly view to the coast in the vicinity of Bondi, where the ocean and horizon are visible, but not the shoreline or beach, which are obstructed by the intervening topography.
- 90 I assess the northerly view to be highly valuable and the easterly view to be of considerable value.
- 91 The second step in *Tenacity* is to consider where within the property these views are obtained. In the case of Unit 5, views to the east are available from within one habitable room - a kitchen - and also from the rear terrace. I accept that while an entry hall has also been considered in Mr Aspinall’s Visual Impact Assessment (Exhibit G), it is not a habitable room and is therefore discounted from the overall assessment.
- 92 The view available from the kitchen is more constrained than the same view when appreciated from the rear terrace. This is a consequence of the size and proportion of the kitchen window, which is elongated with a bench-height sill, and the existence of an external sun hood, which to some extent defines and frames the view.

- 93 The view available from the kitchen and terrace is not particularly altered by sitting or standing.
- 94 In all instances, the view available from Unit 5 is obtained across the side boundary of 3 Benelong Crescent, and then also across the opposite side boundary of 1A Benelong Crescent (the property subject of this appeal).
- 95 The third step in *Tenacity* is to assess the extent of the impact upon views, and in doing so to consider the whole of the property and to generally consider any impact in qualitative terms as well as quantitative terms.
- 96 While the impact upon the view available from the kitchen is “devastating”, in that it is no longer available, I accept that from the rear terrace the easterly view impact is significant, so far as the features of the ocean and horizon will continue to be available, but to a much reduced extent.
- 97 On balance, I consider the view impacts resulting from the amended application, upon the whole of Unit 5, to be moderate in nature. This assessment is influenced, in part, by the experts’ agreement in the joint report at par 7(d) that the view loss from the kitchen of Unit 5 “is reasonable”.
- 98 The fourth step in *Tenacity* is to assess the reasonableness of the proposal that is causing the impact upon the view. This step has been addressed in the paragraphs above and is not repeated here.
- 99 To summarise my assessment of view impacts from Unit 5, I determine that a view of considerable value towards the ocean (step 1), across a side boundary (step 2), will suffer an overall moderate impact (step 3) as a consequence of a reasonable development proposal (step 4).
- 100 I am satisfied this assessment of view impacts from Unit 5 - in isolation - is not sufficient to warrant refusal of the amended application.
- 101 Finally, considering Unit 12, 46 Birriga Road - the first step in *Tenacity* requires an assessment of the value of the view to be affected.
- 102 In the case of Unit 12, I characterise the available view as a relatively narrow arc defined by built and natural features, with these features largely situated in the mid-ground. This view arc spans from the apartment building and lift

overrun at 56 Birriga Road, lying roughly to the north east, and running toward the north and west, until occluded by a combination of existing built form further along Benelong Crescent.

- 103 Within this relatively narrow view arc - along with a number of prominent trees (a Norfolk Island Pine and a copse of Melaleucas) - there is glimpse of Sydney Harbour and of the north shore, partly filtered between some of these trees.
- 104 In her submission to the Court, the resident owner made particular reference to this view of the Harbour as being “highly prized” and further demonstrated to the Court that from some vantage points within Unit 12, it is also possible to discern a portion of Shark Island.
- 105 Nonetheless, because the water view to the Harbour represents a very small portion of the total outlook, I assess the view from Unit 12 to be of a lower value.
- 106 The second step in *Tenacity* is to consider where within the property this view is obtained. In the case of Unit 12, the view is available from within four habitable rooms - a bedroom, living room, study and kitchen.
- 107 The view available from Unit 12 is more constrained closer to the boundary with 1A Benelong Crescent, given the proximity of a nearby palm and existing development further along Benelong Crescent, which serve to block the view in this location. Consequently, this same relationship means that the glimpse of Sydney Harbour becomes more pronounced further east within Unit 12.
- 108 The existence of window sashes, transoms and mullions further constrains, defines and frames the available view.
- 109 The view available from Unit 12 have been assessed (in Exhibit G) at standing height (1,500mm above floor level) and my assessment is that the water component of the view is likely to be diminished when sitting.
- 110 In all instances, the view to water available from Unit 12 is obtained across the side boundary with 48-50 Birriga Road and then across a second side boundary with 1A Benelong Crescent.

