



Land and Environment Court

New South Wales

Case Name: Woollahra Municipal Council v SJD DB2 Pty Limited

Medium Neutral Citation: [2020] NSWLEC 115

Hearing Date(s): 14 July 2020

Date of Orders: 18 August 2020

Decision Date: 18 August 2020

Jurisdiction: Class 1

Before: Preston CJ

Decision: The Court orders:
(1) The appeal is dismissed.
(2) The appellant is to pay the respondent's costs of the appeal.

Catchwords: APPEAL – appeal against a Commissioner's decision on questions of law – shoptop housing development contravened height and FSR development standards – decision to grant development consent – objectives of height and FSR development standards – consistency with desired future character of neighbourhood or area – whether misconstruction of “desired future character” – whether to be construed by reference to Woollahra Development Control Plan 2015 (WDCP) – whether approved adjoining development that contravened development standards an irrelevant consideration – whether misconstruction of desired future character provisions in WDCP – whether misdirection in assessing consistency with objective (d) of height development standard to minimise visual intrusion– whether failure to give adequate reasons for satisfaction required by cl 4.6(3) of Woollahra Local Environmental Plan (WLEP) – whether misconstruction of control C3 in s D5.6.2 of WDCP to design for first

floor commercial use – no errors of law established

Legislation Cited: Environment and Planning Assessment Act 1979 ss 3.42, 3.43, 4.15
Land and Environment Court Act 1979 ss 38, 56A
Woollahra Development Control Plan 2015
Woollahra Local Environmental Plan 2014

Cases Cited: Alexandria Landfill Pty Ltd v Transport for NSW [2020] NSWCA 165
Botany Bay City Council v Premier Customs Services (2009) 172 LGERA 338; [2009] NSWCA 226
Commissioner of Taxation v Macoun (2014) 227 FCR 265; [2015] FCAFC 162
Mine Subsidence Board v Wambo Coal Pty Ltd (2007) 154 LGERA 60; [2007] NSWCA 137
Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 124
NSW Land and Housing Corporation v Orr (2019) 100 NSWLR 578; [2019] NSWCA 231
Plaintiff M47-2012 v Director-General of Security (2012) 251 CLR 1; [2012] HCA 46
Randall v Willoughby City Council (2005) 144 LGERA 119; [2015] NSWCA 205
Resource Pacific Pty Ltd v Wilkinson [2013] NSWCA 33
Segal v Waverley Council (2005) 64 NSWLR 177; [2005] NSWCA 310
SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSW12
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247

Category: Principal judgment

Parties: Woollahra Municipal Council (Appellant)
SJD DB2 Pty Limited (Respondent)

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File Number(s): 2020/108197
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Decision under appeal:
Court or Tribunal: Land and Environment Court of NSW
Jurisdiction: Class 1
Citation: [2020] NSWLEC 1112
Date of Decision: 12 March 2020
Before: Clay AC
File Number(s): 2019/91041

JUDGMENT

A council appeals a Commissioner's decision to grant development consent

- 1 SJD DB2 Pty Limited (SJD) applied for development consent for demolition of existing buildings and construction of a six storey shoptop housing development at 28-34 Cross Street, Double Bay (the site). The proposed development involved retail on the ground floor and 21 residential apartments above, together with two levels of basement parking. The proposed development will provide less space for retail/commercial uses than the existing buildings provide. Although the development will be six storeys, the street wall height is four storeys and the top two storeys are recessed and will be less visible from the street. The proposed development breaches both the height and floor space ratio (FSR) development standards in Woollahra Local Environmental Plan 2014 (WLEP).
- 2 SJD appealed to the Court against the refusal of Sydney Eastern City Planning Panel of the development application. The appeal was heard by Acting Commissioner Clay. He determined to uphold the appeal and grant development consent to the proposed development: *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112.

- 3 Woollahra Municipal Council (the Council) appealed against the Commissioner's decision and orders on questions of law under s 56A(1) of the *Land and Environment Court Act 1979* (the Court Act).

The grounds of appeal

- 4 In the amended summons, the Council raised 7 grounds of appeal, many of which contained subgrounds. The grounds and subgrounds may be grouped as follows:

- (a) *The desired future character grounds*: The Commissioner erred in his construction of the "desired future character" in the objectives of the height and FSR development standards and the objective of the B2 Local Centre zone by:
 - (i) failing to have regard to the relevant provisions of Woollahra Development Control Plan 2015 (WDCP) dealing with the desired future character of the neighbourhood or area (Grounds 1(a), 3(a) and 4(a));
 - (ii) taking into account the legally irrelevant consideration of developments that had been approved or constructed to the east of the site, which exceeded those development standards (Grounds 1(b), 3(b) and 4(b)); and
 - (iii) misconstruing the desired future character provisions for Cross Street in section D5.4.7 of WDCP and for Knox Lane in section D5.4.9 of WDCP (ground 5).
- (b) *The visual intrusion ground*: The Commissioner misdirected himself and asked the wrong question in assessing whether the proposed development was consistent with objective (d) of the height development standard to minimise the impacts of new development on adjoining or nearby properties from "visual intrusion" (ground 2).
- (c) *The inadequate reasons ground*: The Commissioner failed to give adequate reasons for being satisfied that the applicant's written request had adequately addressed the matters required to be demonstrated by cl 4.6(3) of WLEP (ground 6).
- (d) *The commercial viability ground*: The Commissioner misconstrued control C3 in section D5.6.2 of WDCP (ground 7).

The desired future character grounds

- 5 The proposed development contravened both the height and FSR development standards in WLEP. Clause 4.3(2) and the Height of Buildings Map establish a maximum height for the site of 14.7 metres. The height of the proposed development is 19.71 metres to the main roof and 21.21 metres to the plant/lift

overrun. Clause 4.4(2) and the Floor Space Ratio Map establish a maximum FSR for the site of 2.5:1. The FSR of the proposed development is 3.54:1.

6 Clause 4.6 of WLEP nevertheless enabled development consent to be granted for the proposed development, notwithstanding these contraventions of the height and FSR development standards, provided the preconditions in cl 4.6(4) were satisfied.

7 Clause 4.6(4) provides:

“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.”

8 In the desired future character grounds of appeal, the Council first focused on the requirement in cl 4.6(4)(a)(ii) that the Commissioner be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the height and FSR development standards and the objectives for development within the zone within which the development is proposed to be carried out.

9 One of the objectives of the height development standard in cl 4.3(1)(a) is “to establish building heights that are consistent with the desired future character of the neighbourhood”. One of the objectives of the FSR development standard in cl 4.4(1)(b) is “to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale”. One of the objectives of the zone in which development is proposed to be carried out, the B2 Local Centre Zone, is the seventh objective “to ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.”

10 The term “desired future character” is not defined in WLEP. The Council submitted, however, that the desired future character is defined and fixed in two ways.

- 11 First, the zoning and the height, FSR and other development standards for development of the site and its surrounds define and fix the desired future character. The site and its surrounds are zoned B2 Local Centre. The Land Use Table for the B2 zone specifies the development that is permitted with consent and the development that is prohibited. This fixes the type of development that can be carried out in the zone. One of the objectives of the zone is to ensure development is of a height and scale that achieves the desired future character. This focuses on the height and scale of development that is permissible in the zone. The height of development is fixed by the height development standard in cl 4.3. The scale of development is fixed by the FSR development standard in cl 4.4. Development that is of a permissible type and is of a height and scale that complies with the height and FSR development standards will achieve the desired future character.
- 12 Secondly, WDCP gives effect to these provisions of WLEP so as to describe the desired future character of the neighbourhood or area. The Council noted that the purpose of a development control plan under s 3.42(1) of *Environmental Planning and Assessment Act 1979* (EPA Act) is as follows:
- “The principal purpose of a development control plan is to provide guidance on the following matters to the persons proposing to carry out development to which this Part applies and to the consent authority for any such development—
- (a) giving effect to the aims of any environmental planning instrument that applies to the development,
- (b) facilitating development that is permissible under any such instrument,
- (c) achieving the objectives of land zones under any such instrument.
- The provisions of a development control plan made for that purpose are not statutory requirements.”
- 13 The Council noted that one of the aims of WLEP in cl 2(2)(l) is “to ensure development achieves the desired future character of the area” and one of the objectives of the B2 zone is the earlier quoted one, “to ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.”
- 14 Accordingly, the principal purpose of WDCP is to give effect to this aim of WLEP and this objective of the B2 zone. This is recorded in section A1.1.5 of

WDCP, where one of the overarching objectives of WDCP in O3 is “to achieve the objectives contained in Woollahra LEP 2014.”

