



Land and Environment Court  
New South Wales

---

Case Name: Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1048

Hearing Date(s): 24-25 January 2022

Date of Orders: 3 February 2022

Decision Date: 3 February 2022

Jurisdiction: Class 1

Before: Morris AC

Decision: The Orders of the Court are:  
(1) The Applicant's written request under clause 4.6 of the Woollahra Local Environmental Plan 2014 for contravention of the maximum height development standard imposed by clause 4.3 of the Woollahra Local Environmental Plan 2014 is upheld.  
(2) The Applicant's written request under clause 4.6 of the Woollahra Local Environmental Plan 2014 for contravention of the Floor space ratio development standard imposed by clause 4.4 of the Woollahra Local Environmental Plan 2014 is upheld.  
(3) The appeal is upheld.  
(4) Development Application DA 68/2021/1 for alterations and additions to an existing commercial building including the addition of two new levels at Lots 11 and 12 DP 4606, No. 2A Cooper Street, Double Bay is approved subject to the conditions in Annexure A.  
(5) The exhibits, other than exhibits A, B and 1 are returned.

Catchwords: DEVELOPMENT APPLICATION – heritage item – building height

Legislation Cited:	Environmental Planning and Assessment Act 1979 ss 4.15, 8.7  State Environmental Planning Policy No 55 - Remediation of Land, cl 7 Woollahra Local Environmental Plan 2014, cll 2.3, 4.3, 4.4, 4.4A, 4.6, 5.10, 5.21, 6.1, 6.2, Pt 4, Sch 5
Cases Cited:	Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSW LEC 118 SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112; Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 Woollahra Municipal Council v SJD DB2 Pty Ltd [2020] NSWLEC 115
Texts Cited:	Building Code of Australia Macquarie Dictionary Woollahra Development Control Plan 2015
Category:	Principal judgment
Parties:	Pallas Development Management Pty Limited trading as Fortis Development Group (Applicant) Woollahra Municipal Council (Respondent)
Representation:	Counsel: Mr T To (Applicant) Mr S Simington, Solicitor (Respondent)  Solicitors: Boskovitz Lawyers (Applicant) Lindsay Taylor Lawyers (Respondent)
File Number(s):	2021/127724
Publication Restriction:	No

## JUDGMENT

- 1 **COMMISSIONER:** Development Application DA 68/2021/1 was lodged with Woollahra Municipal Council on 24 February 2021 seeking consent to carry out alterations and additions to an existing commercial building, including the addition of two new levels. The Council refused consent and the Applicant is

appealing that decision pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EP&A Act).

- 2 The primary contention in the case is whether consent should be granted having regard to the written request lodged with the application that seeks to vary the building height development standard.

### **The proposal**

- 3 Following a conciliation conference held before another Commissioner of this Court, the Applicant was granted leave on 30 November 2021 to rely on amended plans and documents.
- 4 Those plans differ from those refused by the Council and now propose the following works:

“Lower Ground Floor Level (existing)

i. internal reconfiguration to accommodate a modified food and drink premises

including removal of existing false floor,

ii. new services including back of house/loading space, goods lift, hot water

plant, pump/mechanical room, grease arrestor, waste room, and sprinkler

valve room,

iii. minor excavation work for the new footings and a lift pit, and

iv. new internal fire stairs, lift and lobby.

This level will provide for a total gross floor area of 143m<sup>2</sup>.

Ground Floor Level (existing)

i. relocation of the existing loading dock roller door & gate further to the west

increasing the internal size of the loading dock,

ii. internal reconfiguration to accommodate a single retail tenancy,

iii. new internal fire stairs, lift and lobby, and

iv. new services/fire hydrant & booster room facing Brooklyn Lane.

This level will provide for a total gross floor area of 206m<sup>2</sup>.

Level 1 Floor (existing)

i. internal reconfiguration to accommodate a single office tenancy,

- ii. new toilets,
  - iii. new internal fire stairs, lift and lobby,
  - iv. new comms/electrical room, and
  - v. heritage conservation works including:
    - re-instatement and refurbishment of the existing awing to Cooper Street and Bay Street to match original profile and colour, and
    - replacement of existing horizontal and vertical louvres with new bronze louvres to match existing profile and original colour and materiality.
- As modified, this level will provide for a total gross floor area of 290m<sup>2</sup>.

#### Level 2 Floor (existing)

- i. internal reconfiguration to accommodate a single office tenancy,
- ii. new toilets,
- iii. new internal fire stairs, lift and lobby,
- iv. new comms/electrical room,
- v. heritage conservation works including:
  - replacement of existing horizontal and vertical louvres with new bronze louvres to match existing profile and original colour and materiality, and
  - removal and refurbishment of existing circular ceiling.

As modified, this level will provide for a total gross floor area of 290m<sup>2</sup>.

#### Level 3 Floor (new level)

- i. a new office tenancy comprising a new façade with 'perforated aluminium:  
dark bronze' horizontal and vertical louvres to align with style on levels below,
- ii. new toilets,
- iii. new internal fire stairs, lift and lobby,
- iv. new comms/electrical room, and
- v. new roof mounted AC units/plant, centrally located partially screened by the  
new addition.

