



Land and Environment Court
New South Wales

Case Name: Kingsford Property Developments Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1033

Hearing Date(s): 28 and 29 October 2021

Date of Orders: 24 January 2022

Decision Date: 24 January 2022

Jurisdiction: Class 1

Before: Chilcott C

Decision: The Court orders:
(1) the Applicant's written request, prepared pursuant to cl 4.6 of Woollahra Local Environmental Plan 2014, to vary the applicable height development standard is upheld;
(2) the appeal is upheld;
(3) Development Application DA-226/2019, as amended, for the demolition of existing structures and construction of a new part four, part five storey residential flat building containing 15 units with basement car parking, at 351 to 353 New South Head Road, Double Bay, is determined by the grant of consent, subject to the conditions at Annexure 'A';
(4) the exhibits are returned except exhibits A, B, C, J, K and 1.

Catchwords: DEVELOPMENT APPLICATION – appeal against three conditions of consent – consideration of written requests under cl 4.6 of WLEP – amended plans – costs pursuant to s 8.15(3) of the EP&A Act

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 1.3, 4.15, 4.16, 8.7(1), 8.15(3)
Environmental Planning and Assessment Regulation

2000, cll 55, 77
State Environmental Planning Policy (Affordable Rental Housing) 2009
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing) 2021
State Environmental Planning Policy (Infrastructure) 2007
State Environmental Planning Policy No 55—
Remediation of Land
State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005, cl 3
Woollahra Local Environment Plan 2014, cll 2.3, 4.3, 4.6, 5.10, Sch 5

Cases Cited:

Big Property Group Pty Ltd v Randwick City Council [2021] NSWLEC 1161
Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118
Omid Mohebbati-Arani v Ku-ring-gai Council [2017] NSWLEC 143
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

Texts Cited:

Land and Environment Court of NSW, COVID-19 Pandemic Arrangements Policy, (July 2021)
NSW Department of Planning and Environment, Apartment Design Guide, (July 2015)
Woollahra Community Participation Plan 2019
Woollahra Development Control Plan 2015

Category:

Principal judgment

Parties:

Kingsford Property Developments Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation:

Counsel:
A Pickles (Applicant)
J Fan (Solicitor) (Respondent)

Solicitors:
Mills Oakley Lawyers (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2020/361848

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** Kingsford Property Developments Pty Ltd (the Applicant) has appealed the determination by the Woollahra Local Planning Panel, under delegation from Woollahra Municipal Council (the Respondent) of its development application DA-226/2019, which sought consent for the demolition of existing structures and construction of a new part four, part five storey residential flat building containing 17 units with basement car parking (the Approved Development) at 351 to 353 New South Head Road, Double Bay (the Subject Site).
- 2 The Subject Site is zoned R3 Medium Density Residential under the provisions of cl 2.3 of Woollahra Local Environment Plan 2014 (WLEP), and residential flat buildings are a permissible use of land in that zone.
- 3 The appeal, made under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and falls within Class 1 of the Court's jurisdiction, and determined pursuant to the provisions of s 4.16 of the EP&A Act, seeks the deletion or modification of various conditions imposed on the Approved Development with the grant of consent.
- 4 A site inspection, including the receipt of objector submissions, was undertaken as part of the hearing and conducted consistent with the Court's COVID-19 Pandemic Arrangements Policy. The hearing proper was undertaken via Microsoft Teams.

Amended plans

- 5 In this appeal, the Applicant relies on amended plans, to which the Respondent has agreed, and which were uploaded to the NSW Planning Portal on 1 September 2021. The Applicant subsequently filed the amended application with the Court on 7 September 2021.
- 6 These amended plans were subject to a notice of motion and in relation to which the Court made orders on 6 October 2021 including the following:

“4. the Applicant is to pay the Respondent's costs thrown away as a result of the amendment pursuant to cl.8.15(3) of the Environmental Planning and Assessment Act 1979 as agreed or assessed;

...

6. the Applicant is to file an Amended Statement of Facts and Contentions by 5 October 2021; and

7. the Respondent is to file any Amended Statement of Facts and Contentions by 7 October 2021.”

- 7 The Applicant filed its Amended Statement of Facts and Contentions on 6 October 2021, and the Respondent filed its Amended Statement of Facts and Contentions in reply on 11 October 2021.
- 8 Further, the Applicant's amended development application, is made under the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH), and allocates 20% of the Approved Development's floor space ratio, said at the commencement of the appeal to equate to four (4) units for the purposes of infill affordable housing, but later through an agreed draft conditions provided by the Parties refined to equate to an amount of floor space ratio (FSR) dependent upon the outcome of the appeal.
- 9 The Approved Development, as amended:
 - (1) reduces the total number of units within the development from 17 to 15;
 - (2) includes a maximum height of building (HoB) at 14.3m, in circumstances where the HoB development standard for the Subject Site under cl 4.3 of WLEP is 10.5m.
- 10 The Applicant has provided a written request pursuant to cl 4.6 of WLEP seeking to vary the HoB development standard in support of its Approved Development, as amended.

Site context

- 11 The Subject Site consists of 2 parcels of land commonly known as 351-353 New South Head Road, Double Bay, which are legally described as Lot 2 in DP 1081202 and SP 2583.
- 12 Within the immediate context of the of the Subject Site, along the southern side of New South Head Road, developments are generally characterised by

residential flat buildings of substantial height and scale, ranging from three to thirteen-storeys.

- 13 An aerial photograph of the Subject Site, in which it is highlighted and outlined in red, is provided below at Figure 1.



Figure 1 Aerial photo of the Subject Site (outlined in red)

- 14 The Subject Site is:
- (1) not listed as a heritage item or located within any heritage conservation area as identified within Schedule 5 of the WLEP;
 - (2) located within the vicinity of several heritage listed items to the east, as follows:
 - (a) Item 205 – Weeping Lilli Pilli, all Bangalow Palms, Washingtonia Palm, Queen Palms, Cabbage Palms at No. 5 Manning Road, Double Bay;
 - (b) Item 206 – Overthorpe at No.349 New South Head Road, Double Bay;
 - (c) Item 207 – Overthorpe at No. 349 New South Head Road, Double Bay;

- (3) located on the edge of Wallaroy Precinct bordering Double Bay Commercial Centre. The Wallaroy Precinct is primarily characterised by residential development of varying architectural styles including residential flat buildings, multi-unit dwelling developments and Inter-War flat buildings through to detached dwelling houses and semi-detached dwellings;
- (4) within walking distance of the bus and train interchange at Edgecliff Station, providing access to public transport. A bus stop is also located to the east of the site, on New South Head Road.

