



Land and Environment Court of New South Wales

CITATION : **Castle Constructions Pty Ltd v North Sydney Council
[2008] NSWLEC 1168**

PARTIES : **APPLICANT**
Castle Constructions Pty Ltd

RESPONDENT
North Sydney Council

FILE NUMBER(S) : 11010 of 2005

CORAM: Bly C

KEY ISSUES: Development Application :- demolition of existing
buildings multi-storey commercial/residential building,

LEGISLATION CITED: Environmental Planning and Assessment Act 1979

CASES CITED: Castle Constructions Pty Ltd v North Sydney Council
[2006] NSWLEC 468
Castle Constructions Pty Ltd v North Sydney Council
[2007] NSWCA 164
Castle Constructions Pty Limited v North Sydney Council
& Anor [2008] NSWLEC 137
Nuts 'n Berries v North Sydney Council [2006] NSWLEC
516

DATES OF HEARING: 29 and 30 November, 2 December 2007 and 16, 17, 18, 23
and 25 January and 1 May 2008.

DATE OF JUDGMENT: 7 May 2008

LEGAL REPRESENTATIVES: **APPLICANT**
Mr. T. Robertson, SC
Instructed by Ms Read
of McLauchlan Thorpe Partners.

RESPONDENT
Miss H. Irish
Instructed by Mr. M. Jaku
of Mallesons Stephen Jaques.

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Bly C

7 May 2008

11010 of 2005 Castle Constructions Pty Ltd v North Sydney Council

JUDGMENT

Introduction

1 This is the second appeal/merits review of the respondent council's refusal of a development application for a mixed-use development at 136-140 Walker Street, North Sydney. The original appeal/merits review by Roseth SC in January 2006, refusing the application, was subsequently set aside by Talbot J (*Castle Constructions Pty Ltd v North Sydney Council* [2006] NSWLEC 468).

2 The proposed development comprises the demolition of two residential flat buildings and the erection of a 36 storey mixed use development containing 104 dwellings above a commercial podium of three and five levels. There are to be five basement levels with parking for 110 vehicles. The building is to be about 100m in height with the topmost point of the tower rising to RL162.50. The tower is set back over 7m from Walker Street and 3m from the northern and southern boundaries of the site.

3 Situated on the west side of Walker Street, the site has a frontage of 28.84m, a depth of about 40m, an area of 1,176 .5 m² and a cross fall of about 7 m. In addition to its Walker Street frontage it has, at the rear, a 1.5 m wide access-way extending to Hartnett Street. Surrounding the site is a variety of built forms and land uses including: multi-storey residential flat and commercial buildings, and two and three-storey residential flat buildings.

Planning controls

4 Under the *North Sydney Local Environmental Plan 2001* the site is zoned *Mixed Use* and in this zone the proposed development is permissible with development consent. It is to be noted that cl 30 of the LEP does not have any application for the determination of this development application (see *Castle Constructions Pty Ltd v North Sydney Council* [2007] NSWCA 164). Under *North Sydney Development Control Plan 2002* the site is included in the *North Sydney Centre Planning Area*.

5 Being, in part, a residential flat building, *State Environmental Planning Policy No 65 -*

Design Quality of Residential Flat Development is also applicable.

6 Also said to be relevant is *draft North Sydney Local Environmental Plan - Amendment No 28*. The draft LEP proposes inter alia to amend cl 28D of the LEP so as to promote a height and massing of buildings that will have no adverse impact on land identified as a special areas or on heritage items. It also seeks to promote a height and massing that has no adverse impact on residential land that adjoins the *North Sydney Centre*.

Overshadowing of land in residential zones and special areas is to be minimised and the scale and massing development should take into account human scale. More particularly, by reference to a *Height of Buildings Map* a maximum building height of RL 103 would be applicable to the site of this application. This standard can only be varied on the basis of merits, amenity and public benefit. In addition, a floor space ratio development standard is to be introduced. In relation to overshadowing new controls will prevent increases in overshadowing between 12 noon and 2 p.m.

Public notification of the application

7 The notification of the application resulted in some 75 written objections to the proposal. I heard from a number of these objectors. Matters of concern include:

- Loss of amenity for certain dwellings in the Century Plaza building (171 Walker Street) from loss of sunlight and daylight and increased heating and lighting costs.
- Excessive and uncharacteristic building height by comparison with nearby low-rise residential development, including heritage buildings.
- Localised climate change resulting from overshadowing and wind funneling.
- Increased localised traffic congestion especially during the construction of the building.