- 15 Chapter D5 of WDCP relates to the Double Bay Centre. Section 5.4 describes the desired future character for each street in the Double Bay Centre (D5.4.1). The desired future character for each street is described in terms of “the urban design criteria for each street” (D5.4.1). An annotated street section is provided to illustrate the desired future built form.
- 16 The two relevant streets for the development are Cross Street and Knox Lane. Section D5.4.7 describes the desired future character of Cross Street as:
 - a) Unify the street on the north side by building to the street boundary.
 - b) Retain street level connections to Knox Lane.
 - c) Allow 4 storeys on 50% of each site frontage to Knox Lane. See Control Drawings for more information.
 - d) Encourage arcades and courtyards on the south side that cater for outdoor eating and informal gathering.
 - e) Strengthen built form on corner site.”
- 17 Figure 17 is a pictorial view of the potential street character on Cross Street based on the controls in WLEP and WDCP.
- 18 An annotated section is provided through Cross Street. Amongst the annotations is one requiring “set back level 4 development from the street boundary.”
- 19 Section D5.4.9 describes the desired future character of Knox Lane as:
 - a) Retain and enhance the varied spatial definition of Knox Lane.
 - b) Retain and enhance the honeycomb of arcades and courtyards that connect Knox Street to Cross Street.
 - c) Encourage visual and physical connections between Knox and Cross Streets using:
 - arcaded and/or outdoor connections;
 - north orientated courtyards; and
 - arcade and courtyard creating buildings, which may vary from the control drawings in Section 5.5.8.”
- 20 An annotated section of Knox Lane is provided. Amongst the annotations is one stating “each development site may be permitted to build to 4 storeys on 50% of the Knox Lane frontage if it is interspersed with 2 storey development.”

- 21 Section D5.5 of WDCP contains control drawings which show building envelopes for every site in the Double Bay Centre (D5.5.1). The envelopes are said to generally establish, amongst other things, “four storey heights along streets”. The built form framework is claimed to have been tailored to each site, taking into consideration its particular characteristics. One of the characteristics considered is “the desired future character of the street in which the site is situated” (D5.5.1).
- 22 The relevant control drawing is Control Drawing 4 in section D5.5.8. This drawing shows the site was intended to be developed to a maximum of 4 storeys (14.7m) in the area fronting Cross Street, of which “100% of this area per floor may be built on”, stepping down to an area of 2 storeys (8m) fronting Knox Lane, with an intermediate area of a maximum of four storeys of which “50% of this area per floor may be built on”.
- 23 Section D5.5.12 provides a 3D view of the building envelope. View 1 is a view east along Cross Street. The 3D view shows 4 storeys fronting Cross Street stepping down to 2 storeys fronting Knox Lane. The marginal note to view 1 states that:
- “The building envelopes illustrate the permitted distribution of floor space in the centre. The FSR controls in Woollahra LEP 2014 limit the amount of floor space in the centre.”
- 24 The Council contended that these provisions of WDCP describe in words and pictorially the desired future character of the neighbourhood or area. The desired future character so described is fixed by and is consistent with the provisions of WLEP, including the development standards fixing the maximum height and FSR for the site and its surrounds.
- 25 The Council submitted that the Commissioner’s consideration of cl4.6(4)(a)(ii) of WLEP miscarried because he misconstrued the term “desired future character” in the objectives of the height and FSR development standards in cl 4.3(1)(a) and cl 4.4(1)(b) and in the objective of the B2 zone. The Council submitted the Commissioner’s misconstruction was threefold.
- 26 First, the Council submitted that the Commissioner did not take into account the “desired future character” provisions in section D5.4.7 for Cross Street and section D5.4.9 for Knox Lane or Control Drawing 4 showing the building

envelope for the site in WDCP for the purpose of his assessment under cl 4.6(4)(a)(ii) of WLEP of whether the proposed development is consistent with the objectives of the height and FSR development standards and the objectives for development within the B2 Zone. The Commissioner's only consideration of these desired future character provisions of WDCP was in the context of dealing with the Council's contention 4 concerning inconsistency with the built form envelope controls in WDCP for the Double Bay Centre. The Commissioner thereby separated his consideration of the desired future character provisions in WDCP from his earlier consideration of the desired future character of the neighbourhood or area for the purposes of determining the proposed development's consistency with the objectives of the height and FSR development standards and of the B2 zone.

- 27 Secondly, the Council submitted that the Commissioner took into account an irrelevant consideration in determining the desired future character of the neighbourhood or area. The Commissioner had regard to the developments that had been approved or constructed on adjoining sites to the east (16-18 Cross Street and 20-26 Cross Street), both of which developments contravened the height and FSR development standards, in determining the desired future character of the neighbourhood or area (see at [69]-[71]). The Council submitted that the approved or constructed adjoining developments were a legally irrelevant consideration. The desired future character is defined and fixed by the zoning and the development standards, including the height and FSR development standards, in WLEP, and the provisions of WDCP which provide guidance for giving effect to the provisions of WLEP. Once defined and fixed by WLEP and WDCP, the desired future character cannot change, unless and until WLEP and WDCP are amended. The desired future character cannot be changed by decisions to grant consent to development that contravenes the height and FSR development standards in WLEP.
- 28 The Council submitted that the Commissioner therefore erred in finding that the desired future character could be, and had been, changed by the approved developments to the east, which contravened the height and FSR development standards.

- 29 Thirdly, the Council submitted that the Commissioner misconstrued the desired future character provisions in section D5.4.7 and section 5.4.9 of WDCP. The Commissioner, when he did later consider the desired future character provisions of WDCP, found the “principal goal” of the provisions was to “retain and enhance the various spatial definition of Knox Lane”. The Council submitted that, although one of the criteria specified for the desired future character of Knox Lane is to “retain and enhance the varied spatial definition of Knox Lane”, that criterion needs to be read with the other criteria of desired future character for Knox Lane, the control drawing showing the built form envelope for the area, and the height and FSR development standards in WLEP. Together, these controls describe a desired future character for the area as having no more than four stories fronting Cross Street, stepping down to two stories fronting Knox Lane, with an intermediate area of four stories of which only 50% could be developed.
- 30 SJD contested that the Commissioner misconstrued the term “desired future character” in any of the three ways asserted by the Council.
- 31 First, the Commissioner did not err by not construing the term “desired future character” in various provisions of WLEP by reference to provisions of WDCP. SJD noted that the term “desired future character” is not defined in WLEP. In that circumstance, it was open to the Commissioner to determine for himself what that desired future character might be, having regard to all of the circumstances of the case.
- 32 SJD submitted that, as a matter of law, WDCP cannot operate in a definitional way so as to define the meaning of the term “desired future character” used in WLEP, in the absence of a prescriptive provision in WLEP requiring the term to be construed by reference to WDCP. There is no such legislative cross-reference in WLEP to WDCP.
- 33 That a local environmental plan is not to be construed by reference to a development control plan is a particular application of the general principle of statutory interpretation that delegated legislation made under an Act should not be taken into account for the purposes of interpretation of the Act itself: *Mine Subsidence Board v Wambo Coal Pty Ltd* (2007) 154 LGERA 60; [2007]

NSWCA 137 at [41]; *Plaintiff M47-2012 v Director-General of Security* (2012) 251 CLR 1; [2012] HCA 46 at [56]. The tail cannot wag the dog. To act otherwise is to engage in bottom up interpretation rather than top down interpretation: *Commissioner of Taxation v Macoun* (2014) 227 FCR 265; [2015] FCAFC 162 at [40].