- 111 The third step in *Tenacity* is to assess the extent of the impact upon views, and in doing so to consider the whole of the property and to generally consider any impact in qualitative terms as well as any quantitative terms.
- 112 The overall impact upon the view available from Unit 12 is relatively minor, but I accept it impacts upon the most valuable component of the total view, being the glimpse of Sydney Harbour. This results from the amended application partly obscuring the existing filtered view to water from some of the habitable rooms within the apartment.
- 113 The detailed visual impact assessment set out in Exhibit G (from viewpoint 7) indicates that from the western end of the apartment, closer to the boundary with 1A Benelong Crescent, the view to water will be diminished. At the same time, the amended application is configured to provide some retention of the available view across the proposed outdoor terrace and through the associated angled privacy screens.
- 114 Further east within the apartment (viewpoint 8), the view to water will not be as affected, and the Harbour glimpses currently available through the copse of Melaleucas will be retained.
- 115 Consequently, and on balance, I consider the view impacts resulting from the amended application, upon the whole of Unit 12, to be more minor in nature.
- 116 The fourth step in *Tenacity* is to assess the reasonableness of the proposal that is causing the impact upon the view. This step has been addressed in the paragraphs above and is not repeated here.
- 117 To summarise my assessment of view impacts from Unit 12, I determine that a view of lower value towards the north, including water glimpses (step 1), across a side boundary (step 2), will suffer an overall relatively minor impact (step 3) as a consequence of a reasonable development proposal (step 4).
- 118 I am satisfied this assessment of view impacts from Unit 12 - in isolation - is not sufficient to warrant refusal of the amended application.
- 119 Having assessed the question of view impacts, I then turn to the next issue; whether the amended application satisfies merit considerations relating to the

proposed rear setback when assessed against the objectives and controls as set out in the WDCP, and including any further consideration upon view loss.

- 120 This judgment has already dealt with much of this contention, but I specifically address the relevant objectives and controls set out in the WDCP at B3.2.4. In the context of this particular case, these are as follows:

“[Objective] O1

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

[Objective] O2

To provide acoustic and visual privacy to adjoining and adjacent buildings.

[Objective] O3

To avoid an unreasonable sense of enclosure.

[Objective] O4

To provide separation between buildings to facilitate solar access to private open space.

[Objective] O5

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

[Objective] O6

To contribute to a consolidated open space network with adjoining properties to improve natural drainage and support local habitat.

...

[Control] C3

For development in the R3 Medium Density Residential Zone where an FSR applies, the building depth is 60% of the site depth.”

- 121 It was generally agreed between the experts during oral evidence, and not a specific area of disagreement within the joint report, that the amended proposal meets objectives O1-O6.
- 122 I would also observe that this particular control - a nominal 60% of site depth - is more generic in nature, and less able to accommodate the particularity of any specific set of site and contextual conditions.
- 123 In reaching this determination, I find the pattern of prevailing rear setbacks in the immediate vicinity and the achievement of the relevant WDCP objectives to be the most appropriate basis for determining the rear setback, rather than the numeric control in this instance.

- 124 For these reasons, I am satisfied the rear setback adopted by the amended application is acceptable. And despite the contribution the rear setback plays in creating view impacts, my earlier assessment of those impacts is such that any numeric non-compliance with control C3 is not material to the question of view sharing in this instance.
- 125 Finally, I turn to the cl 4.6 written request prepared by the Applicant, which seeks to justify the departure from the development standard for height of building as set out at cl 4.3 of the WLEP.
- 126 I note that the experts agree at par 14(a) of the joint report (Exhibit 3) that “there is no dispute as to the appropriateness of the proposed building height”.
- 127 At par 15(d) of the joint report, Mr Booth for the Respondent, also states that “a properly constructed cl 4.6 written statement would be supported on the basis that the height of the proposal above natural ground level is fully compliant”.
- 128 As noted earlier in this judgment, during the hearing I granted leave to the Applicant to further amend the cl 4.6 written request and this was tendered as Exhibit L.
- 129 The sequence of events from rendering the 2014 consent operational, to the demolition of the previous dwelling, to the excavation for the approved basement, and followed by the lodgement of the current Development Application, each coincide to make the precise extent of the height non-compliance (if one exists) relative to ground level unclear. Ms Brennan sets out this background in the further amended cl 4. written request.
- 130 The relevant height of building development standard set out in cl 4.3 of the WLEP is 10.5m.
- 131 In the written request, Ms Brennan notes that if an estimate of the existing ground level were made at the time the Development Application were lodged, it would be a less accurate estimate.
- 132 Similarly, if the amended application is superimposed upon the site survey prepared prior to demolition of the previous dwelling, there is an estimated exceedance of building height of 280mm, localised to a small area of the site’s south east corner.

- 133 In any event, the agreed maximum height of the amended application is RL74.350m, relative to the Australian Height Datum, and there is agreement between the experts that the proposed maximum height is appropriate and consistent with the prevailing urban form and character evident in the vicinity.
- 134 Consistent with cl 4.6(3) of the WLEP, the Applicant's written request seeks to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of this particular case, and that there are sufficient environmental planning grounds to justify the contravention.
- 135 Further, and following the planning principle established in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (*Wehbe*), the written request adopts *Wehbe* way 1, seeking to establish that the objectives of the development standard are achieved notwithstanding the non-compliance.
- 136 Clause 4.6(4) of the WLEP then requires the consent authority to be satisfied the Applicant's written request has adequately addressed the matters required 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 particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 137 In this case, the relevant objectives of cl 4.3 of the WLEP 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.
- 138 I accept the relevant objectives of cl 4.3 have been met despite the non-compliance, and am satisfied that the Applicant's written request adequately demonstrates that the amended application is consistent with the desired future character of the neighbourhood, minimises any loss of solar access, minimises view impacts, privacy and visual intrusion.