Notifications and objector submissions

- 15 Pursuant to the provisions of cl 77 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation), as well as the provisions of Woollahra Development Control Plan 2015 (WDGP) and Woollahra Community Participation Plan 2019 (WCPP), the Applicant's development application was originally notified on the following dates:
 - (1) 24 July to 22 August 2019;
 - (2) 4 September 2019 to 3 October 2019; and
 - (3) 15 January to 29 January 2020.
- 16 The respondent received 57 submissions in response to those notifications.
- 17 The Applicant's amended plans were notified between 11 and 26 August 2021, and 29 submissions were received by the Respondent in response to that notification.
- 18 At the commencement of the hearing in this appeal oral submissions were provided by the following six objectors:
 - (1) Mr Malcolm Young on behalf of the Double Bay Residents Association;
 - (2) Mr Hal Epstein, an owner/resident from Manning Road;
 - (3) Ms Eva Santo, a resident of an adjoining residence on New South Head Road;
 - (4) Ms Leslie Macpherson also a resident of an adjoining residence on New South Head Road; and
 - (5) Mr Peter Benjamin , a further resident of an adjoining residence on New South Head Road.
- 19 These objectors had previously provided written submissions in response to the notification of the Applicant's Approved Development and its amended

plans. The objectors submitted that they maintained concerns in relation to the following aspects of the Applicant's Approved Development:

- (1) the bulk and scale of the Approved Development;
- (2) potential impacts on vegetation, including within the adjoining Sir John Hay Gardens;
- (3) potential impacts on views from adjoining properties;
- (4) potential overshadowing impacts on the provision of solar access to adjoining properties;
- (5) the adequacy of setbacks provided by the Approved Development;
- (6) potential impacts of excavation on adjacent properties; and
- (7) potential parking issues and the adequacy of loading facilities.

Contentions

Certain contentions resolved by the Parties and their expert planners

20 At the commencement of the hearing, the Parties advised that, on the basis of the evidence of the Parties' expert planners and urban designers, provided within their joint expert report, a number of contentions in the appeal had been resolved, as follows:

- (1) modifications to the following requirements forming part of condition C.1:
 - (a) condition C.1 (d) in relation to setbacks from the southern boundary and tree impacts, which was resolved through the Parties' agreement to amend the conditions and insert:
 - (i) as condition C2, in relation to tree protection and maintenance:

"A Tree Management Plan is to be submitted to Council's Tree Management Team Leader for their written approval prior to the issue of a construction certificate. The Tree Management Plan is to include the following :

a) A Tree Protection Plan detailing measures to protect all retained trees identified in the arboricultural impact assessment prepared by Tree Wise Men dated 30 May 2021 during demolition, construction and landscaping, and including remediation of any issues raised during those works, including any hold points for direct supervision of works within 6 metres of the tree, including demolition of existing structures, pavements and other surfaces;

b) A Tree Management Plan detailing maintenance measures for the life of Tree 1 including:

- i. Installation of irrigation lines, volume and frequency of water,
- ii. Root care,
- iii. Fertilising,
- iv. Pest control,
- v. Pruning (subject to separate application to Council for assessment and approval as required),
- vi. Yearly inspections and reports for strata management as to measures for the life of the tree,
- vii. Planting of replacement trees and subsequent care.”

(ii) as condition D5(r):

“All piping and pits within the TPZs of Trees 1, 15-18 are to be dug by hand with roots greater than 50mmø retained above or below pipes. The OSD excavation is to be shored vertically as with the basement earthworks.”

(iii) as condition F.13, in relation to tree protection

“Prior to the issue of a Final Occupation Certificate, the Project Arborist is to certify stormwater installation and compliance with measures in the tree management plan.”

(b) condition C1 (e) in relation to increased western setbacks and elimination of level changes in the SW corner, which the Parties agreed should be deleted;

(c) condition C1(g) in relation to the maintenance of existing ground levels with adjoining properties, which has been addressed through the Applicant’s amended plans, and which the Parties agree should be deleted;

(2) the modification of conditions C.3 and C.5(3)(a), in relation to bonds to be posted by the Applicant, and the deletion of which the Applicant does not press;

(3) the modification of condition D.2 concerning dilapidation reports, which the Parties’ expert planners agreed should be modified, and which I accept, should read as follows:

“Dilapidation surveys and dilapidation reports shall be conducted and prepared by a professional engineer (structural) for all buildings and/or structures that are located within the likely “zone of influence” of any excavation, dewatering and/or construction induced vibration as determined applicable by a Structural Engineer.

These properties must include (but not necessarily limited to):

- No. 337 New South Head Road
- No. 355 New South Head Road
- No. 3A Manning Road
- the driveway access handle to No. 349 New South Head Road for the length of the common boundary with the subject site.

AND

These properties may also include (but also may not necessarily be limited to) the following:

- No. 5 Manning Road

The dilapidation reports must be completed and submitted to the Certifying Authority with a copy submitted to Council with the Notice of Commencement prior to the commencement of any development work.

Where excavation of the site will extend below the level of any immediately adjoining building the principal contractor or owner builder must give the adjoining building owner(s) a copy of the dilapidation report for their building(s) and a copy of the notice of commencement required by S81A(2) of the Act not less than two (2) days prior to the commencement of any work.”

Note: The reasons for this condition are:

- To provide a record of the condition of buildings prior to development being carried out.
- To encourage developers and its contractors to use construction techniques that will minimise the risk of damage to buildings on neighbouring land.”

- (4) the modification of condition D.7 in relation to the erection of hoardings, and the modification of which the Applicant does not press;
- (5) the deletion, or, in the alternative the modification, of conditions:
 - (a) D.5(n), in relation to a requirement to obtain a permit to stand plant, and in relation to which the Parties agree that this should be amended to read:

“State that any oversized vehicles proposed to operate on Council property (including Council approved Works Zones) will attain a Permit to Stand Plant on each, and the occasions that the Permit will be required.

(Note: oversized vehicles are vehicles longer than 7.5m or heavier than 4.5T.)”
 - (b) Condition D5(p) in relation to vehicular movement hours, and in relation to which the Parties agree that this should be amended to read:

“When demolition, excavation and construction works are to be undertaken on school days, all medium rigid vehicle and heavy rigid vehicle movements to and from the site are not to occur during the school drop-off and pick up period (7.30am - 9.00am and 2.30pm - 4pm), in order to minimise disruption to the traffic network during school pick up and drop off times.”

- (6) the modification of condition D.12, in relation to permitting demolition or preparatory site works before set out, and which the Parties have agreed, supported by the evidence of their expert planners, should be amended such that its initial paragraph reads:

“Prior to the commencement of any work (‘work’ for the purposes of this Condition excludes demolition or preparatory site works) the Principal Contractor or Owner-builder must ensure that a surveyor registered under the Surveying and Spatial Information Act 2002 sets out.” etc.