- 34 Under Part 3 of the EPA Act, the two plans, WLEP and WDCP, are of a fundamentally different nature and provenance. Both the process for making and the maker of WLEP is different to the process for making and the maker of WDCP.
- 35 The principal purpose of WDCP is to provide guidance on the three matters referred to in s 3.42(1) of the EPA Act to persons proposing to carry out development, in this case in the Double Bay Centre, and to the Council for such development. These matters are to give effect to the aims of WLEP that applies to such development; to facilitate development that is permissible under WLEP; and to achieve the objectives of land zones under WLEP. Whilst these matters do include the objectives of the zone in which the development is proposed to be carried out, in this case the B2 zone, they do not include the objectives of development standards in WLEP, including in this case the height and FSR development standards. SJD submitted, therefore, that the principal purpose of WDCP does not extend to defining the meaning of the term “desired future character” used in provisions of WLEP, including in the objectives of the height and FSR development standards. Moreover, any provisions of WDCP made for the purpose for which a development control plan can be made are not statutory requirements (s 3.42(1) of the EPA Act).
- 36 WDCP is subordinate to WLEP (s 3.43(5) of the EPA Act). In relation to the provisions of WLEP dealing with “desired future character”, the provisions of WDCP dealing with desired future character have no effect to the extent they are the same or substantially the same as the provisions of WLEP applying to the same land or are inconsistent or incompatible with the provisions of WLEP (s 3.43(5)(a) and (b) of the EPA Act).
- 37 Furthermore, insofar as the desired future character provisions of WDCP set standards with respect to an aspect of development that can be carried out on

the site and its surrounds, the consent authority, in determining a development application for such development, “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” (s 4.15(3A)(b) of the EPA Act).

- 38 SJD submitted that these statutory requirements of s 3.43(5) and s 4.15(3A) of the EPA Act make the provisions of WDCP fundamentally unlike the provisions of WLEP.
- 39 In these circumstances, SJD submitted that the provisions of WDCP cannot define the meaning of the term “desired future character” used in the provisions of WLEP. The Commissioner did not err in law, therefore, in not having regard to the provisions of WDCP in determining what was the desired future character of the neighbourhood or area for the purpose of assessing whether the proposed development was consistent with the objectives of the height and FSR development standards and the objectives of the B2 zone under cl 4.6(4)(a)(ii) of WLEP.
- 40 Secondly, SJD submitted that it was not legally irrelevant for the Commissioner to consider the approved and constructed developments to the east of the site in determining the desired future character of the neighbourhood or area.
- 41 The approved and constructed developments to the east of the site could only be an irrelevant consideration if the EPA Act and WLEP expressly or by necessary implication required the consent authority not to consider such a matter: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 124 at 39-40. Neither the EPA Act nor WLEP do so. The term “desired future character” is not defined in WLEP. There is no prescription of matters to be considered or process to be followed to determine what is the desired future character of a neighbourhood or area. In these circumstances, it is a question of fact as to what is the desired future character having regard to all of the circumstances of the case. These circumstances include how the Council has implemented its controls and determined development applications for development that contravenes the controls.

- 42 As a matter of fact, the Council had granted consent to developments to the east of the site that exceeded the maximum height and FSR prescribed by the height and FSR development standards in WLEP. The approval and construction of these developments change the desired future character. SJD submitted that the Commissioner was correct in finding that the desired future character must take into account the form of the developments to which the Council had approved (at [69]-[71]).
- 43 Thirdly, SJD disputed the Council's contention in ground 5 that the Commissioner misconstrued the desired future character provisions of section D5.4.7 and section D5.4.9 by saying that "the principal goal" of section D5.4.7 and section D5.4.9 was "to retain and enhance the varied spatial definition of Knox Lane". First, the Commissioner's statement in [109] was made in the context of his discussion of the desired future character criteria for Knox Lane in section D5.4.9. The Commissioner was not there discussing the desired future character criteria for Cross Street in section D5.4.7. That is clear from the preceding paragraph, [108], the particular reference to Knox Lane in [109] and the words used which repeat the words of criterion (a) of the desired future character for Knox Lane in section D5.4.9. The Commissioner did not do, therefore, what the Council alleged that he did; the Commissioner never said that the principal goal of both sections D5.4.7 and D5.4.9 was to retain and enhance the varied spatial definition of Knox Lane.
- 44 Second, the Commissioner's statement in [109] was only one part of a much larger consideration of the desired future character provisions of WDCP. The Commissioner expressly referred to the site being located within the Double Bay Centre under Part D5 of WDCP (at [23]) and set out the relevant desired future character provisions of WDCP (at [99]-[105]). The Commissioner set out in full the strategies for the built form of the Double Bay Centre in section D5.3.2 (at [100]), the strategies for all streets in section D5.4.2 (at [101]), the desired future character provisions for Cross Street in section D5.4.7 (at [102]) and the desired future character provisions for Knox Lane in section D5.4.9 (at [105]). The Commissioner referred expressly to the sketch in section D5.4.7 showing three levels with no setback to Cross Street and a fourth level setback (at [103]). The Commissioner applied these built form strategies and desired

future character criteria to the proposed development of the site (at [106]-[110]). The Commissioner's consideration in [109] was, therefore, focused only on criterion (a) in section D5.4.9 for Knox Lane and was part of the Commissioner's larger consideration of the desired future character provisions.

- 45 I find that the Commissioner did not err in his construction of the term "desired future character" used in the provisions of WLEP in the three ways claimed by the Council.
- 46 First, the Commissioner was not legally obliged to construe the term "desired future character" in WLEP by reference to the desired future character provisions of WDCP. As SJD submitted, the provisions of a development control plan cannot be used to interpret the provisions of a local environmental plan, unless the provisions of the local environmental plan expressly refer to the provisions of the development control plan for that purpose. WLEP does not refer to WDCP as explicating the meaning of the term "desired future character" used in provisions of WLEP.
- 47 The fact that the principal purpose of a development control plan is to provide guidance on certain matters referred to in s 3.42(1) of the EPA Act does not make it permissible to construe the provisions of a local environmental plan by reference to a development control plan.
- 48 Of course, the maker of a development control plan will need to construe the provisions of a local environmental plan in order to provide guidance on the matters referred to in s 3.42(1)(a), (b) and (c). These matters include the aims of the local environmental plan and the objectives of land zones under the local environmental plan. As in WLEP, these aims and objectives may use terms, such as "desired future character", that are not defined in the local environmental plan. In order to provide guidance in the provisions of the development control plan so as to give effect to these aims or to achieve these objectives that use such undefined terms, the maker of the development control plan will need to construe the meaning of the various terms and apply that construction in the drafting of the provisions of the development control plan. But this process of providing guidance in this way does not define the meaning of the undefined terms in the local environmental plan; it merely

implements an interpretation of the meaning of the terms in the local environmental plan.