This level will provide for a total gross floor area of 245m<sup>2</sup>.

#### Level 4 Floor (new level)

- i. a new office tenancy comprising a new façade with 'perforated screen: white',
- ii. new wrap around trafficable terrace with planter box around the northern, eastern and western boundaries,
- iii. new toilets,
- iv. new internal fire stairs, lift and lobby, and
- v. new comms/electrical room.

This level will provide for a total gross floor area of 99m<sup>2</sup>.

Roof level (new) – This level will comprise a stepped parapet flat roof form with provision of a lift overrun.”

- 5 It is common ground that the proposed building does not provide access, fire rating and emergency egress that comply with the Building Code of Australia (BCA). The only stairway within the building is the feature spiral stairway with no lift access or fire rated egress stairs. The louvres on the building are combustible and need to be replaced with appropriate fire rated materials. The building itself does not achieve the appropriate fire rating for commercial use. The application will address compliance with all relevant provisions of the BCA.
- 6 Those plans were lodged on the NSW Planning Portal on 1 December 2021 with supplementary plans and supporting documents lodged on 25 January 2022. The documentation forms Exhibit B.

### **The site and locality**

- 7 The site and buildings thereon encompass two (2) lots, legally known as Lots 11 & 12 in Deposited Plan 4606 with street address 2A Cooper Street Double Bay (formerly known as 24-26 Bay Street, Double Bay).
- 8 It is rectangular in shape and comprises a primary street front boundary to Cooper Street (north) of 30.46m, a rear street boundary to Brooklyn Lane (west) of 12.265m, and a secondary street front boundary to Bay Street (east) of 13.135m and a southern (side) boundary of 30.45m. Area is 386m<sup>2</sup>.
- 9 The site is generally flat, apart from excavation accommodating the basement level with a minor cross fall of approximately 0.44m from the southwest corner to the northeast corner of the site.

- 10 A three-storey above ground commercial building with basement level, known as “Gaden House” stands on the site. The building thereon was designed by a notable Sydney Architect Neville Gruzman.
- 11 The site is situated at the intersection between Cooper Street and Bay Street and is bounded by road reserves on three (3) of its four (4) boundaries that is Bay Street to the east, Cooper Street to the north and Brooklyn Lane to the west.
- 12 The existing surrounding context of the site includes a range of two (2) to four (4) storey developments and a mixture of uses and buildings such as commercial, business, retail, office, shop-top housing, and includes to the north, across Cooper Street, a two (2) storey building known as the ‘Royal Oak Hotel’, and further to the north, adjacent to the Royal Oak Hotel is a recently approved (five) 5 storey mixed-use development which is close to completion at 30-36 Bay Street orientated to Guilfoyle Park and Bay Street.
- 13 To the north-east, across Bay Street, are one (1) and two (2) storey commercial buildings at No’s 37, 39, 41 and 43 Bay Street and even further north-east (north of Short Street) is a six (6) storey shop-top housing development, known as the Cosmopolitan Building, that forms a whole block redevelopment bounded by Knox Street, Bay Street, Short Street and Goldman Lane.
- 14 To the south, directly adjacent to the site, is a four (4) storey shop-top housing contemporary building at 18 Bay Street. This building has a three-storey street wall height with a recessive fourth storey with a further recessed upper fifth level for providing access to roof-terraces.
- 15 Further to the south, is a mix of older and contemporary style two (2) to four (4) storey commercial buildings with primary orientation towards Bay Street, to the east, across Bay Street, a group of four (4) two-storey terrace style commercial buildings at No’s 29-33 and 35 Bay Street identified as Character Buildings within the Woollahra Development Control Plan 2015 (WDCP). (See sections D5.6.3.8).

- 16 To the west, directly across Brooklyn Lane, are the R2 and R3 Low and Medium Density Residential zones which includes a mix of older and contemporary buildings of residential uses, typically ranging from one-three storeys.
- 17 Six (6) significant street trees are located within the Cooper Street and Bay Street road reserves directly adjacent to the street frontages of the site.

### **Planning controls**

- 18 The Site is zoned B2 Local Centre under the Woollahra Local Environmental Plan 2014 (WLEP). The development is permitted with consent in that zone.
- 19 Clause 2.3(2) of the WLEP 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. The objectives of the B2 zone are:
  - . To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
  - To encourage employment opportunities in accessible locations.
  - To maximise public transport patronage and encourage walking and cycling.
  - To attract new business and commercial opportunities.
  - To provide active ground floor uses to create vibrant centres.
  - To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
  - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.
- 20 Part 4 of the WLEP contains Principal development standards. Those relevant to the application are cl 4.3 Height of buildings, 4.4 Floor space ratio (FSR) and 4.4A Exceptions to FSR (Areas 1 and 1A Double Bay). The effect of these development standards provides for a maximum building height of 14.7m and a maximum FSR of 3:1.
- 21 The proposed development exceeds both of these standards and the Applicant relies on written requests that seeks to vary the standards pursuant to the provisions of cl 4.6 of the WLEP.