- (7) Condition F.2 (a) in relation to the contribution of the development to affordable housing units, and:
- (a) the Parties experts agree that it would be unreasonable to impose a condition that the provision of affordable housing should remain unchanged in circumstances either where:
 - (i) condition 1(f), which required deletion of Apartment 17, is upheld; or
 - (ii) Apartment 17 is retained but reduced in area;
 - (b) the Parties have agreed that, in the circumstances identified above at [(a)], one of the following conditions should be imposed:
 - (i) In the event that the Applicant’s position concerning the fifth storey of the building is accepted:

“F. 2 Affordable Housing

(a) A minimum of 408.7m² is to be allocated for affordable housing as defined in State Environmental Planning Policy (Affordable Rental Housing) 2009. The calculation is to include the proportion of communal area, as a percentage of the total development, that is utilised by those apartments that are for the purpose of affordable housing.”
 - (ii) In the event that the Respondent’s position concerning the fifth storey element of the building is accepted:

“F. 2 Affordable Housing

(a) A minimum of 357.8m² is to be allocated for affordable housing as defined in State Environmental Planning Policy (Affordable Rental Housing) 2009. The calculation is to include the proportion of communal area, as a percentage of the total development, that is utilised by those apartments that are for the purpose of affordable housing.”

- (8) Condition I.1 concerning the dedication of certain units in the Approved Development for the purposes of affordable housing, which should be amended to reflect the units identified above at [(7)(b)].

Remaining matters in this appeal

21 As a consequence of the Parties' resolution of the contentions above (at [20]), the Parties confirmed that remaining contentions concerned imposition of three specific conditions which the applicant seeks to either delete or modify:

- (1) condition C.1(f) requiring removal of an apartment referred to Apartment 17 (Apt 17) and the associated roof on Level 4 of the Approved Development which in essence would delete the fifth storey, with the exception of an access point to the communal roof terrace to the south of the development;
- (2) amendment to condition E.6(d) in relation to types of works permitted during certain hours;
- (3) amendment to conditions E.6(e) in relation to the loading and un-loading of certain materials and equipment during certain times.

22 The Court was assisted in its considerations of these contentions by the evidence of the Parties experts as follows:

- (1) the Parties' expert planners, Ms Kirsty Hogkinson, for the Applicant, and, Mr Wilson Perdigao, for the Respondent;
- (2) the Parties' expert urban designers, Mr Philip Thalís, for the Applicant, and Mr Brett Newbold, who also provided town planning expertise, for the Respondent.

Statutory context

Environmental Planning and Assessment Act 1979

23 The objects of the EP&A Act at s 1.3 are as follows:

- (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
- (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
- (c) to promote the orderly and economic use and development of land,
- (d) to promote the delivery and maintenance of affordable housing,
- (e) to protect the environment, including the conservation of threatened and other species of native animals and plants, ecological communities and their habitats,

- (f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),
- (g) to promote good design and amenity of the built environment,
- (h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,
- (i) to promote the sharing of the responsibility for environmental planning and assessment between the different levels of government in the State,
- (j) to provide increased opportunity for community participation in environmental planning and assessment

24 Section 4.15(1) of the EP&A Act provides that:

(1) Matters for consideration—general In determining a development application, a consent authority is to take into consideration such of the following matters as are of relevance to the development the subject of the development application—

(a) the provisions of—

(i) any environmental planning instrument, and

(ii) any proposed instrument that is or has been the subject of public consultation under this Act and that has been notified to the consent authority (unless the Planning Secretary has notified the consent authority that the making of the proposed instrument has been deferred indefinitely or has not been approved), and

(iii) any development control plan, and

(iiia) any planning agreement that has been entered into under section 7.4, or any draft planning agreement that a developer has offered to enter into under section 7.4, and

(iv) the regulations (to the extent that they prescribe matters for the purposes of this paragraph),

(v) (Repealed)

that apply to the land to which the development application relates,

(b) the likely impacts of that development, including environmental impacts on both the natural and built environments, and social and economic impacts in the locality,

(c) the suitability of the site for the development,

(d) any submissions made in accordance with this Act or the regulations,

(e) the public interest.

25 Section 4.15(3A) of the EP&A Act further provides that:

If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

(a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

(c) may consider those provisions only in connection with the assessment of that development application.

State Environmental Planning Policy (Housing) 2021

26 State Environmental Planning Policy (Housing) 2021 (the Housing SEPP) was made on 26 November 2021 but in October 2021, at the time of hearing, a Draft of the Housing SEPP had been publicly exhibited.

27 Subclause 2(a) of Schedule 7 of the Housing SEPP contains a savings provision in the following terms:

“The former provisions of a repealed instrument continue to apply to the following –

(a) a development application made, but not yet determined, on or before the commencement date,” ...

28 Consequently, the Applicant’s development application that is the subject of this appeal, remains subject to the provisions of SEPP ARH, and, applying the reasoning of Robson J in *Omid Mohebaty-Arani v Ku-ring-gai Council [2017] NSWLEC 143* at [16]-[22], the provisions of the Housing SEPP should be given limited or no weight in these proceedings.

State Environmental Planning Policy (Affordable Rental Housing) 2009

29 The Proposed Development is for construction of a RFB including affordable rental housing and is subject to the provisions of SEPP ARH.

30 The aims of SEPP ARH are provided with its cl 3, as follows:

The aims of this Policy are as follows -

- (a) to provide a consistent planning regime for the provision of affordable rental housing,
- (b) to facilitate the effective delivery of new affordable rental housing by providing incentives by way of expanded zoning permissibility, floor space ratio bonuses and non-discretionary development standards,
- (c) to facilitate the retention and mitigate the loss of existing affordable rental housing,
- (d) to employ a balanced approach between obligations for retaining and mitigating the loss of existing affordable rental housing, and incentives for the development of new affordable rental housing,
- (e) to facilitate an expanded role for not-for-profit-providers of affordable rental housing,
- (f) to support local business centres by providing affordable rental housing for workers close to places of work,
- (g) to facilitate the development of housing for the homeless and other disadvantaged people who may require support services, including group homes and supportive accommodation.

31 The Approved Development is subject to the provisions of Division 1 of SEPP ARH concerning in-fill affordable housing because, consistent with the provisions of cl 10(1) of SEPP ARH:

- (1) the Approved Development is permitted with consent under another environmental planning instrument, in this case, the provisions of cl 2.3 of WLEP (see below (at [39(1)])); and
- (2) the Approved Development is on land that does not contain a heritage item that is identified in an environmental planning instrument, an interim heritage order or on the State Heritage Register under the *Heritage Act 1977*; and
- (3) the percentage of the gross floor area of the Approved Development that is to be used for the purposes of affordable housing is at least 20%; and
- (4) the Subject Site is located in the Greater Sydney region and the Approved Development is within an accessible area.