- 49 So understood, the Commissioner did not err on a question of law by not construing the “desired future character” in the objectives of the height and development standards in cl 4.3 and cl 4.4 and the objective of the B2 zone of WLEP by reference to the desired future character provisions of WDCP.
- 50 This is not to say that it was not permissible for the Commissioner to have had regard to the desired future character provisions in WDCP, only that he was not bound to do so. There can only be an error on a question of law by failing to address a matter that the Commissioner was bound to address. Failure to address a matter that was permissible to consider, but not mandatory to consider, is not an error in deciding a question of law: *Minister for Aboriginal Affairs v Peko Wallsend Ltd* at 39-40; *Randall v Willoughby City Council* (2005) 144 LGERA 119; [2015] NSWCA 205 at [15].
- 51 For these reasons, I reject grounds 1(a), 3(a), and 4(a).
- 52 Secondly, the Commissioner did not take into account an irrelevant consideration in construing and applying the term “desired future character” in WLEP. As has been noted, the term “desired future character” is not defined in WLEP. Its meaning is to be derived from the text and context of the provisions of WLEP in which it is used and the other provisions of WLEP that frame the urban character and built form of the neighbourhood or area. These provisions include the zoning of land (cl 2.2 and the Land Zoning Map), the zone objectives (cl 2.3), the Land Use Table (at the end of Pt 2) and the development standards in Pt 4, including height of buildings (cl 4.3 and the Height of Buildings Map) and FSR (cl 4.4 and the Floor Space Ratio Map). Together, these provisions of WLEP shape the desired future character of neighbourhoods and areas in Woollahra.
- 53 The issue separating the parties is whether these provisions of WLEP exhaustively define and fix the desired future character of these neighbourhoods and areas of Woollahra. The Council’s originalist construction gives the term “desired future character” the meaning that it was understood to have at the time WLEP was made. That meaning is derived from the provisions

of WLEP as made that define and fix the desired future character. Once so defined and fixed by WLEP, the desired future character does not change. The only means of changing the desired future character is to amend the provisions of WLEP that define and fix the desired future character. SJD accepted that the provisions of WLEP can shape the desired future character but so too can external factors such as the developments that are approved and constructed in the neighbourhood or area. These developments change the built form and urban character that exist at any particular time. The desired future character for a neighbourhood or area can evolve over time, responding not only to the provisions of WLEP but also to developments carried out in accordance with development consents granted under WLEP and the EPA Act.

- 54 I consider SJD's construction is correct. The first reason flows from the fact that WLEP has not defined the meaning of the term "desired future character" that is used in various provisions of WLEP. The drafter of WLEP has, therefore, not confined the meaning of the term "desired future character" by reference to the particular provisions in WLEP, including those concerning the zoning, the permitted and prohibited development, and the development standards, that shape the urban character and built form of neighbourhoods or areas in Woollahra. In circumstances where the term "desired future character" is undefined and unconfined in WLEP, the matters that may be taken into account in evaluating what is the desired future character of a particular neighbourhood or area at any point in time will similarly be unconfined, except insofar as there may be found in the subject matter, scope and purpose of WLEP some implied limitation on the matters that may legitimately be considered. There is no limitation found in the subject matter, scope and purpose of WLEP which would preclude consideration of developments that have been approved and constructed in the neighbourhood or area.
- 55 The second reason flows from the text and context of the provisions in which the term "desired future character" is used. The term is used in the objectives of the height and FSR development standards, and in the objective of the B2 zone, as a referent for an assessment of consistency or compatibility.

- 56 In the objective of the height development standard in cl 4.3(1)(a), the referent of “desired future character of the neighbourhood” is used to establish building heights. The building heights that the clause establishes and that are shown on the height of buildings map are consistent with the desired future character of the neighbourhoods in Woollahra. This means that the desired future character of the neighbourhood establishes the building heights for buildings on land in the neighbourhood and not the other way around, that the building heights establish the desired future character.
- 57 In the objective of the FSR development standard in cl 4.4(1)(b), the referent of “desired future character of the area” is used in order to ensure that buildings in particular zones, including the B2 zone, are compatible in terms of bulk and scale. The FSR for land in those zones that the clause establishes and that is shown on the Floor Space Ratio Map is compatible with the desired future character in terms of bulk and scale. This means that the desired future character establishes the FSR of buildings in these zones and not the other way around, that the FSR of the buildings in those zones establishes the desired future character.
- 58 In the seventh objective of the B2 zone, the referent of “desired future character of the neighbourhood” is used in order to ensure that development is of a height and scale that achieves the desired future character. This means that the desired future character of the neighbourhood establishes the height and scale of development in the neighbourhood and not the other way around, that the height and scale of development in the neighbourhood establishes the desired future character.
- 59 In each of these three objectives, therefore, the desired future character of the neighbourhood or area exists before and informs the establishment of the maximum height and FSR for buildings, and the height and scale of developments, in the neighbourhood or area. This necessarily means that the desired future character of the neighbourhood or area can be evaluated by reference to matters other than only the provisions of WLEP establishing the zoning, the permitted and prohibited development, and the development standards for permitted development in the zone. In this case, this means that

the desired future character of the neighbourhood or area can be evaluated by reference to matters other than the building height and FSR established by the height and FSR development standards in cl 4.3 and cl 4.4 and the zoning and Land Use Table for the B2 zone.

60 Thirdly, the application of cl 4.6 of WLEP to the height and FSR development standards supports a broader not narrower construction of the term “desired future character” used in those development standards. Clause 4.6 provides an appropriate degree of flexibility in applying certain development standards to particular development (cl 4.6(1)(a)). However, cl 4.6 does not apply to a development standard that is expressly excluded from the operation of the clause (cl 4.6(2)). Neither the height of buildings development standard in cl 4.3 nor the FSR development standard in cl 4.4 is expressly excluded from the operation of cl 4.6. This contemplates that development that contravenes the height and FSR development standards may be approved under cl 4.6.

61 One of the matters in respect of which the consent authority is required to be satisfied under cl 4.6(4)(a)(ii) in order to be able to grant development consent for development that contravenes a development standard is that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard. In this case, the consent authority needed to be satisfied that the proposed development is consistent with the objective in cl 4.3(1)(a) “to establish building heights that are consistent with the desired future character of the neighbourhood” and the objective in cl 4.4(1)(b) “to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale”.

62 Construction of the term “desired future character” that would confine its meaning to being defined and fixed by the development standards only would make forming the opinion of satisfaction under cl 4.4(4)(a)(ii) that the proposed development is consistent with these objectives difficult, if not impossible. On this construction, the height and FSR development standards define and fixed the desired future character. A development that contravenes the height and FSR development standards needs to demonstrate that it will be consistent with the desired future character. It cannot do this because, contravening the

development standards, it is inconsistent with the desired future character that is defined and fixed by those development standards.

63 This circularity is avoided if the term “desired future character” is construed as permitting regard to be had to matters other than only the development standard. On this construction, the desired future character of the neighbourhood or area can be shaped not only by the provisions of WLEP, including the development standards themselves, but also other factors, including approved development that contravenes the development standard.

64 For these reasons, I reject ground 1(b), 3(b) and 4(b).

65 I reject the third way the Council contended the Commissioner erred in ground 5. The Commissioner did not misconstrue section D5.4.7 or section D5.4.9. I agree with and adopt SJD’s submissions on this ground. The Council’s contention is based on a misreading of the Commissioner’s reasons. The Commissioner did not state that the principal goal of both sections D5.4.7 and D5.4.9 was “to retain and enhance the varied spatial definition of Knox Lane”. The Commissioner’s statement to that effect at [109] was only focusing on criterion (a) for the desired future character of Knox Lane, nothing more. The Commissioner considered elsewhere all of the desired future character provisions of WDCP, as SJD has identified. He well understood, and recorded his understanding in the judgment, that the controls described a desired future character for the site as involving four storeys fronting Cross Street, two storeys fronting Knox Lane, and four storeys in between of which only 50% could be developed.

66 I reject ground 5.

The visual intrusion ground

67 One of the objectives of the height development standard in cl 4.3(1)(d) is “to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion.” Under cl 4.6(4)(a)(ii), the Commissioner was required to evaluate whether the proposed development will be in the public interest because it is consistent with this and the other objectives of the height standard. The Commissioner identified this need to evaluate whether the proposed development is

consistent with this objective of minimising the proposed development's impact on adjoining or nearby properties from visual intrusion (see at [64(e)], [65(d)] and [76]-[88]). There was no issue between the parties about the proposed development's impact on adjoining or nearby properties from disruption of views, loss of privacy or overshadowing. The only issue was visual intrusion.