- 22 The building and interiors on the site are listed as a local heritage item No 681 in Sch 5 of the WLEP and accordingly, the provisions of cl 5.10 apply. Consent is required for demolition, altering the exterior of the building and making structural changes to its interior or changes to anything inside the item, and erecting a building on the site.
- 23 Pursuant to cl 5.10(4) of the WLEP, the consent authority must, before granting consent under this clause in respect of a heritage item or heritage conservation area, consider the effect of the proposed development on the heritage significance of the item or area concerned.
- 24 The site is within a Flood planning area and, pursuant to the provisions of cl 5.21 of the WLEP, development consent must not be granted to development on land the consent authority considers to be within the flood planning area unless the consent authority is satisfied the development—
- (a) is compatible with the flood function and behaviour on the land, and
  - (b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and
  - (c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and
  - (d) incorporates appropriate measures to manage risk to life in the event of a flood, and
  - (e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.
- 25 The Council raises no contentions in relation to flooding and has provided conditions of consent that would address these issues.
- 26 The site is classified as Class 2 on the Acid Sulfate Soils Map. As there are works to be carried out below the natural ground surface, an Acid Sulfate Soils Management Plan is required. Clause 6.2 of the WLEP relating to Earthworks requires consideration of a list of matters in deciding whether consent is to be granted. In this regard, the Applicant has prepared a Geotechnical Report and the Council raises no contentions in relation to these issues. The agreed conditions of consent also address these requirements.



- 27 The WDCP applies to the site. Chapter D5 Double Bay Centre is particularly relevant to the application with the site included in the Bay Street (south) locality. The existing character is described as follows:

“Bay Street connects New South Head Road with the harbour. Its north-south orientation results in the street being sunny throughout the day. It is lined by modest buildings on narrow lots, with irregular setbacks at street level and street trees. Together the elements contribute to an intimate and relaxed atmosphere. There are a number of buildings that have been identified as character buildings in Section 5.6.3.8 Heritage items and character buildings. These include several Victorian terraces that have been modified for retail use.”

- 28 The Desired future character is described as:

- “a) Retain the existing modest, lot related building widths and retail frontages.
- b) Provide setback areas at ground level that can be used for outdoor eating or public circulation.
- c) Retain the character buildings along Bay Street.
- d) Maintain the avenue of trees.”

- 29 Figure 15 depicts a potential architectural resolution and address on Bay Street (south) based on the controls in the chapter. It encourages a variety of roof forms with balconies and rooms overlooking the street. The use of adjustable screening to protect rooms from low angle summer sun is contemplated and character buildings are to retain the existing front setbacks. Buildings are to be built to the street alignment with shopfronts, projecting rooms and balconies with outdoor dining at street level encouraged. A four (4) storey building is depicted with a three (3) storey street wall and the fourth (4) storey setback by 3.5m. An articulation zone is located at the front 2.4m of the site.
- 30 Part D5.5 applies to Built form envelopes with a series of Control drawings prepared for individual sites. The site is depicted on Control drawing 5 and is nominated as a ‘character building’. It anticipates a (four) 4 storey building with a 2.5m articulation zone to Cooper Street, 2.4m to Bay Street and 1.2m to Brooklyn Lane. The plan does not provide for the setting back of the fourth level of the building due to the corner location of the site. A colonnade is to be constructed on the ground floor frontage of Bay Street.

- 31 Part D5.6.2 encourages residential uses on the upper floors of buildings.
- 32 Part 5.6.3.5 applies to Corner buildings which may be granted additional floor space to create strong corner buildings. The site enjoys the additional floor space provision under the WLEP.
- 33 Part 5.6.3.8 applies to Heritage items and character buildings. The site contains both. The objectives of the part are to protect and enhance heritage items and conservation areas, and encourage the sensitive adaptation or reuse of buildings that contribute to the spatial definition of the urban spaces they address.
- 34 Variations to the building envelope will only be considered where it can be demonstrated that the variations support the sensitive adaptive reuse of heritage items relating to the building's massing.
- 35 State Environmental Planning Policy No 55 - Remediation of Land (SEPP 55) applies with cl 7 relevant to the application. That clause required that a consent authority must not consent to the carrying out of any development on land unless—
- (a) it has considered whether the land is contaminated, and
  - (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
  - (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

### **The contentions**

- 36 The contentions in the case were, prior to the amendment of the application, detailed in the Statement of Facts and Contentions filed on 22 July 2021:
- (1) The DA must be refused because the Proposal exceeds the maximum height development standard and the Court could not be satisfied that the requirements of cl 4.6 of WLEP have been met.
  - (2) The DA must be refused because the Proposal exceeds the maximum permissible FSR and the Court could not be satisfied that the requirements of cl 4.6 of WLEP have been met.
  - (3) The Proposal will not minimise view, solar access, overshadowing and visual intrusion impacts on the shop-top housing development at 18 Bay

Street and overshadowing and visual intrusion impacts on the public domain on Bay Street and Cooper Street.