Expert evidence

8 In dealing with the respondent's contentions I was assisted by the evidence of the following experts. On behalf of the respondent:

- Mr. G. Mossemeneer - town planning,
- Mr. N Dickson - architecture/urban design,
- Mr. J Hill - town planning,
- Ms L Maher - conservation planner.

9 On behalf of the applicant:

- Mr. T. Burns - architecture and town planning,
- Mr. R Lamb - visual analysis,
- Mr. S. King - architecture and shadow analysis,
- Ms J Hill - heritage.

The contentions

10 The respondent's contentions now comprise:

1. The proposed building:

- is excessive in height and scale,
- does not provide an adequate set back from Walker Street,
- will have an unacceptable impact on heritage items in the vicinity.
- will overshadow the Century Plaza building,

2. The proposed building is inconsistent with the draft LEP.

11 Contention 1 was particularized by the respondent by reference to various provisions of the LEP and the DCP.

12 As for contention 2, on 15 April 2008 Lloyd J. determined, in favour of the applicant in these proceedings, an application for certain declarations and orders involving the draft LEP (*Castle Constructions Pty Limited v North Sydney Council & Anor* [2008] NSWLEC 137). In particular he decided that the council's resolutions regarding the draft LEP, the associated s 68 report and the request for the Minister to make the plan under s 70 of the *Environmental Planning and Assessment Act 1979* are *invalid and of no effect* [107]. Any step taken by the council in pursuance of these resolutions is also invalid and of no effect. Moreover, the Minister is restrained from making any local environmental plan forwarded to him by the council in pursuance of the resolutions.

13 In his judgement, Lloyd J. concluded [106(f)], for reasons associated with achievable floor space, the independence of a particular report and the rezoning of residential land that *the public exhibition process miscarried*, resulting in the process being invalidated. Consequently because the draft LEP has not been effectively advertised it cannot be considered to be a draft local environmental plan for the purposes of s 79C(1)(a) of the E P & A Act.

14 Despite this the council contends that the draft LEP is not invalid and the council's inherent planning vision for the *North Sydney Centre* has not been proved to be flawed. I agree and whilst it cannot be considered to be certain and imminent I accept that it can be given some weight as a public interest consideration under s 79C(1)(e) of the E P & A Act. However, bearing in mind the weight attracted by a draft local environmental plan that is certain and imminent and even an exhibited draft local environmental plan that is not certain and imminent the weight that should be given to this draft LEP must be commensurately less. Moreover, taking into account Lloyd J.'s doubts [80] in relation to the 250,000 square metre target for additional floor space as stipulated by the Department of Planning, this is a further indicator as to the limited weight that should be attributed to the draft LEP.

Excessive height and scale

15 In relation to the transition and visual dominance aspects of the respondent's height and scale contention, the particulars refer to cl 14(2) of the LEP that requires the consent authority to take into account relevant aims and objectives. This clause also provides that consent must not be granted for any development that is inconsistent with the specific aims of the LEP, the objectives of the zone or the objectives of any applicable controls. (Of course cl 14(2) of the LEP is also generally applicable). The particulars also refer to the aims and objectives and controls in cll 2(b), 3(a), 28D(1) and (5) of the LEP and Cl

8.8b of the DCP including streetscape and topography and the area statement for the *Central Business District*.

16 The general and specific aims of the LEP seek development that is appropriate to its context, is in character with the neighbourhood and is compatible with neighbouring development in terms of bulk, scale and appearance. The *Mixed Use Zone* objectives provide for a high-quality urban environment and the protection of the amenity of residential areas. The more particular objectives in the LEP that deal with building heights and massing seek to maintain the status of the *North Sydney Centre* as a major commercial centre and at the same time provide for pedestrian comfort in terms of visual dominance.

17 Having an RL of 162.5 the proposed building complies - by more than 30 m or 10 storeys - with cl 28D(2)(a) of the LEP that provides that the height of the building must not exceed RL 195 AHD. However this must be considered in the light of the building heights and massing objective in cl 28D(1)(a) that seeks to:

achieve a transition of building heights generally from 100 Miller Street (Northpoint) and 79-81 Berry Street (being the location of the tallest buildings) stepping down towards the boundaries of the North Sydney Centre.

18 The *Northpoint* building has a top of building RL of 200m and the *Beaumonde* building at 79 -81 Berry Street has an RL of 185m. At RL 162.5m the proposed building is 22.5m (about 7 storeys) lower than the closer of these two identified benchmark buildings (*Beaumonde*) and, on this basis it is responsive to the requirement that there be a *transition* or *stepping down* as required by cl 28D(1)(a).