32 The following provisions of SEPP ARH are of relevance to the Proposed Development, as follows:

- (1) clause 10, in relation to which:
 - (a) residential flat buildings are permissible in the R3 Medium Density Zone;
 - (b) the Subject Site is not heritage listed; and

- (c) the Subject Site is in an accessible location as defined under the SEPP ARH;
- (2) clause 14 which provides standards that cannot be used to refuse consent to the Proposed Development;
- (3) the provisions of cl 15 of SEPP ARH, which do not apply to the Proposed Development as State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development (SEPP65) continues to apply by operation of cl 4 of SEPP65;
- (4) clause 16A which requires that a consent authority must not consent to development to which Division 1 applies unless it has taken into consideration whether the design of the development is compatible with the character of the local area;
- (5) clause 17 of SEPP ARH which requires that a consent authority must not consent to development to which Division 1 applies unless conditions are imposed by the consent authority to the effect that:
 - (a) for 10 years from the date of the issue of an occupation certificate for the Proposed Development -
 - (i) the dwellings proposed to be used for the purposes of affordable housing will be used for the purposes of affordable housing; and
 - (ii) all accommodation that is used for affordable housing will be managed by a registered community housing provider; and
 - (b) a restriction will be registered, before the date of the issue of an occupation certificate, against the title of the property on which the Proposed Development is to be carried out, in accordance with s 88E of the *Conveyancing Act 1919*, that will ensure that the requirements of paragraph (a) are met.

State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development

- 33 State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development (SEPP65) aims to improve the design quality of residential flat development in New South Wales, and recognises that the design quality of residential flat development is of significance for environmental planning for the State due to the economic, environmental, cultural and social benefits of high quality design.
- 34 The policy came into effect on 17 July 2015 and by the operation of cl 4 of SEPP65, the provision of this SEPP applies to the Approved Development because SEPP65 applies to residential flat buildings, shop top housing and

mixed use developments with a residential component, if the building has 3 or more storeys and contains 4 or more dwellings.

- 35 SEPP65 sets a consistent policy direction for residential flat development in New South Wales and provides a uniform State-wide framework for more detailed planning for residential flat development. It has a statutory effect on development and as a consequence may supplement the provisions of state environmental planning policies, local environmental plans and development control plans.
- 36 SEPP65 has a close and integrated relationship with the Apartment Design Guide (ADG) published by the NSW Department of Planning and Environment (see below at [37]).

Apartment Design Guide

- 37 The ADG published by the NSW Department of Planning and Environment, provides consistent planning and design standards for residential apartments in New South Wales.
- 38 Parts 3 and 4 of the ADG provide objectives, design criteria and design guide for the siting, design and amenity of apartment development.

Woollahra Local Environmental Plan 2014

- 39 The following provisions of WLEP are of relevance in this appeal:
 - (1) Clause 2.3 concerning zone objectives and land use table, and in relation to which:
 - (a) subclause 2.3(2) requires that the consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone; and
 - (b) the Subject Site is zoned R3 Medium Density Residential, the objectives of which 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.

- (2) clause 4.3, concerning height of buildings (HoB), and which provides a development standard of 10.5m for developments on the Subject Site, and which has the following objectives:
 - (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.
- (3) clause 4.6 which facilitates consideration of requests seeking exception to development standards, and which relevantly provides:
 - (1) The objectives of this clause are as follows—
 - (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
 - (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.
 - (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.
 - (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—
 - (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.
 - (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 Planning Secretary has been obtained.
- (5) In deciding whether to grant concurrence, the Planning Secretary must consider—
 - (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
 - (b) the public benefit of maintaining the development standard, and
 - (c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

Woollahra Development Control Plan 2015

- 40 Those provisions in WDCP that specify requirements, standards or controls that relate to certain matters which are listed in cl 6A of the SEPP65 have no effect in the assessment and determination of a development application for development to which SEPP65 applies.
- 41 Notwithstanding this, the provisions of Part B1.4 in relation to the Wollaroy Precinct, which provides a desired future character statement for the Precinct, are of relevance to the current appeal.

Remaining contentions

- 42 As identified above (at [21]) the remaining contentions in this appeal concern the Applicant's proposed deletion or modification of three conditions imposed by the Respondent when it granted consent to the Approved Development.
- 43 These conditions are:
 - (1) condition C.1(f) , which required the removal of one apartment, referred to as Apartment 17 (Apt 17), and the associated roof on Level 4 of the Approved Development and which would, in effect, have deleted the development's fifth storey, with the exception of an access point to a communal roof terrace to the south of the RFB;
 - (2) condition E.6(d) which identified that only certain types of work were permitted during certain hours of the day during construction of the Approved Development; and

- (3) condition E.6(e) which limited the loading and un-loading of materials required for the Approved Development during certain times of the day.
- 44 The Applicant's proposed deletion or modification of these three conditions was the subject of expert evidence and legal submissions during the hearing, and my consideration of whether each of these conditions should be either deleted or modified is provided below.

Should condition C.1(f) be deleted or modified?

- 45 Condition C.1(f) imposed with the grant of consent for the Approved Development required that:

"Apt 17 including the roof terrace (eastern) and the associated roof on Level 4 must be deleted and the area shall be non-trafficable roof with a maximum RL of 22.50 to AHD, with the exception of the access point to the communal roof terrace area to the south.

Reason: In order to reduce the height, bulk and scale of the proposed development and to achieve the desired future character of the Wallaroy Precinct."

- 46 The Applicant's Approved Development, as amended, has proposed a modified design of the RFB, which, although it maintains a fifth storey (Level 4) element, reduces the scale of that storey and the building as a whole.
- 47 The Applicant's amended plans exceed the HoB development standard of 10.5m applicable to development on the Subject Site and the Applicant relies on an amended written request prepared pursuant to the provisions of cl 4.6 of WLEP. The Respondent raises no contention in terms of that request.
- 48 The Applicant submitted that its further amended plans also provided changes to the streetscape presentation of the Approved Development, including in relation to the depth of the front setback, which it said provided improved responsiveness to, and compatibility with, the character of the local area, as required under the provisions of cl 16A of SEPP ARH, the objectives of both the R3 zone and the HoB standard in WLEP, and the Wollaroy Precinct desired future character statement in Part B1.4 of WDCP.
- 49 The Parties expert urban designers, Mr Thalys and Mr Newbold agreed within their joint expert report that:
- (1) the acceptability, or otherwise, of the Applicant's fifth storey element would be resolved through consideration of the following two questions:

- (a) did the Applicant's proposed amendments respond sufficiently to the applicable controls?; and
 - (b) were further amendments necessary to achieve satisfactory compliance with those controls?
- (2) the Applicant's amended plans achieved superior outcomes compared to the Approved Development, in relation to applicable controls, including:
 - (a) improved conformity with applicable development standards and controls within SEPP ARH, WLEP and WDCP, notably in relation to character and building bulk and scale, including its height;
 - (b) increased setbacks at the frontage that improve compatibility with the desired future character of the Wollaroy Precinct;
 - (c) improved responsiveness to the character of the local area as a consequence of the following proposed changes to the Approved Development:
 - (i) increased street setbacks to accommodate more effective landscaping along its frontage to New South head Road, and along its western "backdrop";
 - (ii) a more refined architectural resolution of the building's street elevation as a consequence of its reduced scale;
 - (iii) a reduction in potential obstruction of significant streetscape views towards the Overthorpe gardens adjacent to the Subject Site;
- (3) the Applicant's amended plans generally demonstrate a high level of compatibility with desired character for the Wallaroy Precinct as provided within section B1.4 of WDCP, because:
 - (a) the setbacks and landscaping within the amended plans respect and enhance the visually-significant green backdrop that is provided by the 'Overthorpe' gardens;
 - (b) the increased front setback also would ensure the viability of an existing fig which is located next to the street frontage, and which represents a prominent streetscape feature that must survive in order to visually-integrate the proposed building with its significant landscape setting;
 - (c) the building form has been stepped in response to the sloping topography of the Subject Site, and generally contributes to a transition from the smaller dwellings that occur across the Precinct's upper slopes to the apartment buildings located on the footslopes of the Precinct;
 - (d) the elevations of the Approved Development, as amended, that would be visible from the street are well-modulated or articulated, and due to the more-refined composition of elevations within the

amended proposal, the building would not detract from the predominant streetscape character;