- (4) The proposed fifth-storey (level 4 floor) does not achieve, and is not consistent with the existing and the desired future streetscape character of Bay Street (South).
  - (5) The proposed fifth-storey addition (level 4 floor) is considered to have an unacceptable adverse impact on the heritage significance of 'Gaden House including interiors', a local heritage item.
  - (6) The DA must be refused because the preconditions in cl 6.1 of the WLEP have not been met by the application.
  - (7) The DA should be refused because the Court would not be satisfied on the information available that the land is suitable for the commercial purpose for which the development is being carried out.
  - (8) The Proposal comprises additional gross floor area with no bicycle or motorbike parking, representing a total short-fall of 13 bicycle and 3 motorbike parking spaces on the site, failing to provide the minimum number of bicycle or motorbike parking as outlined in Part E1.6 and Part E1.7 of the WDCP.
  - (9) Inadequate information has been submitted to enable full and accurate assessment of the Proposal against the relevant considerations pursuant to s 4.15 of the EP&A Act.
- 37 The amendments made to the application have addressed the majority of the original contentions in the case. Those that remain are contentions 1 and contention 3, in a modified form. The Council no longer presses the contention that the proposal does not minimise overshadowing and visual intrusion impacts on the public domain on Bay and Cooper Street.
- 38 The Council no longer presses the Contention that the written request in regard to the FSR of the site should not be allowed. It supports the variation to the additional FSR.
- 39 The Council does not press contention 4, that the building does not achieve and is not consistent with the existing and the desired future character (DFC) of Bay Street (south). It now submits the proposal is consistent with the existing and DFC of Bay Street (south).
- 40 Of particular note is that the Council's heritage officer has considered the amended building design and associated Heritage Impact Statement and advises the plans now satisfy the earlier contention and particulars in the case, and that the proposed built form and works are acceptable from a heritage

viewpoint. A number of conditions have been recommended and are included in the agreed conditions (Exhibit 3).

- 41 The amended plans and supporting documentation have addressed the Council's requirements in relation to bicycle and motorbike parking spaces.
- 42 The amended application now includes a Detailed Site Investigation dated 14 January 2022. That report reviews an early study and site investigation, groundwater sampling and subsequent investigations and concludes that, based on the findings of those investigations, that the site is suitable for the proposed development. Accordingly, the Council submits the provisions of cl 7 of SEPP 55 are met and consent can be granted to the application. I accept that submission. Similarly, the additional details provided by the Applicant now satisfy the contention relating to Acid Sulphate soils. I accept those submissions.
- 43 The contentions that remain are contention 1 and contention 3 as it relates to the view and visual intrusion impacts on the shop-top housing development at 18 Bay Street. The Council says the Court would not be satisfied that the written request under cl 4.6 of the WLEP as it relates to Building height adequately demonstrates that compliance with the development standard is unreasonable or unnecessary, that there are sufficient environmental planning grounds to justify contravening the development standard or that the proposal will be in the public interest.

### **The evidence**

- 44 Expert evidence was heard from Mr G Karavanas for the Applicant and Mr W Perdigao for the Council.
- 45 The experts agree that the first contention relates specifically to two apartments on the shop-top building known as 18 - 22 Bay St, Double Bay, to the south of the site. These apartments include U42 (on level 4) and U51 (on level 5). Both apartments have two private open space areas. The primary open space of U42 is located directly off the living area of that apartment on level 4. The secondary open space of U42 is located on level 5, accessed via the common lift and lobby. The primary open space of U51 is directly accessed off the living area and located on level 5, while the secondary private open

space of U51 is located on the southern side of that apartment on level 5 and is accessed from a bedroom.

- 46 Units 42 and 51 comprises a number of other views and outlooks that are available and unaffected. For the upper level of the terrace of unit 42, the outlook to the north east, east and southeast is expansive and unaffected as are the views and outlook from the northern terrace of unit 51 to the northwest and west. Indeed, there is a bank of west facing windows from unit 51 which also comprise uninterrupted views and outlook to the west. In addition, unit 51 also comprises another private open space area to the south with uninterrupted views and outlook to the south. While the terrace area is accessed from a bedroom, it comprises a table and chairs, a jacuzzi and a bar fridge and appears to be frequently used.
- 47 The experts also note that the upper terrace of unit 42 does not comprise the primary open space for this apartment. The terrace area is located on a separate level from the unit itself, is accessed via a common lift and lobby, and has mechanical ventilation units on it.
- 48 They agree that the proposed development results in an acceptable level of visual intrusion from the lower primary open space of unit 42. This is because the primary orientation of this terrace is to the west and the outlook to the west is not affected by the proposal. The outlook to the northwest is improved when compared to a compliant envelope. While there is a minor impact to the outlook to the north from vantage point 2 (at the western extremity of this terrace), this impact is minor, and in totality, there does not appear to be a net reduction of outlook when considering the net gain of vantage 1.
- 49 The experts also agree that the existing shop top housing development at 18 - 22 Bay St Double Bay to the south of the site was approved in breach of the height and FSR development standards. The approved development comprised a height of 18.1 metres and a FSR of 3.15:1. The maximum height under the LEP was then 13.5 metres (and now is 14.7 metres or 4 storeys) and the maximum FSR was 2.5:1. Therefore, the approval and the existing building has a non-compliant height by one story and a breach in FSR of some 600 square metres.