19 As for the requirement for a *transition* or a *stepping down towards the boundaries*, the site is situated adjoining the eastern boundary of the *North Sydney Centre* that extends along Walker Street. However it does not adjoin the closest northern boundary that extends between Walker Street and Hartnett Street (along the common boundary of 142 and 144 Walker Street), that boundary being 15m to the north of the site. The *North Sydney Centre* boundary then extends northwards along Hartnett Street stepping back to Walker Street along McLaren Street. Whilst this boundary indentation off Walker Street must be taken into account the fact that the north-eastern extremity of the *North Sydney Centre* extends beyond McLaren Street, a significant distance further to the north of the site cannot be disregarded, particularly when considering any *transition* or *stepping down* in a northerly direction. Consequently the multi-storey buildings at 168 Walker Street and 41 McLaren Street can be taken into account.

20 The question that thus arises is whether the height difference from the *tallest buildings* is sufficient, in the context of the requirement that the *stepping down* is actually *towards the boundaries* of the *North Sydney Centre*. Given the relationship between the *tallest buildings*, the site and the *North Sydney Centre* boundaries, I am satisfied that this requirement is met. Despite this, and notwithstanding that the requirement is for a *stepping down towards* rather than to the boundaries it is appropriate to consider what are appropriate or maximum building heights at or close to the boundaries of the *North Sydney Centre* where the site is located. Unfortunately the controls in the LEP for the *North Sydney Centre* provide no direct assistance. Clause 29 of the LEP applies various building height limits in the *Mixed Use*, *Residential* and *Neighbourhood Business Zones*

(by reference to Sheet 2 of *the map*) but there is no indicated height limit for this site. Hence the height control of RL of 162.5 in cl 28D(2)(a) is unaffected and remains as the predominant height control that is met by this development. Similarly cl. 30 that provides for a building height plane at the boundaries of the *North Sydney Centre* is no longer applicable. In the circumstances I am convinced, taking into account the mixed use zone and the height and scale objectives, that the remaining controls in the LEP are indicative of an abrupt change in building heights at the boundary. I shall return to this aspect later.

21 Being a precinct undergoing transition (as distinct from the *transition* requirements in cl 28D(1)(a)), cl. 9 of SEPP 65 requires consideration of desired future character. The *North Sydney Centre Character Statement* for the *North Sydney Centre Planning Area* and the character statement for the *Central Business District* in s.1.1 of the DCP are matters to be taken into consideration in the light of s.5.1a iv that requires that new development should minimise negative impacts on the amenity of adjoining development and reflect the applicable character statement. In this context it is relevant to note that whilst the *North Sydney Centre Planning Area* incorporates the *North Sydney Centre* they are not the same, the *Planning Area* relevantly extending northwards beyond St Leonards Park and extending eastwards to the Warringah Expressway. The *North Sydney Centre Planning Area* is divided into a number of localities or districts: *Central Business District, Hampton, Civic Neighbourhood, Eden Neighbourhood, McLaren Street Conservation Area and Walker Street Conservation Area*. The site is included in the *Central Business District*, the boundaries of which are largely consistent with the boundaries of the *North Sydney Centre*.

22 Part h. - *Skyline* in the *Quality Built Form* section of the DCP essentially repeats cl. 28D(1)(a) of the LEP by referring to a *stepping down* in height from the tallest buildings *to the boundary* although it does add to this *stepping down* by referring to *surrounding residential areas*. Because the *North Sydney Centre Character Statement* uses the words *North Sydney Centre* and *the Centre* and absent a definition to the contrary, I accept that these are referable to the *North Sydney Centre Planning Area*. To describe how this *stepping down* might be achieved, Figure 1.1 and Figure 1.2 are provided in the DCP. These figures depict two *notional arcs* that describe the stepping down of existing and possible future building heights along Miller and Berry Streets.

23 I do not agree with Mr. Mossemeneer's contention that the *notional arcs* should be disregarded because they are not sufficiently proximate to the site and are inconsistent with the LEP. Instead I accept that they can and should be interpreted in the light of the LEP and for the purposes of understanding the desired future character of the *North Sydney Centre* particularly in terms of the manner in which new development should fit within and contribute to a skyline of built form. In this context I note that the *notional arcs* take no account of topography, thus being a skyline or silhouette control.

24 The *Miller Street Figure 1.1* (looking east) was reproduced (Exhibit O) with the proposed building superimposed thereon, seemingly indicating a comfortable compliance with that *notional arc*. Whilst the proposed building was not superimposed on the *Berry Street Figure 1.2* it is reasonably apparent that it also does not project above that *notional arc*. This could be seen to indicate that the proposed building is not too high.