- (4) the height of the Approved Development, as amended, would not give rise to any potential adverse impacts on adjoining residential properties or dwellings, for detailed reasons provided in their joint report, including that the fifth storey element (level 4 of the building) would not:
 - (a) disrupt existing views;
 - (b) create visual intrusion;
 - (c) give rise to any overshadowing impacts; and
 - (d) it would not give rise to any privacy impacts.

50 However, the Parties' expert urban designers did not agree on whether any further amendments to the Applicant's amended plans were necessary, as follows:

- (1) Mr Newbold recommended a further reconfiguration of the development's presentation at its top most level fronting New South Head Road to reduce visual intrusion of the front edge of that level in relation to the vegetation that would form its backdrop, as viewed from New South Head Road. Mr Newbold said these amendments would further improve the compatibility of the development with the character of the local area because:
 - (a) shifting the NW corner southwards by approximately 5m would reduce the non-compliant height of that corner by almost 25%;
 - (b) due to the perspective effect of sightlines from New South Head Road, the mass of the top storey would be appreciably reduced;
 - (c) it would achieve an appreciable reduction in the three-dimensional mass of the development and would ensure that a larger proportion of existing canopy would remain visible from New South Head Road achieving superior compatibility with "character of the local area" together with the statement of Desired Future Character for the Wallaroy Precinct in WDCP;
- (2) Mr Thalys said that, in his opinion, further amendment to the Applicant's amended plans were unnecessary and that Mr Newbold's proposal was contrary to the underlying design strategy that had guided the development's design because setting the top floor back from the street would have a number of negative design impacts, including:
 - (a) the smaller footprint would lead to a reduction in the total FSR, which would reduce the affordable housing contribution of the Applicant's RFB by 25m², which was an undesirable social outcome;
 - (b) amending the top floor to a position further back from the street alignment would reduce the proposal's positive presence to the broad space of New South Head Road;

- (c) the further setting back of the top floor would have no relation to the building form, character and key alignments below, detracting from the building's urban presence and architectural coherence;
- (d) moving more mass towards the rear of the site would inevitably increase overshadowing of the generous rear gardens, increase overshadowing of the neighbouring buildings to the rear, reducing their sky view and compressing this shared space;
- (e) the amendment proposed would transfer building mass over the full-height void in the centre of the Subject Site which would reduce its openness to the sky, in so doing reducing the daylight and natural ventilation afforded to future residents.

51 During the hearing, the Parties' expert urban designers provided further oral evidence in relation to Mr Newbold's proposal that further amendments should be made to the Applicant's amended plans, and they opined as follows:

(1) Mr Newbold confirmed that:

- (a) he agreed that the built form of the Applicant's RFB, as represented within the Applicant's amended plans, was consistent with the desired future character of the Wollaroy Precinct;
- (b) the height and built form of the Approved Development, as amended, by comparison with other buildings in the area of the Subject Site, sits comfortably in its surroundings;
- (c) the Applicant's amended plans maintain the essence of the backdrop of vegetation to the Subject Site and along with the Applicant's proposed landscaping would complement the Overthorpe gardens;
- (d) notwithstanding the above points (at [(a)] to (c))]:
 - (i) he disagreed with Mr Thalys and the Applicant that his recommended further amendment to the development, while requiring what he described as a modest change to building form, would provide a significant of change to the extent of the green backdrop to the Approved Development, as amended;
 - (ii) he accepted that his recommended change would give rise to a small overshadowing impacts to the property at 3A Manning Road, but regarded this a minor and acceptable impact, but would represent a modest adjustment with a significant benefit.

52 In closing the Respondent submitted that:

- (1) the differences between the positions of the Parties on this contention were matters of fine balance; and

- (2) it did not oppose the Court's approval of the fifth floor element as now proposed by the Applicant, other than in relation to a proposed modification to the form and extent of the roof as it presents to the street, which it said should be further amended in the manner proposed by its expert Mr Newbold, which it said improved the compatibility of the development with the character of the local area.

53 The Applicant:

- (1) noted the agreed evidence of the Parties' expert urban designers in relation to the consistency of the Applicant's amended plans with the desired future character of the Wollaroy Precinct, its compatibility with the character of the local area and the fact that the Approved Development, as amended, would not give rise to adverse environmental impacts.
- (2) noted further that Mr Newbold had acknowledged within his evidence that the Approved Development, as amended, would sit comfortably within its surrounds; and
- (3) concluded that the further amendments recommended by Mr Newbold should not be required because:
 - (a) it would provide only modest benefits in terms of the views available from the public domain to the vegetation that would form the backdrop to the Approved Development, as amended; and
 - (b) it would give rise to unnecessary overshadowing impacts to an adjoining property at 3A Manning Road;
 - (c) it would unreasonably reduce the FSR available within the development for use as affordable rental housing by around 25m².

54 The effect of Mr Newbold's recommended further amendments to the Approved Development was helpful illustrated in a drawing prepared by Mr Newbold and included within the joint report of the Parties' expert planners and urban designers as figure 2D, and which is reproduced below as Figure 2.