- 50 They agree that, the environmental planning grounds expressed in the submitted cl 4.6 of the WLEP variation includes the commercial use of the building, the heritage listing, the prominent corner allotment, the consistency in context, equitable access, urban design benefits, among other environmental planning grounds.
- 51 They also agree that the proposed additional height is compatible with the context and desired future character of the area. The proposal has been thoughtfully designed to present as a fourth story (with the fifth storey setback) development which is consistent with the context. A number of recently approved and constructed developments in the vicinity also exceed the height limit. Accordingly, they agree that the proposal is consistent with the existing and desired future character, which is one of the environmental planning grounds used by the Applicant to support the application.
- 52 They also agree that the proposal has an acceptable impact on the heritage significance of the item, another environmental planning ground put forward.
- 53 The principle difference between the experts is whether the development is consistent with objective (d) of cl 4.3 of the WLEP as it relates to the minimisation of impacts on adjoining and nearby development from disruption of views and visual intrusion. Mr Perdigao says that it is not and Mr Karavanas says that it is.
- 54 Mr Perdigao says units 42 and 51 enjoy district views of Double Bay, Darling Point, Bellevue Hill and views of the sky. This includes views of the vegetated ridgeline of Darling Point and Bellevue Hill. He says these units enjoy a pleasant outlook being a filtered outlook of the sky located behind a street tree canopy of the street trees located on Cooper Street and Bay Street. The views available from both apartments do not, in his opinion, constitute a significant view, however he says it does constitute an outlook. He says the proposal has incorporated measures to reduce the impact on this outlook, however it has not *minimised* the impacts upon visual intrusion and views. He says *minimise* means ‘to reduce to the smallest possible amount or degree’ (Macquarie Dictionary Online). He says this is different to *reduce* which means ‘to bring down or lower in degree, intensity’.

- 55 He says the proposal does not minimise visual intrusion impact to unit 51 because it introduces a building (new level 4) of a greater height and scale than existing, that is located in the foreground of the significant northern outlook which includes filtered views of the sky located behind a street canopy. The provision of a green wall along a portion of the southern elevation of the building (new level 4) and planter located within the southern setback at the same level is not an improvement of, or a like for like replacement of the existing outlook that will be intruded upon as a result of the building (new level 4) above the height development standard. The proposed building (new level 4) does not retain filtered views of the sky located behind a street canopy backdrop and would disrupt the continuous panoramic outlook available from the northeast to the north and to the northwest, which includes the vegetated ridgeline of Bellevue Hill to Darling Point and the street tree canopy of Bay and Cooper Streets.
- 56 Mr Perdigao also says the proposal does not minimise view impact to unit 51 as it introduces a building (new level 5) located in the foreground of a district view of Double Bay and Darling Point that includes views of the vegetated ridgeline of Darling Point and the district view of Bellevue Hill that includes views of the vegetated ridgeline of Bellevue Hill. He concludes that the proposal has not reduced the impacts of visual intrusion and views to the greatest degree possible when considering the element causing the impact is that of a non-compliant height building envelope. Furthermore, the northern terrace of unit 51 is an area of primary open space and its primary orientation is to the north and therefore the relative impacts to this unit are not minimised.
- 57 While he acknowledges the building at 18 Bay St was approved in breach of height and FSR standards, he says this is not a relevant matter of consideration in respect of minimisation of impacts. He says the existing built form on adjoining sites must be factored into any environmental planning assessment and because the existing building does not conform to FSR and height development standards, this does not negate or lessen the importance of the existing views or an outlook that it currently enjoys or benefits from.

- 58 He says the matters for consideration are whether the proposal achieves objective (d) of cl 4.3 of the WLEP that is “to minimise the impacts of new development on adjoining or nearby properties disruptions from views, loss of privacy, overshadowing or visual intrusion”. In this case being disruption of views and visual intrusion upon adjoining properties being units 42 and 51 of 18 Bay St. He says there is no dispute that there will be no loss of privacy or overshadowing as a result of the amended proposal.
- 59 Mr Karavanas says the proposal does achieve consistency with objective (d) of cl 4.3 of the WLEP as it relates to the minimisation of impacts on adjoining and nearby development from disruption of views and visual intrusion.
- 60 He says units 42 and 51 do not enjoy any iconic views, any views of water or land water interface across the subject site. These apartments have an outlook rather than a significant view. The outlook is of street trees along Cooper Street and buildings beyond. The buildings beyond are those of 30 - 36 Bay St, Double Bay and 2 - 22 Knox Street Double Bay. Both buildings have a six storey form and as such, units 42 and 51 do not have a view or an outlook over or beyond these buildings. While the outlook from both apartments does not, in his opinion, constitute a significant view or a significant outlook, he says the proposal has incorporated a number of measures to minimise any impact on this outlook and also minimise visual intrusion. These measures include the following:
- shifting the upper level away from the common boundary with numbers 18 - 22 Bay St by 2.7 metres;
  - chamfering the southwestern corner of the building;
  - providing a planter within the eastern portion of the southern setback, and
  - providing a green wall for the remainder of the upper level.
- 61 As a result, he says the appearance of the proposed building is visually softened and less prominent. By moving the building away from the common boundary, the outlook to the northeast and northwest is also opened up and the visual intrusion is minimised. In addition, the landscaping provides a visual interpretation of a street tree canopy with the building beyond. In this regard he says that despite there being no significant outlook from these apartments, the visual intrusion is minimised.