25 However, in my opinion the two *notional arcs* need to be considered and applied together especially because views of built form as a whole within the *North Sydney*

Centre seem to be very important, particularly taking into account the building heights and massing objective in cl 28D(1)(a) of the LEP. They are also relevant when taking into account aspects of visual dominance and streetscape when viewed from residential areas as required by 28D(1)(e). When the *arcs* are combined, this produces a three-dimensional "umbrella" shaped height or skyline envelope. Even taking into account that the site is not positioned directly under either of the *arcs*, (that have been drawn along Miller Street and Berry Street respectively) I expect that the proposed building would project well beyond the envelope when considered in its three dimensional form.

26 The *notional arcs* provide an understanding of what the DCP means when it speaks of stepping down *to the boundary and surrounding residential areas* and it is important to note the indicated (existing and potential) heights of buildings at the edges of the *North Sydney Centre* as revealed by the *arc* diagrams. At the extremities of the Berry Street *arc*, indicated potential top of building RL's in Berry Street are in the order of 135m -145m. Similarly at the extremities of the Miller Street *arc*, indicated existing top of building RL's are in the order of 110m - 125m.

27 Taking into account the location of the site vis-à-vis the *North Sydney Centre* boundaries and accepting as I do that these RL's are broadly indicative of a range of appropriate building heights anticipated by the DCP for these boundaries, with the top of the proposed building being at RL 162.5, I conclude that it is much too high. In this context Mr. Byrnes expressed the opinion that a better response to the *notional arcs* would be to reduce the building by five storeys or 15m to a top of building RL of 147.5m. (These five storeys would be removed from the middle of the building rather than of the top because the top has been carefully sculptured and would be a good element to retain). Even with such a reduction in height the three-dimensional envelope would be infringed. 28 Unless the proposed building is lowered significantly it does not meet the requirements of the DCP and would have an unacceptable visual dominance. In my opinion, this is sufficient to warrant refusal of the application.

29 Consistent with the DCP requirement to consider *surrounding residential areas* and desired future character, the specific aims in cl. 3 and cl 28D(5) of the LEP require consideration of impacts associated with scale, form and massing in the locality and on neighbouring and lower scale development adjoining the *North Sydney Centre*. In this context the site adjoins (opposite) land zoned *Residential C* in the *Hampden Neighbourhood* that has a height limit of 12m (cl 17(5) of the LEP). The heritage items a short distance to the north of the site have a height limit of 10m (Cl 29(2) of the LEP). Taking into account the existing ground levels these height limits approximate RL's of about 67m and 69m. Comparing these allowable heights with the height of the proposed building this represents a significant difference in height across the boundary of the *North Sydney Centre* in the order of 95m or about 32 storeys. Adopting Mr. Byrnes' recommendation (to reduce the building's height by five levels), that height difference would be reduced to about 80m or 27 storeys but this is still a significant difference. This is essentially the contextual approach taken by Mr. Mossemear in reaching his conclusion that the proposed building would totally dominate its lower scale neighbours in this part of Walker Street and that its excessive scale will be apparent from a distance well outside the edge of the *North Sydney Centre*. By comparison a building having a maximum top of building RL of 103m (as provided for in the draft LEP) would have a difference in height of about 35m or 13 storeys and this would, in his opinion, be acceptable.

30 In pressing of the concept of an abrupt city edge, Mr. Byrnes disagreed with Mr. Dickson as to the need for development on the site to transition from the *North Sydney Centre* to the neighbouring residential development rather than to its boundaries. He supports this approach by reference to a number of existing buildings at various locations around the boundaries of the *North Sydney Centre* that have heights in the order of 25 storeys essentially abutting low-rise buildings (Exhibit BB). In dealing with visual dominance, Mr. Byrnes also explained that the abrupt relationship between a 13-storey building (said by Mr. Mossemeneer to be satisfactory) and adjacent low-rise buildings is very much the same as their relationship with the proposed building.

31 Like Mr. Byrnes, Dr Lamb explained that the edge of the *North Sydney Centre* is determined by the existing and allowable scale of commercial and mixed use building forms, not by the scale of adjacent low scale residential buildings. The *North Sydney Centre* is conceived as having distinctive edges identified by tall buildings permitted by the controls that contrast in scale and form with low-rise development outside the *Centre*. The *Centre* is expected to have an edge to it which is totally unlike and in contrast to the lower scale development beyond. Indeed the application of the planning controls produces a built form for the site that is fundamentally different from the close-by two or three storey residential buildings. In his opinion the proposed building is appropriately responsive to the intended contrast in scale. Mr. Byrnes and Dr Lamb also agreed that the appearance of the proposed building (reduced by at least five storeys) would not be out of character when viewed from the surrounding district against the existing backdrop of taller and similar height buildings.