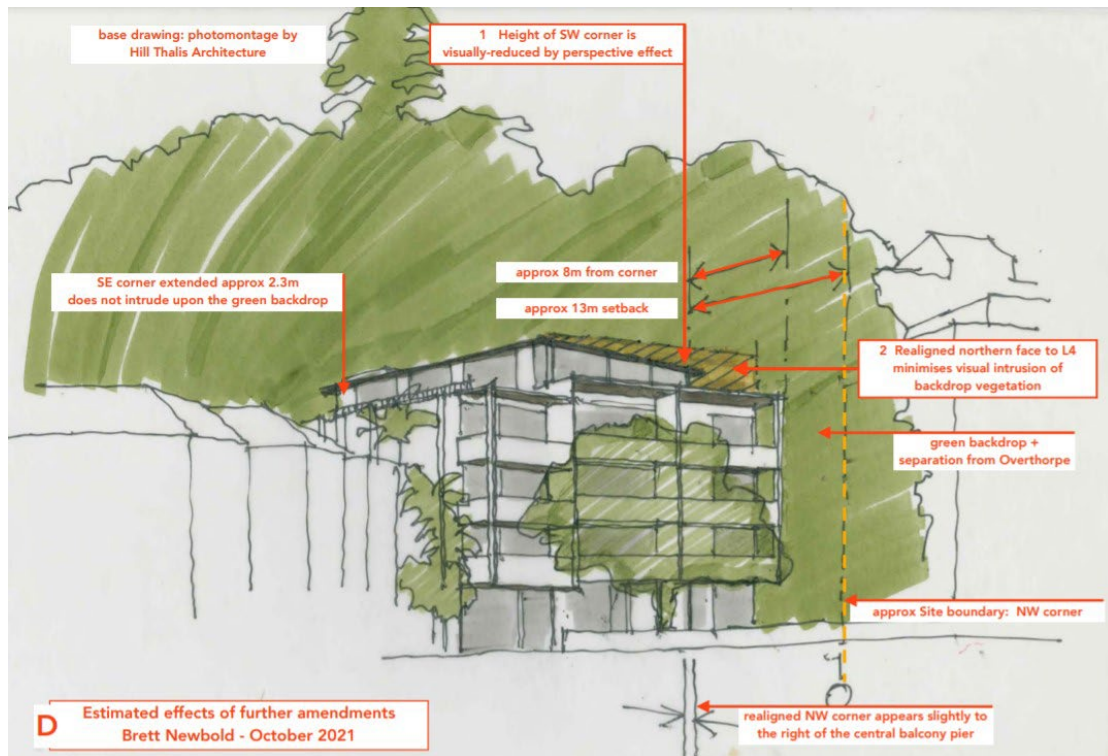


Figure 2 Sketch of further amendments as proposed by Mr Newbold

- 55 I have given consideration to the evidence of the Parties' expert urban planners and, the submissions of the Parties in relation to the fifth floor element of the Applicant's Approved Development, and whether the Applicant's design should be amended to provide the outcome sought by Mr Newbold to amend the front edge of that element, and to shift of some of the building's bulk to the rear of the development.
- 56 I note the submission of the Respondent that it did not press deletion of the fifth storey element as originally required under condition C.1(f) imposed on the Approved Development.
- 57 I also note that the Parties' expert urban designers are largely agreed in relation to the improvements that would be achieved to the Approved Development through approval of the Applicant's amended plans (see above (at [49])).
- 58 I am satisfied that Mr Newbold's recommended amendments should not be required as part of any consent granted to the Applicant's Approved Development, as amended, because, in addition to the points above (at [56])

and [57]), I agree with, and adopt, the reasons provided by the Applicant, supported by its expert urban designer, Mr Thalís, and in particular I agree that:

- (1) Mr Newbold's recommended amendments will provide only modest improvements to the view, from the public domain, of the vegetation that would form the background to the development. I am satisfied that those views would, in any case, remain substantial and the amendments sought by Mr Newbold are unlikely to be significant in the perception of a passer-by, whether that be on foot or from a motor vehicle;
- (2) the overshadowing impacts to the property at 3A New South Head Road that would arise from shifting building mass to the rear of the Subject Site are not justified when considered against the modest views of background vegetation that would be achieved from the public domain by adopting the recommendations;
- (3) the public interest would not be served by the reduction in the FSR available within the Approved Development, as amended, for affordable rental housing that would be result from adopting Mr Newbold's recommendations.

59 I note that the Parties have provided alternate conditions of consent concerning the implications of the Court's decision in respect of the fifth storey and, as a consequence of my conclusions above, it is the Applicant's conditions that should be adopted.

60 Notwithstanding my conclusions above that that the Applicant's fifth floor element should not be deleted, and Mr Newbold' recommendations should not be adopted, the Approved Development, as amended, continues to exceed the HoB development standard in cl 4.3 of WLEP.

61 The Applicant has provided an amended written request to vary the applicable HoB development standard of 10.5m applicable to development on the Subject Site prepared pursuant to c 4.6 of WLEP. The Court must be satisfied that this written request is well founded in order to enliven its powers to grant consent, and I address this below.

Is the Applicant's written request to vary the HoB development standard under cl 4.3 of WLEP well founded?

62 As noted previously, the Approved Development, as amended, has a maximum HoB of 14.3m in circumstances where the HoB development standard applicable to development on the Subject Site under cl 4.3 of WLEP is 10.5m.

- 63 The Applicant has provided a written request pursuant to the provisions of cl 4.6 of WLEP, to vary the HoB development standard in WLEP.
- 64 The Respondent, consistent with the agreed evidence of the Parties' expert planners that the Applicant's cl 4.6 request is well founded, does not challenge a conclusion that the Applicant's written request to vary the HoB development should be upheld.
- 65 Notwithstanding the submissions of the Parties and opinions of their experts, the Court is also required to be satisfied that the request is well founded.
- 66 I have reviewed the written request and I agree with the submission of the Parties, and the opinions of the expert planners, that the request is indeed well founded, because:
- (1) the Applicant's written request to vary the HoB development standard demonstrates that compliance with the standard is unnecessary because, consistent with the guidance provided by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827, the Proposed Development would achieve the objectives of that standard (see above at [39(2)]), because:
 - (a) in relation to the first objective at cl 4.3(1)(a) the height of the Approved Development is, in my assessment, consistent with the desired future character of the neighbourhood, which was also a conclusion supported by the agreed evidence of the Parties' expert planners;
 - (b) in relation to the second objective at cl 4.3(1)(b):
 - (i) the Subject Site sits within an area zoned for R3 Medium Density Residential, and adjacent to New South Road which is zoned SP2;
 - (ii) given that all lots surrounding the Subject Site are also zoned R3 there is no transition to be achieved between zones, and so the objective is not applicable to the Approved Development, as amended in this appeal;
 - (iii) however, to the extent that any transition is required between either the R2 zone some distance to the south of the Subject Site, or the SP2 zoning of New South Head Road, I am satisfied that the responsiveness of the development's stepped built form as it transitions south to north through the Subject Site, achieves this objective, and this conclusion is supported by the agreed evidence of the Parties' expert town planners;

- (c) in relation to the third objective at cl 4.3(1)(c), the Approved Development, as amended minimises the loss of solar access to existing buildings and open space, noting as I have above, that the Applicant's amended plans minimise overshadowing to the property at 3A Manning Road, and the Parties' expert urban designers agree that it does not give rise to overshadowing impacts to other surrounding properties, including 'Overthorpe' and its gardens, and the Approved Development, as amended would comply with the Applicable controls in WDCP;
- (d) in relation to the fourth objective in cl 4.3(1)(d), I agree that the Approved Development, as amended, would minimise the impacts on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion, which I note was also supported by the evidence of the Parties' urban design and planning experts during the hearing; and
- (e) in relation to the fifth objective in cl 4.3(1)(e), I agree that there are no views of the harbour and surrounding areas that require protection in terms of the Approved Development, as amended.