- 62 Mr Karavanas says there are a number of further matters for consideration in respect of the minimisation of impacts. Firstly units 42 and 51 comprise a number of other views and outlooks that are available and unaffected. This is agreed by Mr Perdigao. Secondly, he says that the terrace areas, when adjoining residential or shop-top developments, would normally require privacy protection measures such as privacy screens. If the side elevation of the terraces affected comprised a privacy screen, that would have a greater impact on visual intrusion than the proposed upper level. Thirdly he says that because the units were approved beyond both FSR and height standards of the LEP the impact is from a part of a building that breaches those development standards. For these reasons he says that compliance with the height standard is unreasonable and unnecessary because it does achieve objective (d) of the standard in minimising the impact relating to disruption of views and visual intrusion.
- 63 The written request includes a number of environmental planning grounds that Mr Karavanas says are sufficient to justify contravening the development standard. Mr Perdigao does not support any of these reasons, however does not provide any evidence as to why, other than that because it has not been adequately demonstrated the impacts of proposed level 4 are acceptable in relation to the proposal not minimising the impacts of disruption of views and visual intrusion upon unit 42 and unit 52. For that reason he says there are not sufficient environmental planning grounds to justify contravening the building height development standard.
- 64 In cross examination, Mr Perdigao did say that the restoration of the heritage item would be an environmental planning ground, however did not consider it would be sufficient to vary the building height development standard.
- 65 Mr Karavanas says there are sufficient environmental planning grounds to justify contravening the development standard. He says the works that are required to sympathetically restore the building and retain its integrity and longevity are very costly and total \$4,382,253.25. The additional level will assist in the recovery of funds to assist in the provision of these restoration

works. He says this is an environmental planning ground. The council did not dispute the estimate of costs provided by the Applicant.

66 In relation to contention 3 there is no agreement between the experts. Mr Perdigao says the proposal does not achieve objective 09 of Part D5 of the WDCP which encourages view sharing, nor does it achieve objective (d) of cl 4.3 of the WLEP to minimise the impacts of new development on adjoining or nearby properties from disruption of views.

67 Mr Karavanas relies on his evidence in relation to contention 1 and concludes that the proposal is acceptable in terms of visual intrusion because it does minimise those impacts upon the roof terrace areas of units 42 and 51 at 18 Bay St. He says the proposed siting, design and landscaping of the upper level will minimise visual intrusion and appropriately interpret the leafy outlook of the Cooper street trees. He considers the proposal does achieve the relevant objectives of the WDCP and encourages view sharing.

## **Conclusion and findings**

### *The 4.6 objections*

68 Clause 4.6 of the WLEP imposes a precondition to a consent authority exercising the power to grant consent to development on land to which the clause applies, and if I am not satisfied that the provisions of the clause are met, consent cannot be granted. The Applicant relies on these provisions as the proposed development does not meet the development standards for FSR and building height. Two written requests have been prepared on behalf of the Applicant and are included in Exhibit B that relate to the development standards for FSR and Building height.

69 Whilst the Council does not press its contention in relation to the non-compliance with the FSR development standard, the Court must be satisfied that the provisions of the clause are met.

70 Clause 4.6 of the WLEP is in the following form:

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 Secretary has been obtained.

(5) In deciding whether to grant concurrence, the 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 Secretary before granting concurrence....

- 71 This imposes a number of tests, the first that compliance with the development standard must be unreasonable or unnecessary in the circumstances of the case, the second that there are sufficient environmental planning grounds to justify contravening the development standard, the third that the Applicant's written request has adequately addressed the matters required to be demonstrated by subcl (3) and the fourth, that 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. In addition, satisfaction of those matters that must be considered by the Secretary in determining whether concurrence should be granted is required.

72 Preston CJ has provided guidance on the application of cl 4.6 of the WLEP, most recently in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 (*Initial Action*). A number of preconditions are identified, the first, in cl 4.6(4)(a), is that the consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a)(i) and (ii).

73 These two matters are summarised at [15] and [23] of that decision as follows:

“15. The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the applicant’s written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters.

...

23. As to the second matter required by cl 4.6(3)(b), the grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature: see *Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]. The adjectival phrase “environmental planning” is not defined, but would refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects in s 1.3 of the EPA Act.”

74 In *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (*Wehbe*) Preston CJ sets out five ways of demonstrating that compliance with a development standard is unreasonable or unnecessary. They are:

- “(1) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
- (2) the underlying objective or purpose is not relevant to the development with the consequence that compliance is unnecessary;
- (3) the underlying objective or purpose would be defeated or thwarted if compliance was required with the consequence that compliance is unreasonable;

(4) the development standard has been virtually abandoned or destroyed by the Council's own actions in granting consent departing from the standard;

(5) the zoning of particular land was unreasonable or inappropriate so that a development standard appropriate for that zoning was also unreasonable or unnecessary is applied to the land.”

- 75 The written requests consider all of the relevant provisions. I accept the conclusions made in relation to environmental planning grounds, particularly those that apply to the necessary upgrading works to the Heritage Item. The building is clearly in need of upgrading and in particular to the façade of the building which is significantly deteriorated. The provision of necessary fire protection works, access and egress are also required and, will be assisted through the provision of the additional floor space. Accordingly, I am satisfied that the provisions of cl 4.6(4)(a)(i) are met.