32 Like Mr. Mossemeneer, Mr. Dickson gave little weight to the *notional arcs*. He nevertheless explained that an acceptable building on the site must demonstrate a high-quality urban environmental response that has a graduated height with respect to heights of buildings to the southwest, north and east particularly in the close by small scale *Hampden Neighbourhood*. To this end he prepared a number of diagrams that support the above-mentioned maximum top of building RL of 103 m. Because these diagrams omitted several existing buildings and importantly do not give proper recognition to the *notional arcs* I give them little weight.

33 In the circumstances I do not accept that the site should, in terms of building height, be treated as an area of transition between the multi-storey buildings in the *North Sydney Centre* and the small-scale buildings outside its boundaries. Considering the height and scale of the smaller of the existing buildings in the Hampton neighbourhood and taking into account the building heights anticipated it is plain that the LEP and the DCP provide for an abrupt edge to the *North Sydney Centre*. This is supported by the absence of the building height plane controls in cl 30. I also do not accept that there should be a transition from the People Telecom building at 76 Berry Street (RL 110) across this site because under the present controls this building could be significantly taller, taking also into account that its site is to be rezoned to commercial.

34 It cannot be disputed that the proposed building would dominate its lower scale immediate neighbours but the existing medium to high-rise buildings in the surrounding residential area comprising the Hampden Neighbourhood (including the 20 storey Century Plaza building that has a top of building RL of approximately 130m) cannot be disregarded. This wider and in my opinion correct understanding of the character of the

neighbourhood, when considered together with the height and envelope controls in the LEP and DCP indicates that this site can sustain a building considerably taller than its more immediate neighbours outside the *North Sydney Centre*.

35 Taking into account the building's podium, the setbacks of the tower from Walker Street and from the site's northern boundary together with the 15 m separation (142 Walker Street to the north) from the *North Sydney Centre* boundary I accept that there would be no determinative difference between the impacts associated with a building at RL 103m (as sought by the draft LEP) and a building that was no taller than the "umbrella" formed by the two *notional arcs*. Considering the position of the site vis a vis the boundary of the *North Sydney Centre* this would indicate a building with a top of building RL of about 130m, some six levels lower than that suggested by Mr Byrnes. In this regard I have considered the relevantly applicable objectives dealing with pedestrian comfort, streetscape, character and compatibility particularly in the light of the applicable planning controls, including those directed towards future character. Given what I have concluded in relation to compliance with the height and envelope controls I am satisfied that these objectives would not be infringed by a reduced height building and accept that it is not necessary for the built form of the *North Sydney Centre* to complement, in the sense of being directly responsive to the nearby low-scale residential development. In these circumstances I also conclude that when viewed from residential areas outside the North Sydney Centre a building with a reduced height as described above would probably not exhibit an unacceptable visual dominance.

Set back from the Walker Street.

36 The LEP contains design objectives for the mixed-use zone relevantly requiring a mix of residential and non-residential uses and the concentration of the non-residential component at the lower levels of the building. Also, the building must be set back above a podium. These requirements are met by the proposal. However the respondent contends that, by reference to ss 1.1(k)(iii) and 1.1(m)(i) of the *Character Statement* for the *Centre Planning Area* the setbacks of the podium and the tower from Walker Street to the east are inadequate. The podium is set back from the street alignment about 1.8 m. The articulated tower building excluding the balconies is set back between 7.2 m and 7.9 m and the balconies are set back between 4.7 and 4.5 m.

37 Sub-section 1.1(k)(iii) requires that in this part of Walker Street, buildings be set back 7 m from the property boundary and ss 1.1(m)(i) requires an additional 5 m set back for that part of the building above the podium.