- 68 The Commissioner addressed this question of whether the objective of the height development standard to minimise visual intrusion was satisfied (at [76]). The only visual intrusion alleged was the intrusion of the proposed development into the southern outlook of the existing apartments of the northern side of Cross Street. The Commissioner described this visual intrusion as follows:

“The southern outlook of apartments on the northern side of Cross Street will see, to varying degrees, an apartment building including two levels of apartments above the height control, rather than the roof of the proposed building and an outlook across Double Bay Centre and to the amphitheatre of Edgecliff. The change in outlook will clearly vary depending on the level of the apartment. Some will see above the proposed building and some will not.” (at [76]).

- 69 The Commissioner considered that this amounted to “visual intrusion” for the purposes of the objective in cl 4.3(1)(d). The Commissioner found at [81]:

“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.”

- 70 The Commissioner assessed the degree of visual intrusion, however, to be minor and to have been minimised. The Commissioner found at [86] and [87]:

“In my opinion, however, the visual intrusion of the development is minor and has been minimised. The upper levels of the proposed building are set back, increasing their separation from the apartments across Cross Street. The overall height is consistent with an appropriate urban design for the site.

It is the ‘impact’ of visual intrusion, which is to be minimised, which also requires an assessment of the context of what is enjoyed by the affected viewer. The outlook to the south cannot be considered in isolation of its role in the amenity of those apartments. Each of the affected apartments has a view to the north, including Sydney Harbour, and almost all have their living areas to the north. For the most part, it is second bedrooms and studies which have the outlook to the south. The affected outlook does not add greatly to the amenity of the affected apartments.”

- 71 The Commissioner concluded that he was satisfied that the proposed development was consistent with the objectives in cl 4.3(1)(d) (at [88]).
- 72 The Council submitted that the Commissioner misdirected himself, and asked the wrong question, by assessing whether the impact of the visual intrusion was minimised by reference to the primacy of the views to the north enjoyed by the affected apartments. Whether the impact of the visual intrusion created by the proposed development has been minimised cannot be assessed by reference to views and outlook enjoyed by the affected apartments in a completely different direction.
- 73 The Council submitted that this was an irrelevant consideration. Alternatively, the Council submitted that the Commissioner's finding that the visual intrusion was minimised by reason of the affected apartments still having views and outlook in the different direction was manifestly unreasonable.
- 74 SJD submitted that the Commissioner's finding that the proposed development minimised the visual intrusion was a factual one, involving no error on any question of law. It was reasonably open to the Commissioner to have regard to "the context of what is enjoyed by the affected viewer" (at [87]), being all of the views and outlook enjoyed by the affected apartments, in order to assess the degree of visual intrusion of the proposed development and whether any visual intrusion had been minimised.
- 75 The Commissioner found that because the proposed development would only intrude on one outlook of the apartment, the outlook to the south across Double Bay south to the amphitheatre of Edgecliff (at [76]), which intrusion would be minor (at [86]), and the apartments' views and outlook to the north, including Sydney Harbour, would be unaffected (at [87]), the visual intrusion would be minimised (at [86], [87]). That was a factual finding open to the Commissioner.
- 76 SJD submitted that, in these circumstances, the Commissioner did not have regard to an irrelevant consideration or make a manifestly unreasonable decision in finding that the visual intrusion of the proposed development on the affected apartments has been minimised because the apartments will still enjoy views and outlook to the north.

- 77 I find the Council has not established that the Commissioner took into account an irrelevant consideration or made a manifestly unreasonable decision in finding that the proposed development is consistent with the objective in cl 4.3(1)(d) because the impacts of the proposed development on adjoining or nearby properties from visual intrusion will be minimised. I agree with SJD's submission that it was factually open to the Commissioner to assess the impact of the proposed development on the affected apartments from visual intrusion in the context of all of the views and outlook enjoyed by the affected apartments.
- 78 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.
- 79 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?
- 80 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.
- 81 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.

82 I reject ground 2.

The inadequate reasons ground

83 Under cl 4.6(4)(a)(i), the Commissioner was required to determine whether he was satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). One of the matters in cl 4.6(3)(a) is "that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case."

84 The Commissioner expressed his conclusion in [96] that he was satisfied that the applicant's written request had adequately addressed the matters in cl 4.6(3):

"In summary therefore, having regard to the matters in issue between the parties I am satisfied that the clause 4.6 objection adequately address the matters in cl 4.6(3) by demonstrating to my satisfaction that:

(a) the controls have been abandoned and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));

(b) the proposal meets the objectives of the controls and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));

(c) there are sufficient environmental planning grounds to justify contravening the standards."

85 The Council contended in ground 6 that the Commissioner failed to give reasons for this conclusion. The Council noted that the Commissioner had earlier found at [32] that the states of satisfaction that compliance is "unreasonable or unnecessary" and that there are "sufficient environmental planning grounds" to justify the contravention must be reached only by reference to the cl 4.6 request. The Council submitted, however, that the Commissioner did not explain how he had reached the requisite states of satisfaction only by reference to the cl 4.6 requests.

86 The Council accepted that the Commissioner may have referred in his reasons to evidence relevant to aspects of the matters in cl 4.6(3), but the Council submitted that nowhere does the Commissioner explain how he formed the requisite states of satisfaction about the matters in cl 4.6(3) by reference only

to the cl 4.6 requests. That omission founds the contention of failure to give reasons.

- 87 SJD contested that the Commissioner failed to give reasons. First, SJD submitted that the adequacy of the reasons given on a particular point needs to be viewed in the context of the issue being decided. In this case, one of the principal issues was whether the applicant's cl 4.6 request should be upheld. This involved the Commissioner determining whether he was satisfied of the matters in cl 4.6(4)(a). The Commissioner devoted much of his judgment to explaining why he was satisfied of the matters in cl 4.6(4)(a). The Commissioner's conclusion in [96] was the end of a process of reasoning, and not his only reason, for explaining why the Commissioner was satisfied of the matters in cl 4.6(4)(a).
- 88 Secondly, SJD submitted that the Commissioner did refer in his reasons to the cl 4.6 request. SJD noted that the Commissioner had observed at [32] that the question of whether he was satisfied that the applicant's written request had adequately addressed the matters required to be demonstrated by cl 4.6(3) was to be answered by reference to the cl 4.6 request. The Commissioner referred in [66] to what had been said by Mr Lidis in the cl 4.6 objections, as well as in his evidence, that the approval of developments to the east of the site that contravened the height and FSR development standards demonstrated that the development standards had been abandoned. As the Commissioner noted in [96(a)], if development standards have been abandoned, it is unreasonable or unnecessary to require compliance with the development standard. The Commissioner addressed this method of demonstrating that compliance with the development standards is unreasonable or unnecessary in [91]-[95]. This provides the reasoning for the Commissioner's conclusion in [96(a)].
- 89 SJD submitted that the Commissioner's conclusion in [96(b)], that the proposed development meets the objectives of the development standards, notwithstanding contravention of the development standards, was supported by the Commissioner's analysis of the proposed development's consistency with the objectives of the development standards, particularly that the proposed

development will be consistent or compatible with the desired future character of the neighbourhood or area. This analysis included reference to the cl 4.6 request. In [71], the Commissioner stated that he agreed with Mr Lidis, “as stated in the cl 4.6 objections”, that the approved developments to the east of the site established the desired future character of this part of Cross Street.

90 Thirdly, SJD submitted that consideration of the cl 4.6 request does not require reproducing “slabs” of the request or summarising the contents of the request. The requirement in cl 4.6(3) is that the consent authority “has considered a written request from the applicant that seeks to justify the contravention of the development standard”. The reasons given by the Commissioner needed only to show that such consideration had occurred and to explain why the Commissioner was satisfied that the written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). This is a requirement as to substance not form. There is no requirement for the reasons to refer expressly to the form of the written request provided the reasons address the substance of the written request and explain why that substance adequately addresses the matters required to be demonstrated by cl 4.6(3). The Commissioner’s reasons were sufficient to do this.