#### *Floor space ratio*

- 76 The objectives of the FSR development standard are:

(b) for buildings in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, and Zone B4 Mixed Use—to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.

- 77 I accept the agreed evidence that the proposed building would be compatible with the desired future character of the area in terms of bulk and scale. Accordingly, the proposal would be consistent with the objectives of the standard.
- 78 The zone objectives are detailed at [20]. The proposal will provide a range of retail, business and entertainment uses that serve the needs of people who live in, work in and visit the local area. It will also encourage employment opportunities in accessible locations, and, being close to public transport, will maximise public transport patronage and encourage walking and cycling. The new commercial floor space is likely to attract new business and commercial opportunities to the Double Bay centre and the design of the development provides active ground floor uses that would assist in the creation of vibrant centres.

- 79 Again, having accepted the agreed evidence, I am satisfied the development is of a scale and type that is compatible with the amenity of the surrounding residential area and is of a height and scale that achieves the desired future character of the neighbourhood.
- 80 For these reasons, I find the proposed development is consistent with the objectives of the zone.
- 81 On this basis, I am satisfied that the requirements of cl 4.6(4)(a)(ii) of the LEP are met and the development would be in the public interest.
- 82 The concurrence of the Secretary is not required in these circumstances.
- 83 For these reasons, I am satisfied that the written request relating to the FSR development standard is well founded and should be upheld.

#### *Height of buildings*

- 84 The objectives of the Height of buildings development standard 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.
- 85 There is no dispute that the building height will be consistent with the desired future character of the neighbourhood. The WLEP height controls provide for the transition in scale and, given the location of the site, I am satisfied that the transition in scale that would result from the building in the form is appropriate and would achieve objective (b).
- 86 It is common ground that the development has been designed to minimise the impacts of the new development on loss of solar access to existing buildings and open space, and also to minimise the impacts of the new development on

adjoining or nearby properties from loss of privacy and overshadowing. I accept those findings.

- 87 The final objective is achieved as views of the harbour and surrounding areas would not be affected.
- 88 The only area of dispute is whether the design of the proposal minimises impacts of new development on adjoining or nearby properties from disruption of views or visual intrusion.
- 89 There are two matters that must be considered, the first being disruption of views and the second being visual intrusion. For the development to be consistent with the objective, the proposal would have to minimise these impacts.
- 90 The extent of these impacts is confined to one of the two terraces that form part of units 42 and 51 at 18 Bay Street, the adjoining site to the south. There is no contention that the development would impact any other adjoining or nearby properties.
- 91 Both experts agree that there are no significant views from either terrace that would be impacted but rather, these areas enjoy an outlook. That outlook is one of a number of other views and outlooks that are available and unaffected by the proposal.
- 92 It is also agreed that the proposal has incorporated measures to reduce the impact on the outlook however, according to Mr Perdigao, it has not been minimised. He takes a similar view that the visual intrusion of the new building has not been minimised.
- 93 This matter was considered by Clay AC in *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112 where he stated at [78]-[81]:

“The objective of the height control is "to minimise the impacts of new development on adjoining or nearby properties from disruption of views...or visual intrusion".

The first question is whether the building, including that part above the height control, is a visual intrusion. A visual intrusion is not a disruption of a view, because that is a separate potential impact identified in the objective. The proposal does not disrupt "views"; it is common ground that the southern outlook is not a view.

The Macquarie Dictionary defines “intrusion” as the act of intruding and intrude as to thrust or bring in without reason, permission, or welcome. A visual intrusion must be an unwelcome form which intrudes into the available outlook. It would appear to me that a new building of itself will not necessarily be a visual intrusion. There must be something unwelcome about it. It could be the form of the building itself, or it could be its relationship to the viewer and what lies beyond.

There is no doubt that the form of the building itself does not constitute a visual intrusion. It is an attractive well-designed building with coherent form and scale.

The building does intrude into the outlook of some apartments on the northern side of Cross Street. Part of a pleasant outlook will be replaced by closer building, albeit of excellent design. That amounts to a visual intrusion. The question then is whether the development minimises the visual intrusion, because even a complying building will be a visual intrusion to some apartments in Cross Street.”

- 94 Further guidance is provided by Preston CJ in *Woollahra Municipal Council v SJD DB2 Pty Ltd* [2020] NSWLEC 115 where he states, also at [78]-[81]:

“In terms, what is to be minimised under the objective in cl 4.3(1)(d) are “the impacts of new development on adjoining or nearby apartments”, not the disruption of views, loss of privacy, overshadowing or visual intrusion. True, the impacts of the new development on the adjoining or nearby apartments are to be from the disruption of views, loss of privacy, overshadowing or visual intrusion, but it is the collective impacts of the new development on adjoining or nearby properties from these various sources of impact that is to be minimised.

This focus of the objective frames the evaluative task required by cl 4.6(4)(a)(ii). Is this development consistent with this objective of minimising the impacts of new development on adjoining or nearby properties from these sources of impact?