38 In their joint report Mr. Mossemeneer and Mr. Byrnes agreed in relation to the podium heights and setbacks (subject to the now agreed 3 m setback from the southern boundary). They also agree that the 12 m setback requirement (from Walker Street) for the tower is excessive and unnecessary. However, having accepted the proposed set back of the podium from the street, Mr. Mossemeneer does not accept that the setback of the tower, being (in his opinion) less than 5 m where the standard requires 12 m is sufficient. Instead, taking into account the 5 m setback of the commercial building to the south and the likely setback of the higher (redevelopment) element to the rear of the heritage items of about 20 m, a setback of the proposed tower of 7 m at the southern end and 10 m at the northern end could be acceptable, provided that the tower is substantially reduced in height. Moreover any reduction in setbacks should be accompanied by an overall reduction in the height of the building. Mr. Byrnes disagreed arguing that the suggested

setbacks of 7 m and 10 m would not offer any significant benefit and would be as unreasonable in their effect as the originally contended 12 m setback. Also the proposal provides a weighted average setback of 5 m above the podium and this is consistent with the setback arrangement for the People Telecom building at 76 Berry Street.

39 The tower building (excluding the balconies) is set back, on average, about 5.8 m behind the podium. The balconies however, on average, are set back about 2.8 m behind the podium although this ignores the fact that about one quarter of the Walker Street facade (in the centre) of the tower is unaffected by balconies and has a setback of about 7 m. The plans show that the balconies variously have solid and glass balustrades but are otherwise unenclosed. Taking these matters into account together with the setback relationship with the People Telecom building I have for the most part been persuaded by the evidence of the applicant that the setback of the tower from Walker Street and its relationship with the podium is satisfactory. Despite this, I accept the evidence of Mr Mossemeneer that an increased setback (but not to the extent suggested by him) at the north east corner of the building including the removal of the heavy frame around the balcony would be beneficial.

Impact on heritage items.

40 The building heights and massing objective in cl 28D(1)(b) of the LEP requires that there be no adverse impact on the close-by heritage items in Walker Street. In addition the respondent's contentions refer to cl 50 that requires that development in the vicinity of heritage items should *not adversely affect the significance of the item or its curtilage* and consideration to this effect is required. Clause 8.8a of the DCP contains guidelines for the protection of the heritage significance of curtilages including the maintenance of the relationship between heritage buildings and their settings. Clause 8.8b relevantly requires the maintenance of characteristic features of the streetscape. Section 8.8 h deals with heritage items and conservation areas and by reference to figure 8.2 seeks to ensure that the scale of development is consistent with existing characteristic buildings.

41 According to Ms Maher there would be no material effect on any of the heritage items, but she was nevertheless concerned that the 35-storey building would be inconsistent with the scale of the items. The impact is restricted to visual domination by the tower of the proposed building on the Walker Street streetscape that forms part of the visual curtilage of the heritage items. Also the impact will vary depending upon the particular contextual relationship and the filtered effect of various trees. Like Mr. Mossemeneer, she was of the opinion that the tower should be reduced in height so as to provide a better proportional relationship to the items. Mr. Dickson had a similar opinion arguing that the proposed building would be incongruously large and would adversely dominate the scale of the streetscape that forms part of the visual curtilage of the heritage items for the reasons that he gave in relation to visual dominance generally. As a consequence it would adversely impact on the items notwithstanding that the traditional setting has already been compromised by the existing urban context.

42 Conversely, Dr Lamb did not accept that streetscape was a relevant consideration in the heritage context because the locally significant heritage items are not included within a conservation area. They also do not have an identified physical curtilage beyond their own sites, notwithstanding that they can be seen within a setting, which includes the site of the proposal. He explained that the issue of scale is similar to the issue of the relationship between the scale of the proposed building and the adjacent low-scale nearby

residential development generally. This relationship will be transformed by a tall building and this is a logical and predictable outcome for the *Mixed Use Zone* bearing in mind that what is proposed is consistent with the desired future character for the *North Sydney Centre*. Simply because the proposed building could be seen in the same setting does not make it inappropriate on heritage grounds. Also, major contrasts in form, scale, character and streetscape have to be accepted, taking into account the planning controls. Similarly, Mr. Byrnes explained that the impacts on the heritage buildings associated with a building at RL 103 as recommended by Mr. Mossemeneer, taking into account the potential redevelopment of the adjoining site to the north to a height of up to 25 m will be much the same as for the proposed building. Ms Hill also disagreed with the respondent's experts explaining that the setting for the heritage items is the *North Sydney Centre* and the addition of a tower building would have little impact.

43 I understand and accept Dr Lamb's contention that the heritage items do not have an identified physical curtilage beyond their own sites, but it is nevertheless important to consider the impact of the proposed building in terms of visual domination. Plainly the scale of the proposed building is significantly greater than that of the items, but this needs to be considered in the context of the various elements that contribute to the existing and future Walker Street streetscape as well as the various planning controls that direct building height. The existing streetscape is one of considerable contrasts, taking into account the low-rise buildings on the west and east sides of the street and the taller buildings in the Hampden precinct as well as the existing and approved multi-storey buildings including those at 3 - 11 Ward Street and 17 and 168 Walker Street.