67 As concerns the provisions of subcl 4.6(3)(b) of WLEP, the Applicant's written request stated, and I accept, that there are sufficient environmental planning grounds to justify the Applicant's non-compliance with the standard in cl 4.3 of WLEP because the breach of the HoB development standard facilitates the achievement of the purposes of SEPP ARH through the addition of FSR to the development that would provide affordable rental housing consistent with the objectives of that SEPP, and:

- (1) consistent with the findings of my colleague, O'Neill C, at [40] in her judgment in the matter of *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161:
 - (a) the Applicant's written request in this appeal states that the exceedance of the HoB development standard is justified as a response to the provision of additional affordable housing units,
 - (b) the increase in the building envelope within the Applicant's amended plans accommodates the FSR bonus afforded to the Applicant under the provisions of SEPP ARH; and
 - (c) the so-called bonus FSR provided under SEPP ARH facilitates the effective delivery of new affordable rental housing, which is a sufficient environmental planning ground to justify the contravention of the HoB development standard, within the meaning of environmental planning grounds identified by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [23].

68 The Applicant's written request also stated, and I agree, that the Approved Development, as amended, would achieve the objectives of the R3 zoning of the Subject Site (see above (at [39(1)(b)]), because:

- (1) it would provide for the housing needs of the community within a medium density environment;
- (2) it would provide a variety of housing types within a medium density residential environment;
- (3) the zone objective concerning the provision of services and facilities to meet the day to day needs of residents is not relevant to the development; and
- (4) the Approved Development, as amended, would be of a height and scale that achieves the desired future character of the neighbourhood, which has also been confirmed by the agreed evidence of the Parties' expert urban designers.

69 Having considered the Applicant's cl 4.6 written request to vary the development standard cl 4.3 of WLEP as it applies to the Proposed Development, as amended, I have concluded that the request is well founded, and should be upheld, because:

- (1) compliance with the standard is unnecessary because the Proposed Development, including its non-compliance with the HoB developments standards in cl 4.3, achieves the objectives of the standard in cl 4.3, and is therefore consistent with them, notwithstanding its non-compliance, in satisfaction of the provisions of cl 4.6(3)(a) of WLEP for reasons provided above (at [66(1)]);
- (2) there are sufficient environmental planning grounds to justify the non-compliance with the standard in satisfaction of the provisions of cl 4.6(3)(b) of WLEP, for reasons provided above (at [67]);
- (3) the Proposed Development will be in the public interest because it is consistent with the objectives of the standard in cl 4.3 of WLEP (see above at [(1)]) and with the objectives for development within the R2 zone in which the Proposed Development is to be carried out (see above (at [67]));
- (4) having considered the matters in cl 4.6(5) of WLEP, I am also satisfied that:
 - (a) the contravention of the development standard in cl 4.3 does not raise any matter of significance for State or regional environmental planning; and
 - (b) there would be no public benefit of maintaining the development standard in cl 4.3 in the circumstances of this case; and

- (c) there would be no other matters required to be taken into consideration by the Planning Secretary before granting concurrence.
- (5) there is no need for the Court to seek the concurrence of the Planning Secretary, as the relevant matters requiring my consideration under the provisions of cl 4.6 of WLEP have been so considered.

Should Condition E.6(d) be modified?

- 70 Condition E.6(d), imposed with the grant of consent for the Approved Development, required that only certain types of work were permitted during certain hours of the day during construction of the Approved Development, including that piercing and piling should not be undertaken:
- (1) before 9am or after 4pm on any weekday; or
 - (2) before 9am or after 1pm on Saturday; or
 - (3) at any time on a Sunday or public holiday.
- 71 The Respondent submitted, supported by the evidence of its expert planner, Mr Perdigao, that the condition imposed is of a form that reflects a standard condition, and requirements therein, consistently imposed by the Respondent for developments on lots located along New South Head Road.
- 72 The Applicant submits that:
- (1) piercing and piling activities, as are required for its Approved Development, as amended, are quieter activities than other of the activities identified in the condition and, as a consequence, should not be restricted in terms of hours to the extent that noisier activities are restricted; and
 - (2) the conditions imposed on the Approved Development, as amended, should be more crafted to the specifics of the development and its context, and that the imposition of a standard condition was not appropriate in this case.
- 73 Within the joint expert report of the Parties expert planners and urban designers, the Applicant's expert planner Ms Hodgkinson had stated that limiting the hours which would warrant limiting certain construction activities, such as piercing or piling, to times that were more restrictive than those provided in the interim Construction Noise Guidelines (ICNG)) published by the NSW Environmental Planning Authority 2009, which recommends that the standard hours for normal construction activity permit these activities between 7am and 6pm, Monday to Friday, and 8am to 1pm on Saturday (although the

text of the joint report states, erroneously, but not materially, that this timing applies on Sundays). She also noted that limiting the permitted hours for construction works, which includes piercing and piling, would:

- (1) unreasonably impact on the timeframes for completion of construction works by the Applicant; and
- (2) serve little purpose given the location of the Subject Site adjacent to a classified Road, being New South Head Road, which has an inherent degree of disturbance attached to its use, presumably in relation to vehicles.

74 Mr Perdiagao had noted within the joint report that the ICNG did not restrict a consent authority from imposing more stringent construction hours than set out as standard hours within section 2.2 of the document. He added that, in his opinion:

- (1) he did not agree that the amenity benefits of completing construction works within a shorter timeframe was sufficient to outweigh the amenity benefits achieved through the imposition as proposed by the Respondent, and
- (2) the imposition of more limited timeframes for noisy works, including piercing and piling, was a clearer basis for managing the consequences of potential noise impacts, and related neighbour complaints, that may arise from construction works than relying on some activities being less noisy than others during the extended hours sought by the Applicant.

75 In closing, the Applicant, submitted that, while it embraced the Respondent's capacity to impose conditions in relation to construction hours that differed from those identified as standard within the ICNG, piercing and piling activities should be excised from condition E.6.(d) as the work to be undertaken by the Applicant would not involve piling into rock but would only involve concrete pours, and the condition is, therefore, appropriate to the specifics of the development in this appeal and its location.

76 The Respondent, in its closing remarks, noted that, in addition to the evidence of Mr Perdigao, the Applicant had provided no evidence that the piercing and piling works to be undertaken as part of the Approved Development, as amended, would be quieter than on other projects or other activities identified within the condition as imposed, which, therefore, should be retained.

77 I have considered the evidence of the Parties' experts and the submissions of the Parties, and conclude as follows:

- (1) I accept the Respondent's submission that I have been provided with no evidence that would allow me to accept the Applicant's assertion that piling and piercing to be undertaken on the Subject Site, would be quieter than other activities identified in the condition and as a consequence should be allowed;
- (2) I accept, and note the Applicant's acceptance, that, consistent with the note that accompanies Table 1 of the ICNG, which provides what it calls standard construction hours, a consent authority is able to impose more stringent construction hours;
- (3) I accept and adopt the reasons provided by the Respondent's expert town planner that the condition imposed has been similarly imposed on other developments, of similar circumstance to that in this appeal, as a standard condition, and its imposition conditioning any approval of the Applicant's Approved Development, as amended, is reasonable.