As the Commissioner recognised, any assessment of the impacts of new development on adjoining or nearby properties requires identification of a baseline of the amenity currently enjoyed by the properties, which level of amenity would be impacted on by the new development. In terms of views and outlook, this requires identification of the views and outlook currently enjoyed by the properties.

The next step in the assessment is to identify the nature and extent of disruption of views and visual intrusion that the new development will cause on the current level of amenity, including existing views and outlook, of the properties. If a new development does not disrupt any views and only visually intrudes in one outlook in a minor way, as the Commissioner found was the nature and extent of impact in this case, it is reasonably open to find that the impacts of the new development on adjoining or nearby properties have been minimised. Such assessment



does not involve taking into account an irrelevant consideration or making a manifestly unreasonable decision.”

- 95 The first test is to determine the baseline and what will be impacted by the new development. The impact from the terraces is to those views available from the terraces to the north, north east and north west and primarily comprises district views and vegetation. There is no doubt that the building would impact on those views however, what has to be determined is whether that impact has been minimised. In relation to visual intrusion, I follow the findings of Clay AC and find that the proposed building, due to its good design, coherent form and scale and the mitigating landscaped elements introduced is not a visual intrusion.
- 96 Having regard to the evidence and the benefit of the site view, I am satisfied that the impact of the development on views and visual intrusion has been minimised.
- 97 That is because the non-complying elements of the building have been setback from the southern boundary as well as the western and eastern boundaries. The curved wall around the south western corner of level 4 also contributes to the minimisation of the impacts to views and the visual intrusion of the building when viewed from the terraces of units 42 and 51. The introduction of the green wall and planter box also minimise those impacts. Finally, the reduced footprint of level 4, being well setback from the boundaries of the site also minimises the impact of the new development on those adjoining properties.
- 98 Over time, as the trees in Cooper Street grow, the canopy will be more visible from the apartments, and will integrate with the green wall.
- 99 I do not accept Mr Perdigao’s evidence that for the impact to be minimised it would have to be reduced the smallest possible amount or degree. To do so would mean that there would be no impact at all. The objective of the control contemplates some impact, it just requires the impact to be minimised. I accept the submission of Mr To, for the Applicant, that to adopt this logic, there would always be a further reduction possible to the point of there being no breach and therefore no impact. This is not what is contemplated by cl 4.6 of the WLEP. It contemplates that the development standard will be breached. What has to be

determined is if that breach is appropriate in the circumstances of the case. I consider that it is.

- 100 For these reasons, and, associated with my earlier findings, I am satisfied that the proposed development would be consistent with the objectives of the Height of buildings development standard. Having already found the development is consistent with the objectives of the B2 zone, the proposal would be in the public interest and I am satisfied that the requirements of cl 4.6(4)(a)(ii) of the WLEP are met.
- 101 The same environmental planning grounds were put forward in support of the request and I consider that these are also appropriate in relation to the building height.
- 102 Similarly, the concurrence of the Secretary is not required to vary this development standard.
- 103 For these reasons, I am satisfied that the written request relating to the Building height development standard is well founded and should be upheld.
- 104 Pursuant to cl 4.6(5) of the WLEP, I am satisfied the proposal is not considered to raise any matter of significance for State or regional development.
- 105 The states of satisfaction required by cl 4.6 of the WLEP have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the control.

#### *Merit assessment*

- 106 The focus of the appeal is on the objective (d) of the Building height development standard. Having found that it is appropriate to vary this standard, there are no other contentions that arise. The third contention requires consideration of similar issues and no further assessment of the impacts is required.
- 107 In relation to the matters raised by objectors, I accept the agreed position of the experts and the submissions of the Council that the development would be consistent with the desired future character of the neighbourhood. The evidence is that the character will evolve to one of four storeys with a fifth

storey setback so that it is not visible from the public roads. This is consistent with the proposal.

108 Heritage was not raised as a contention in the case and therefore, I accept the Council's submission that the works proposed are appropriate and will not adversely affect the heritage significance of the item. The works that will improve fire safety, accessibility and egress are important and will ensure long term preservation of the building.

109 Having regard to the evidence, I am satisfied that the relevant provisions of the WLEP have been satisfied and that there are no reasons why consent should not be granted.

110 The Orders of the Court are:

- (1) The Applicant's written request under clause 4.6 of the Woollahra Local Environmental Plan 2014 for contravention of the maximum height development standard imposed by clause 4.3 of the Woollahra Local Environmental Plan 2014 is upheld.
- (2) The Applicant's written request under clause 4.6 of the Woollahra Local Environmental Plan 2014 for contravention of the Floor space ratio development standard imposed by clause 4.4 of the Woollahra Local Environmental Plan 2014 is upheld.
- (3) The appeal is upheld.
- (4) Development Application DA 68/2021/1 for alterations and additions to an existing commercial building including the addition of two new levels at Lots 11 and 12 DP 4606, No. 2A Cooper Street, Double Bay is approved subject to the conditions in Annexure A.
- (5) The exhibits, other than exhibits A, B and 1, are returned.

.....

**S Morris**

**Acting Commissioner of the Court**

[Annexure A \(861891, pdf\)](#)

\*\*\*\*\*

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.