44 Whilst it can be desirable to maintain characteristic features of the streetscape, future streetscape character must be considered in the light of the applicable planning controls. Any notion of consistency of scale must similarly be considered in the light of the height controls in the LEP and the envelope controls in the DCP. In this regard I find the evidence provided on behalf of the applicant to be persuasive, and taking into account my earlier reasoning and conclusion in relation to the (reduced) height of the proposed building, I am satisfied that there would be no adverse impact on the heritage items sufficient to warrant refusal of the application. In reaching this conclusion and in the context of visual domination I have taken into account the fact that the property at 142 Walker Street (having an area slightly less than half that of the subject site) that separates the site from the heritage items could reasonably be redeveloped with a substantial building that would have the effect of providing a buffer of sorts between the proposed building and the heritage items.

Overshadowing of the Century Plaza building.

45 The amenity impacts associated with overshadowing resulting from the proposed building involve the residentially zoned Century Plaza building and in particular a number of its north-west facing dwellings that will be subject to a reduction in solar access. In his report Dr King notes that in the Century Plaza building there are 80 dwellings divided into four dwelling types referred to as Units A, B, C and D. Every floor has one of each. The south-east facing Type B and C dwellings are unaffected by the proposal. Type A dwellings have extensive eastern and northern sunlight exposure to both windows and terraces and, unlike the Type D dwellings, it was agreed that they would suffer no loss of amenity.

46 The building heights and massing objectives in the LEP include in cl 28D(1)(c), a

requirement to *minimise overshadowing of land* in the residential zones. The associated relevant controls in cl 28D(2)(b) and (d) provide that consent must not be granted unless:

(b) there is no net increase in overshadowing of any land between the hours of 9 a.m. and 3 p.m., 21 June outside the composite shadow area, as shown on the map marked "North Sydney Local Environmental Plan 2001 (Amendment No. 9) - North Sydney Centre".

(d) there will be no increase in overshadowing that would reduce the amenity of any dwelling that is outside the North Sydney Centre and falls within the composite shadow area referred to in paragraph (b).

47 An examination of the *Composite Shadow Area Map* shows that much of the Century Plaza building's site (the whole site being outside the *North Sydney Centre*) is affected by the grey coloured *composite shadow area*. Under the *Environmental Planning and Assessment Act 1979* the definition of *land* includes *a building erected on the land*. Despite this, given that sub clauses (b) and (d) are part of the same control in clause 28D(2) one can reasonably expect that, by referring variously to *land* and *dwelling* in the same context that there is intended to be a difference in the meaning of these words. Further support for this conclusion can be found in subclause (b) itself because the *composite shadow area* as shown on the map is a two-dimensional representation as is the more usual interpretation of *land*. In the final analysis though, little turns on this.

48 For the purposes of clause 28D(2)(b) I am satisfied that there are parts of the Century Plaza building's site, that comprises *land* that is *outside the composite shadow area* and as a consequence of being overshadowed by the proposed building at the winter solstice, the requirement that there be *no net increase in overshadowing* would appear not to have been met. Conversely, even if Type A dwellings were required to be considered under this clause, because there is no loss of amenity and subject to the merits and public benefits associated with the proposed building being satisfactory I accept that clause 28D(2)(b) is complied with.

49 Clause 28D(4) deals with variations to the overshadowing controls in clause 28D(2)(b) and (c) (*State Environmental Planning Policy No 1 - Development Standards* not being applicable by virtue of cl 28D(3)). Clause 28D(4) allows the consent authority to make a determination to vary these requirements *to a minor extent only* (*minor* is not defined), subject to the following two relevant provisos (sub-cll (c) and (d) are either complied with or not applicable):

(a) it is satisfied that the variation is justified due to the merits of the development application and the public benefit to be gained, and

(b) it is satisfied that any increase in overshadowing will not reduce the amenity of any land.

50 The test associated with the merits of the development application raised by (a) above raises the question of whether the proposal is, apart from overshadowing, generally satisfactory and this question is to be answered by reference to the other issues in the case. As for the public benefit test, I am satisfied that this would be met by the proposal

itself together with the applicant's agreement/offer to provide certain benefits. These matters include the provision of commercial floor areas and housing, contributions under s94 of the *Environmental Planning and Assessment Act 1979* and other contributions towards the upgrading of the North Sydney railway station and the provision of a pedestrian link through the site. As for the question of reduction of amenity of land in (4)(b) above (leaving aside for the moment the question of amenity impacts on the dwellings (Type D dwellings) in the Century Plaza building) I accept that that part the Century Plaza building's site will be overshadowed. However this was not raised as a matter of concern and I accept that amenity will not be relevantly reduced. In the circumstances I am satisfied that the variation of clause 28D(2)(b) is justified.