- 139 I note specifically, that the portion of the amended application which potentially contributes to the exceedance of the height of building control does not contribute in any way to the view impacts experienced at Units, 4 and 5, 3 Benelong Crescent, and Unit 12, 46 Birriga Road.
- 140 Clause 4.6(4) of the WLEP requires the consent authority to be satisfied the Applicant's written request has adequately addressed the matters required 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 particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 141 I also accept the amended application is consistent with the objectives of the R3 Medium Density Residential zone, which include providing for the housing needs of the community within a medium density residential environment, and to allow for development of a height and scale that achieves the desired future character of the neighbourhood.
- 142 The amended application is compatible with the built form of the immediate vicinity. It presents as a unified and composed building form of an appropriate scale and form.
- 143 I accept the environmental planning grounds relied upon within the Applicant's cl 4.6 written request to justify the proposed variation to height of building development standard. These include:
- (1) The height and scale of the amended application being consistent with the adjacent building at 3 Benelong Crescent and being of a lower scale when compared with 1 Benelong Crescent, both of which are in the immediate vicinity and are viewed in the same visual catchment.
 - (2) The amended application being below the maximum floor space ratio, and notwithstanding the potential exceedance of the height of building development standard, is meeting the objectives of the R3 Medium Density Residential zone.
 - (3) The amended application meeting the objectives of the development standard notwithstanding the potential exceedance of the height of building control.
- 144 Additionally, cl 4.6(4)(b) of the WLEP requires the concurrence of the Planning Secretary be obtained, while cl 4.6(5) requires the Planning Secretary to

consider whether, in granting this concurrence, the proposed contravention of the development standard raises any matters of significance for State environmental planning, the public benefits of maintaining the standard, and any other matters required to be considered by the Planning Secretary.

145 As I am satisfied the matters in cl 4.6(4) have been adequately addressed, and similarly, satisfied the matters required in cl 4.6(5) have been adequately considered, by reason of s 39(6) of the *Land and Environment Court Act 1979*, I propose to uphold the written request to vary the development standard set out at cl 4.3 of the WLEP.

146 There are additional jurisdictional considerations to be addressed prior to any grant of consent.

147 Firstly, I am satisfied that SEPP 55 applies to the proposal and has been properly considered. The 2014 consent, now commenced, determined that the site was suitable for residential uses. I am satisfied the amended application does not require further consideration under cl 7(1)(b) and (c) of SEPP 55.

148 I am satisfied that SEPP 65 applies to the proposal. The original application was accompanied by a Design Verification Statement prepared by Mr Carl Salim architect (NSW Architects Registration Board registration number 7498), fulfilling the requirements of SEPP 65.

149 I am satisfied that SEPP BASIX is an additional relevant environmental planning instrument. I am satisfied the Applicant has submitted a BASIX Certificate, number 1146378M_02, dated 26 November 2021 in satisfaction of SEPP BASIX. Conditions of consent require implementation of the BASIX commitments.

150 Finally, I am satisfied that the remaining matters of merit are capable of resolution by way of conditions of consent and adopt the Applicant's draft conditions of consent (Exhibit C), which were agreed at the conclusion of the hearing.

151 Therefore, I now propose to grant consent to the Development Application as amended and as described within the plans forming Exhibits D and E in these proceedings.

Orders

152 The Court orders that:

- (1) The Applicant's written request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 seeking a variation to the development standard for height of building is upheld.
- (2) The appeal is upheld.
- (3) Consent is granted to Development Application No. DA 10/2021 for alterations and additions to a three-storey residential apartment building above a basement level, comprising four x three bedroom units, one x four bedroom unit and with a flat roof form, at 1A Benelong Crescent, Bellevue Hill, subject to the conditions contained in Annexure A.
- (4) The exhibits, other than 1, 3, B, G and H, are returned.

.....

M Pullinger

Acting Commissioner of the Court

[Annexure A \(931173, pdf\)](#)

Amendments

01 November 2021 - Pursuant to UCPR r 36.17 and with the consent of the parties, amend Annexure A to the judgment of 25 October 2021 by removing the 'draft' watermark and deleting the page two title "Applicant's Draft conditions of consent – 28 Jul 2021; Draft conditions of consent" and inserting "Conditions of consent".

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.