91 I find the Council has not established that the Commissioner failed to give reasons for his conclusion that he was satisfied that the applicant’s written request had adequately addressed the matters required to be demonstrated by cl 4.6(3).

92 First, it is not sufficient for the Council to show that the Commissioner’s reasons could beneficially have been more detailed in explaining the Commissioner’s findings of fact and reasons for making those findings of fact. The inadequacy of reasons has to be sufficient to constitute an error of law: see *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 282, 274. As Basten J observed in *Resource Pacific Pty Ltd v Wilkinson* [2013] NSWCA 33 at [48]:

“When an appellate court is invited to find that a trial judge provided inadequate reasons, it is important to understand the nature of the function being invoked. It is not the function of an appellate court to set standards as to the optimal, or even desirable, level of detail required to be revealed in reasons for judgment. Rather it is to determine whether the reasons provided

have reached a *minimum* acceptable level to constitute a proper exercise of judicial power.”

- 93 Similarly, Bell P in *NSW Land and Housing Corporation v Orr* (2019) 100 NSWLR 578; [2019] NSWCA 231 at [66] held that the function of an appellate court in reviewing the adequacy of reasons given by the primary judge “is to determine not the optimal level of detail required in reasons for a decision but rather the minimum acceptable standard” and “the standard is not one of perfection”.
- 94 Secondly, the content of the obligation to give adequate reasons in part turns on “the function performed by the tribunal and the nature of any appeal which is created in respect of its decisions”: *Alexandria Landfill Pty Ltd v Transport for NSW* [2020] NSWCA 165 at [404].
- 95 The function being performed by the Commissioner involved merits review of the Council’s decision to refuse consent to the proposed development. The Commissioner on the appeal was re-exercising the function to determine the development application for the proposed development. The exercise of this function involved deciding the issue of whether the matters in cl 4.6(4) were satisfied so as to be able to grant development consent. In discharging this function the Commissioner was required to conduct the proceedings with as “little formality and technicality” as possible (s 38(1) of the Court Act) and was not bound by the rules of evidence but could inform himself on any matter and in such manner as he thought fit (s 38(2) of the Court Act). The merits review function typically involves a choice between factors involving evaluative judgments. In these circumstances, it may not be necessary or possible to give expansive reasons, if the various competing factors have been identified and addressed: *Alexandria Landfill Pty Ltd v Transport for NSW* at [49].
- 96 Where the right of appeal is limited to questions of law, as is the case with an appeal under s 56A of the Court Act, findings of fact can be treated less elaborately than an issue involving a question of law or mixed fact and law: *Soulemezis v Dudley (Holdings) Pty Ltd* at 281. It ordinarily will be sufficient if the reasons apprise the parties of the broad outline and constituent facts of the reasoning on which the decision-maker has acted: *Soulemezis v Dudley (Holdings) Pty Ltd* at 273. It may be sufficient if the judgment reveals the

ground for, although not the detailed reasoning in support of the findings of fact: *Soulemezis v Dudley (Holdings) Pty Ltd* at 282 and see *Alexandria Landfill Pty Ltd v Transport for NSW* at [320].

- 97 Where an appeal is limited to questions of law, a complaint that a judgment fails to engage with the evidence and submissions will lie outside the scope of an appeal confined to questions of law: *Alexandria Landfill Pty Ltd v Transport for NSW* at [404], [411].
- 98 Thirdly, attention needs to be given to the level of generality at which issues need to be addressed. The primary obligation to give reasons is to address the principal contested issues: *Segal v Waverley Council* (2005) 64 NSWLR 177; [2005] NSWCA 310 at [99(a) and (b)]. It is unnecessary to address in the reasons the arguments in favour of or against the resolution of a principal contested issue: at [99(b)]. The principal contested issues may be expressed at a higher level of generality or broken down into sub-issues or sub-sub-issues. A pragmatic and functional approach needs to be adopted in determining the level to which reasons need to be addressed. As Basten JA observed in *Resource Pacific Pty Ltd v Wilkinson* at [46], “commonsense says that at some point the exercise of division must cease...because the administration of justice requires a pragmatic and functional approach to the obligations imposed on trial judges.” Similarly in *Alexandria Landfill Pty Ltd v Transport for NSW*, Macfarlan JA noted at [322] that the principal issues in that case were “expressed at a high level of generality but below them rested issues and sub-issues and even sub-sub-issues, not all of which the LEC could reasonably be expected to address expressly.”
- 99 Fourthly, the failure expressly to refer to a particular matter in a judgment is not decisive that the matter was not considered: *Whisprun Pty Ltd v Dickson* (2003) 77 ALJR 1598; [2003] HCA 48 at [62]. In this case, for example, a failure expressly to refer to the cl 4.6 written request in the reasons, other than in a few paragraphs of the reasons, does not establish that the Commissioner did not consider and base his finding of satisfaction under cl 4.6(4)(a)(i) on the written request. It is also sufficient in certain circumstances for reasons to be implicit in the judgment rather than be explicit: *Alexandria Landfill Pty Ltd v*

Transport for NSW at [323]. In *Soulemezis v Dudley (Holdings) Pty Ltd*, McHugh JA found that it was sufficient that the judge's judgment "reveals the ground for, although not the detailed reasoning in support of, his finding of fact" (at [282]).

100 Fifthly, the reason given on a particular point in a particular passage of the judgment needs to be read in context. As Bell P observed in *NSW Land and Housing Corporation v Orr* at [77]:

"These principles include the following:

(i) Decision-makers commonly express their reasons sequentially; but that does not mean that they decide each factual issue in isolation from the others. Ordinarily they review the whole of the evidence, and consider all issues of fact, before they write anything. Expression of conclusions in a certain sequence does not indicate a failure to consider the evidence as a whole": *Re Minister for Immigration and Multicultural Affairs, Re; Ex parte Applicant S20/2002; Appellant S106/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 30; 77 ALJR 1165 per Gleeson CJ at [14] (Ex parte Applicant);

(ii) the court should not read passages from the reasons for decision in isolation from others to which they may be related: *Re Maria Politis v Commissioner of Taxation* [1988] FCA 739 at [14]; 20 ATR 108 at 111;

(iii) the reasons must be read fairly and as a whole: *Ex parte Applicant* at [147] per Kirby J; *Wu Shan Liang* at 291; *Bisley* at 251;

(iv) the reasons recorded ought not to be inspected with a fine tooth-comb attuned to identifying error: *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 287; [1993] FCA 456 (Pozzolanic) at 287; *Wu Shan Liang* at 272, 291;

(v) there should be a degree of tolerance for looseness in the language of the tribunal, unhappy phrasing of the tribunal's thoughts or verbal slips: *Pozzolanic* at 287, *Wu Shu Liang* at 272 and 291."

101 Judged by these standards, the Commissioner's judgment reached the minimum acceptable standard required in the present context.

102 At the outset, it is important to identify the principal contested issues that the Commissioner was obliged to address. The Council's statement of facts and contentions identified, as contentions that the development application be refused, the proposed development's contravention of the height development standard (contention 1) and the FSR development standard (contention 2). The particulars to those contentions included that the applicant's written request had not adequately addressed the matters required to be demonstrated by cl 4.6(3) of WLEP.