- 78 I also agree with Mr Perdigao that Ms Hodginson's concern in relation to construction timeframe impacts, and benefits that might be derived therefrom, should be taken to outweigh the day to day amenity benefits of restricting the hours permitted for noisy works.
- 79 For reasons provided above (at [78]) I am satisfied that condition E.6(d) as originally imposed by the Respondent on the Approved Development, should continue to be imposed for the development as now amended by the Applicant.
- 80 I note that in the alternate proposed draft conditions provided by the Applicant it proposed that within condition E.6(d) the times during which certain works are not to take place should be qualified by adding the phrase "other than with the specific approval of the Council".
- 81 I've considered this proposal from the Applicant to amend the wording of Condition E.6(d) and, notwithstanding that it may not have been the subject of submissions at the hearing, I am satisfied that it is acceptable, noting that it places with the Respondent all responsibility for any decisions concerning alternative arrangements. Consequently, any variation to the condition is unable to be approved unless the Respondent agrees to such a request from the Applicant.

Should Condition E.6(e) be modified?

- 82 Condition E.6(e), imposed with the grant of consent for the Approved Development, required that no loading or unloading of material or equipment associated with the activities listed in part (d) of the condition must take place

before 9am or after 4pm any weekday, or before 9am or 1pm after any Saturday, or at any time on a Sunday or public holiday.

- 83 The activities identified in in part (d) of condition E.6 were piling, piercing, rock or concrete cutting, boring, drilling, rock breaking, rock sawing, jack hammering and machine excavation.
- 84 The Applicant had submitted at the hearing that this condition should be amended to permit the loading or unloading of materials or equipment particularly associated with piling and piercing, which activities are including in part (d), such that this can be undertaken at earlier and later times in the day compared to those identified in Condition E.6(e) as imposed by the Respondent.
- 85 Notwithstanding some evidence at the hearing from the Applicant's expert urban designer, Mr Thalys, that there may exist a parking zone outside the Subject Site on New South Head Road that can be used to load and unload materials and equipment without the need to block New South Head Road, the Parties agreed to draft proposed conditions on this matter for review by Court.
- 86 The Respondent had tendered its proposed draft conditions of consent during the hearing as Exhibit J, which included condition E.6(e) in terms unchanged from those imposed by it with its initial grant of consent to the Approved Development.
- 87 The Applicant filed with the Court its proposed conditions in reply on 29 October 2021, and within that document, the Applicant included a condition E.6(e) that did not differ from that tendered by the Respondent.
- 88 I note that the condition imposes restrictions in relation to the timing loading and unloading permitted of items identified in condition E.6(d), from which the Applicant had sought to exclude piling and piercing. However, I have already determined that piling and piercing should remain subject activities within condition E.6(d).
- 89 Having determined that piling and piercing should remain as activities to which E.6(d) should apply, the agreed condition E.6(e) provided by the Parties would apply to material or equipment associated with piling and piercing, and I am

satisfied that this should be the case. I also observe that I have not been presented an alternative to this outcome by the Parties for my consideration.

- 90 Notwithstanding this conclusion, I note that a reason that Applicant had sought to amend condition E.6(f) was to avoid the prospect of being required to load and unload materials and equipment associated with the activities in Condition E.6(d) and in so doing to cause disruption to traffic during peak hour periods on New South Head Road. In this regard I again note the evidence of Mr Thalys (above at [85]), and observe that should his evidence be correct, the unloading and loading of materials and equipment would then be possible adjacent to the Subject Site and within the times identified in Condition E.6(d) without it giving rise to disruption to traffic on New South Head Road during peak hour periods.

Remaining jurisdictional matters

- 91 I have already addressed (see above at [69]) the jurisdictional pre-condition in relation to the Applicant's non-compliance with the HoB development standard in cl 4.3 of WLEP and have confirmed that the Applicant's written request to vary this standard is well founded and should be upheld, satisfying that pre-condition.
- 92 The Parties' expert planners have also addressed remaining jurisdictional matters within their joint report tendered as evidence at the hearing, in which they agree, and I am satisfied, that:
- (1) the Applicant has satisfied all jurisdictional requirements of SEPP ARH, including satisfaction of all development standards within it;
 - (2) the provisions of SEPP65 have also been satisfied by the Approved Development, as amended, noting that the Respondent raises no contention in relation to these provisions and the Parties' expert planners were satisfied that to the extent these provisions required further assessment in relation to visual impact and character, these have been considered and are resolved in this appeal (see above at [58]).
 - (3) the Applicant has provided a BASIX certificate (No. 992642_02) in satisfaction of the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004;
 - (4) the Subject Site has been used historically for residential purposes, and no change to its residential use is proposed by the Applicant. Further, the Respondent has confirmed that it has any record of the Subject Site being used for a purpose that would give rise to contamination of the

land, and the Parties are satisfied, and I agree, that the Proposed Development is compliant with the provisions of cl 7 of State Environmental Planning Policy No 55—Remediation of Land;

- (5) the Subject Site is located within the Sydney Harbour catchment, as defined within cl 3 of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP (SHC)), and the Proposed Development, as amended, is consistent with the planning principles in cl 13 of SREP (SHC);
- (6) the Proposed Development, as amended, does not give rise to any matters of relevance in relation to State Environmental Planning Policy (Infrastructure) 2007;
- (7) the relevant provisions of WLEP have been satisfied, including the provisions of cl 5.10 concerning heritage, and the requirement of scl 5.10(4) that the consent authority must, before granting consent it must consider the effect of the proposed development on the heritage significance of any heritage item or heritage conservation area concerned, which has been satisfied in my considerations in this appeal.

93 Consequently, I am satisfied that all relevant jurisdictional matters have been addressed and the Court's power to grant consent to the Applicant's development application is enlivened.

Conditions

- 94 The Parties have filed their respective draft proposed conditions of consent and to the extent that these differed reflecting the positions of the Parties' on contentions in this appeal, those differences have now been resolved in this judgment.
- 95 Consequently, the Court is in a position to finalise the appeal through making orders granting consent to the Applicant's Approved Development, as amended, and subject to conditions as follows.

Orders

96 The Court orders:

- (1) the Applicant's written request, prepared pursuant to cl 4.6 of Woollahra Local Environmental Plan 2014, to vary the applicable height development standard is upheld;
- (2) the appeal is upheld;
- (3) Development Application DA-226/2019, as amended, for the demolition of existing structures and construction of a new part four, part five storey residential flat building containing 15 units with basement car parking, at

351 to 353 New South Head Road, Double Bay, is determined by the grant of consent, subject to the conditions at Annexure 'A';

(4) the exhibits are returned except exhibits A, B, C, J, K and 1.

.....

M Chilcott

Commissioner of the Court

[Annexure A \(841130, pdf\)](#)

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