- 103 The Commissioner upfront in the judgment identified in [3] the contentions, including that “The Council says that the appeal should be dismissed because the objections made pursuant to cl 4.6 of WLEP do not adequately address the non-compliances...”. The Commissioner addressed these contentions from [29] onwards. He quoted cl 4.6(3) and (4) in full (at [30]). He identified the need, in order for there to be power to grant consent to a development that contravenes a development standard, for the Court to be satisfied that the written request has adequately addressed the matters required to be demonstrated by cl 4.6(3) (see at [31]). He noted that this state of satisfaction “must be reached only by reference to the cl 4.6 request” (at [32]).
- 104 The first matter in cl 4.6(3)(a) that the written request must adequately address is that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. The Commissioner identified the common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary (at [35]). The Commissioner noted that the applicant relied on two of these ways: first, that the objectives of the development standard are achieved notwithstanding noncompliance with the standard and, secondly, that the development standard has been abandoned by the Council (at [36]).
- 105 The Commissioner identified the objectives of each of the development standards that the proposed development contravened (at [37], [38]). These objectives involved assessing the consistency or compatibility of the proposed development with the desired future character of the neighbourhood or area. The Commissioner later identified (in [64]):

“The elements of cl 4.6 in issue between the experts and the parties” as including:

(a) whether the controls have been abandoned and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));

(b) whether the proposal meets the objectives of the controls and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));

(c) whether or not the proposal is consistent and compatible with the desired future character of the area consistently with the objective of the controls and therefore in the public interest (cl 4.6(4)(a)(ii));

...”

- 106 The elements of cl 4.6 in issue in (a) and (b) clearly relate to the question under cl 4.6(4)(a)(i) of whether the applicant's written request has adequately addressed the matter in cl 4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. Element (c) clearly relates to the question under cl 4.6(4)(a)(ii) of whether the proposed development will be in the public interest because it is consistent with the objectives of the height and FSR development standards that the proposed development be consistent or compatible with the desired future character of the neighbourhood or area. However, as one of the ways in which the applicant contended that compliance with the height and FSR development standards would be unreasonable or unnecessary was that the proposed development achieved these objectives notwithstanding noncompliance with the development standards, the question of whether the proposed development was consistent or compatible with the desired future character of the neighbourhood or area was also relevant to addressing the question under cl 4.6(4)(a)(i) of whether the applicant's written request has adequately addressed the matter in cl 4.6(3)(a).
- 107 Perhaps recognising this overlap between the matters about which the Commissioner was required to be satisfied in cl 4.6(4)(a)(i) and (ii), the Commissioner distilled the issues he needed to determine to be fourfold:
- "These issues can be distilled as:
- (a) have the controls been abandoned?
 - (b) what is the desired future character?
 - (c) is the proposal consistent/compatible with that desired future character?
 - (d) has any visual intrusion been minimised?" (at [65]).
- 108 The Commissioner stated he would deal with (b), (c) and (d) first, then (a) (at [65]).
- 109 The consequence was that the Commissioner's consideration of distilled issues (b) and (c) served not only to address and give reasons for his addressing the matter in cl 4.6(4)(a)(ii) but also the matter in cl 4.6(4)(a)(i) of whether the applicant's written request has adequately addressed the matter required to be demonstrated in cl 4.6(3)(a) of whether compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

- 110 That this was the approach adopted by the Commissioner is illustrated by particular references in his discussion of desired future character to the cl 4.6 request (eg [66] and [71]) and to the applicant's argument in the cl 4.6 request that the development standards have been abandoned, so that compliance with the development standards would be unreasonable or unnecessary (eg at [66], [67]).
- 111 The Commissioner next addressed distilled issue (d) of whether any visual intrusion had been minimised. One of the objectives of the height development standard in cl 4.3(1)(d) was to minimise the impacts of new development on adjoining or nearby properties from, amongst other impacts, visual intrusion. Again, whilst this issue related to the question in cl 4.6(4)(a)(ii) on whether the proposed development will be in the public interest because it is consistent with the objectives of the height development standard, it was also relevant to the matter in cl 4.6(4)(a)(i) of whether the applicant's written request has adequately addressed the matter required to be demonstrated by cl 4.6(3)(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. The applicant in its cl 4.6 request had argued that compliance with the height development standard was unreasonable or unnecessary because the proposed development achieved the objectives of the height development standard, including objective (d), notwithstanding that it contravened the development standard.
- 112 The Commissioner's consideration of the issue of whether the objective of the height control to minimise visual intrusion was satisfied, therefore, served both of these purposes (in [76]-[88]).
- 113 This dual consideration of the matters in cl 4.6(4)(a)(i) and (ii) led the Commissioner to conclude at [91] that "the development meets the objectives of the standards notwithstanding the breach of the controls". This was the first way that the applicant's cl 4.6 request had sought to justify that compliance with the development standards was unreasonable or unnecessary in the circumstances of the case (see at [35(a)] and [36]). As this was sufficient to demonstrate that compliance with the development standard was unreasonable or unnecessary, the Commissioner noted that "it is not strictly

necessary to decide whether or not the controls have been abandoned” (at [91]). This was the second way that the applicant’s cl 4.6 request had sought to justify that compliance with the development standards was unreasonable or unnecessary (see [35(d)] and [36]). Nevertheless, for completeness, the Commissioner went on to determine that way (at [92]-[95]).

114 The Commissioner’s analysis of the issue of whether the applicant’s written request had adequately addressed the matters required to be demonstrated by cl 4.6(3) was summarised in [96]. The Commissioner expressly stated that he was:

“satisfied that the clause 4.6 objection adequately address[ed] the matters in cl 4.6(3) by demonstrating to my satisfaction that:

(a) the controls have been abandoned and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));

(b) the proposal meets the objectives of the controls and therefore it is unreasonable or unnecessary to require compliance (cl 4.6(3)(a));

(c) there are sufficient environmental planning grounds to justify contravening the standards.”

115 A careful analysis of the Commissioner’s judgment, therefore, reveals, first, that the Commissioner correctly identified the task he was required to undertake, that is, he asked himself the right question, of deciding whether he was satisfied that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3); secondly, particularly addressed the matter in cl 4.6(3)(a) of whether compliance with the development standards is unreasonable or unnecessary in the circumstances of the case; thirdly, referred to the applicant’s written request in his addressing of the matters in cl 4.6(3), both expressly by referring to the request on a number of occasions and impliedly by referring to the content of the request that sought to justify the contravention of the development standards; and fourthly, stated his conclusion that he was satisfied that the cl 4.6 request adequately addressed the matters in cl 4.6(3).

116 In these circumstances, the Commissioner’s judgment, read fairly and as a whole, is adequate to reveal the grounds for, and provide sufficient reasoning in support of, his factual finding that the applicant’s written request has adequately addressed the matters required to be demonstrated by cl 4.6(3).

The reasons have reached a minimum acceptable level to constitute a proper exercise of the function being exercised by the Commissioner of determining the applicant's development application for the proposed development. Having regard to the function being exercised by the Commissioner, and the nature of the appeal available from the Commissioner's decision being limited to questions of law, the Commissioner was not required to be more detailed in explaining his reasons for this finding of fact. The Commissioner did address the issue at the appropriate level of generality. He did not need to descend to the sub-issues or the sub-sub-issues in his reasons. The fact that he did not recite the content of the cl 4.6 request and address every argument in it in his reasons does not establish that the Commissioner did not consider all of the content and arguments in the cl 4.6 request. The Commissioner also was not obliged to record in his reasons his detailed consideration of that content and arguments in the cl 4.6 request. It was sufficient for the Commissioner to consider the cl 4.6 request as a whole and explain in substance why he was satisfied that the request adequately addressed the matters required to be demonstrated by cl 4.6(3).

117 I reject ground 6.

The commercial viability ground

118 The Council had raised as a reason for refusal of the proposed development that it involves the removal of existing commercial/office uses from the site (approximately 1100m²) and provides inadequate replacement of commercial/office space (572m²) (contention 6 in the statement of facts and contentions). The Council contended that this loss of commercial space of approximately 500m² was inconsistent with controls C1 and C3 in section D5.6.2 of WDCP, which provide:

“C1 Design for a mix of uses within buildings

C3 Design for retail, commercial and community uses at ground and first floor levels. Consider design solutions that promote retail, commercial use at first floor level such as galleried arcades.”

119 The Council contended that control C3 relates to objectives O3 and O4 which provide:

“O3 Encourage the continuation of retail and commercial uses at street level in the Centre.

O4 Encourage first floor retail and commercial use.”

120 The Commissioner found that “the reduced commercial space on the site is not a reason for refusal” (at [53]) and that “the absence of commercial uses proposed at the first floor is not a reason for refusal” (at [61]). The Commissioner found that the loss of commercial space on the site would not affect the viability of the Double Bay Centre. The potential loss of employees and office space is so small as not to have a measurable impact on the viability of the Double Bay Centre (at [54]). As far as retail uses are concerned, the Commissioner found that the retail components on the site will be enhanced by the provision of higher quality retail space with the capacity to attract a range of retail uses, including food, services and boutiques (at [55]).

121 In ground 7 of the appeal, the Council contended that these factual findings of the Commissioner miscarried by reason of the Commissioner misconstruing control C3. The Council contended that the Commissioner misconstrued the control in three ways.

122 First, the Council submitted that the Commissioner construed the control as having the objective to “encourage” first floor retail and commercial uses, when the control required “design for” first floor retail and commercial uses. The Commissioner said in [56]:

“The DCP does not command first floor commercial uses, but simply, without incentive, encourages that use as an objective to maintain the viability of the Centre and its mix of uses. It is not necessary for every development to provide the whole mix of development. The proposal provides a mix of retail and residential uses, it is a mix of uses. There will be other opportunities within the Centre to develop mixed uses, including more commercial space, particularly as suggested by Mr Duane, on or closer to New South Head Road.”

123 The Council noted that the Commissioner’s statement that the WDCP encourages first floor retail and commercial uses without incentive referred to his earlier statement in [52] that:

“There is no provision within WLEP or the DCP which provides any incentive which matches the ‘encouragement’ in the DCP. That is, there is no bonus provision which one might find to support the encouragement for first floor commercial development.”

124 The Commissioner later observed that designing for retail and commercial uses on the first floor level does not necessarily require that they be used for that purpose. The Commissioner stated in [59]:

“Two other observations should be made. First Control C3 of D5.6.2 says that a proponent should ‘design’ for retail, commercial and community uses at ground and first floor levels, even if they are not actually required to be used for that purpose. Retail and commercial uses in particular require a higher floor to ceiling height than a residential use. That means that a proponent could have designed a first floor to accommodate such use which does not in fact eventuate and there will then be a residential use which occupies unnecessary height within a development. Further, in the context of this application, as otherwise evident in this judgment, the proposed building continues the ‘line’ of each storey of the development to the east, and to design for a higher floor to ceiling height on the first floor would mean that the ‘lines’ would not follow and there would be a discordant urban design outcome.”

125 The Council submitted that the Commissioner’s focus on the controls as merely encouraging first floor retail and commercial uses misconstrued control C3, which requires the proposed development to design for first floor retail and commercial uses. The requirement to “design for” first floor retail and commercial uses is a requirement to use those areas for those purposes. The Commissioner erred in finding otherwise.

126 Secondly, the Council submitted that the Commissioner misconstrued objectives O3 and O4. The encouragement in those objectives had nothing to do with any incentive or bonus provision which might support the encouragement of first floor retail and commercial uses. The Council submitted that section D5.6.2 “encourages” first floor retail and commercial uses by providing that such uses are to be incorporated into the design of any proposed development in the Double Bay Centre.

127 Read in this way, the Council submitted that the Commissioner misconstrued control C3 by finding that it did not prescribe the use of the ground and first floor levels for retail and commercial uses.

128 Thirdly, the Council contended that the Commissioner had put aside the standards set by control C3 and applied his own standard as to what was reasonable in terms of the design of the first floor of the proposed development: *Botany Bay City Council v Premier Customs Services* (2009) 172 LGERA 338; [2009] NSWCA 226 at [26].

- 129 SJD contested that the Commissioner misconstrued control C3. First, control C3 is a manifestation of objectives O3 and O4. If those objectives are to encourage (a non-prescriptive concept) retail and commercial uses at ground and first floor levels, control C3, which gives effect to those objectives, should be read as also encouraging those uses on those levels. Hence, the requirement to “design for” those uses on those levels should be read as an encouragement, not a prescription or command, to achieve those uses at those levels. The Commissioner therefore did not err in so reading control C3.
- 130 Secondly, SJD submitted that the notion of “design for” first floor retail and commercial uses does not itself require the result of such uses of the first floor level. The Commissioner was correct in finding that the notion of “design for” does not “command” first floor retail and commercial uses (at [56]).
- 131 Thirdly, SJD submitted that this construction is supported by reading control C3 and objectives O3 and O4 in context. One of the other controls is C1, requiring “design for a mix of uses within buildings”. As the Commissioner correctly observed, controls C1 and C3 and objectives O3 and O4 “are within a broader context of the objectives for development in the Double Bay Centre which includes at D5.1.3: ‘O3 To encourage a diverse mix of uses in the Double Bay Centre and maintain retail uses at ground level.’” (at [49]). SJD noted that this objective supported the notion of encouragement cited by the Commissioner.
- 132 Fourthly, SJD noted that the Commissioner’s statements in his reasons about control C3 need to be read in the context of the principal issue that the Commissioner was addressing. The Commissioner’s contention 6, labelled “use”, particularised that “the loss of approximately 500m² of commercial space would have a detrimental impact on the commercial viability of the Centre...”. The Commissioner was addressing this issue when he made his observations about control C3. The Commissioner had first made a finding of fact that the loss of the commercial space would not impact on the commercial viability of the Double Bay Centre (at [54]). The Commissioner’s subsequent observations that WDCP does not command, but only encourages, first floor commercial uses (at [56] and [59]) need to be read in this context.

- 133 In any event, SJD submitted that even if the Commissioner misconstrued control C3, he nevertheless addressed it as a focal point of his consideration and he was permitted to make a finding that departed from the control: *Botany Bay City Council v Premier Customs Services* at [4].
- 134 I find that the Council has not established that the Commissioner misconstrued control C3. I agree with the four reasons given by SJD. I add two further reasons.
- 135 First, the control's requirement is to "design for" retail and commercial uses at ground and first floor levels. A requirement to "design for" is distinct from a requirement to "construct" or a requirement to "ensure use" of ground and first floor levels for retail and commercial uses. That "design" is distinct from "construct" is shown by objective O9, which is to "ensure that buildings are designed and constructed to minimise noise and other impacts on building occupants in adjoining properties". Control C3 does not have this dual requirement of ensuring both design and construct, but only the sole requirement of design.
- 136 "Design" is also distinct from actual use. Designing spaces on the ground and first floor levels that can be used for retail and commercial uses does not ensure that such spaces will actually be used for those uses. The market may have other ideas. The spaces may remain vacant. Hence, a requirement to design for retail and commercial uses on those levels falls short of requiring the carrying out of retail and commercial uses on those levels.
- 137 Secondly, control C3 has two sentences. The first is to "design for" retail and commercial uses at ground and first floor levels. The second is to "consider design solutions" that promote retail and commercial uses at first floor level and gives an example of the design solution of galleried arcades. Both sentences need to be read in order to understand what is required by control C3. The second sentence's requirement to "consider design solutions that promote" is non-prescriptive as to result. The notions of "consider" and "promote" are distinct from "ensure"; neither notions of "consider" or "promote" require the result of retail or commercial uses at first floor levels. The requirement in the first sentence to "design for" needs to be read in this context. So read, it too

requires consideration of, but not ensuring the result of, retail and commercial uses at first floor level.

138 For the reasons given by SJD and these two further reasons, the Commissioner did not misconstrue control C5.

139 I reject ground 7.

Conclusion and orders

140 The Council has not established any of the grounds of appeal against the Commissioner's decision and orders. The appeal should be dismissed. Costs should follow the event.

141 The Court orders:

- (1) The appeal is dismissed.
- (2) The appellant is to pay the respondent's costs of the appeal.

Amendments

10 September 2020 - Correction to typographical error at [99]

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