51 The issue of dwellings outside the *North Sydney Centre* being the subject of increased overshadowing as arises in cl 28D(2)(d) is less easily resolved. A significant proportion of the north-west elevation of the Century Plaza building will be overshadowed by the proposed building and as indicated above there are a number of Type D dwellings that will, as a consequence, each suffer a reduction in solar access. Plainly, because of this increased overshadowing the amenity of each of the affected dwellings could be reduced. In this regard I accept because the footprint of these dwellings falls within the *composite shadow area*, (notwithstanding that some of the higher dwellings might not be within a three-dimensional interpretation of this shadow area) then those dwellings are subject to cl 28D(2)(d).

52 In his report Dr King acknowledges that the Type D dwellings at the south-west end of the Century Plaza building are variously affected depending upon their level in the building. Taking into account the height and the stepped profile of the upper levels of the proposed building, the lower levels of the Century Plaza affected to a greater extent than the upper levels. Attached to his report there are a number of tables and diagrams (prepared by Dr King and Mr. Byrnes in November 2006) depicting the shadows cast by the proposed building between 12:15 p.m. and 3 p.m. at the winter solstice onto 20 Type D dwellings (Unit 4 is the lowest level dwelling and Unit 80 is the highest level dwelling). Mr. Mossemeneer agreed that the tables and diagrams are accurate.

53 In their joint report Dr King acknowledges that there is additional overshadowing (to varying degrees) of the affected bedrooms of each dwelling. However this nominal overshadowing comprises, for each dwelling, a *minor amenity impact*. He reached this conclusion taking into account several considerations including the degree of overshadowing and retained sunlight that can be considered to be reasonable under controls other than those in the LEP, including the DCP and the *Residential Flat Design Code* that suggests an equitable level of amenity of two hours of sunlight for closely built up areas. Also the affected dwellings have exceptional overall amenity in the form of harbour views. He also emphasized that the loss of sunlight for each dwelling, considered separately, occurs at the times of day when the present patterns of usage suggest that such solar access is rarely actively sought. Also, there is no suggestion that any of the dwellings would not receive adequate daylight.

54 In his report Mr. Mossemeneer provides a number of three-dimensional diagrams depicting winter solstice shadows cast on the Century Plaza building with and without a building up to a height of RL 103m (as would be permitted by the draft LEP) on the site. These diagrams reveal that a number of Type D dwellings at 2 p.m. and 3 p.m. that are not presently overshadowed would be overshadowed at this time. He said that it would be

a reasonable expectation for residents, at least above level 6, to retain the sunlight that they currently enjoy. Conversely a building on the site with an appropriate height (RL 103 m) would not produce significant additional shadows on the Century Plaza building. He also pointed out that the additional overshadowing from the proposed building on the 20 affected Type D dwellings is of greater significance than would otherwise be the case because these dwellings do not receive sunlight in their living areas, these areas being orientated towards harbour views. He also noted that these bedrooms are used for other purposes such as studies and reading rooms and on this basis access to sunlight is beneficial. Whilst he acknowledged that certain dwellings in the Century Plaza building at the lower levels could lose some sunlight the proposed building would produce significant additional shadows. In turn this will affect the amenity of residents to a degree that warrants refusal of the application.

55 An examination of the shadow information provided by Mr. Mossemeneer, Mr. Byrnes and Dr King reveals that the three bedrooms and two small balconies in each of the 20 Type D dwellings in the Century Plaza building will, to various degrees, be the subject of overshadowing from the proposed building. After 12:30 p.m. they will be progressively overshadowed: by 1:00 p.m. 11 floors will be overshadowed; by 1:15 p.m. 17 floors will be overshadowed; and by 1:30 p.m. all 20 floors will be overshadowed. Should the height of the building be reduced by five levels as suggested by Mr. Byrnes (or down to RL 130m as referred to above), this overshadowing will be commensurately reduced.

56 Plainly, irrespective of which of these three heights are taken into account, the overshadowing of these dwellings (that are within the *composite shadow area*) will be increased. But will it reduce their amenity for the purposes of cl 28D(2)(d)? According to the tables in Dr King's report the extent of additional overshadowing varies between 45 minutes and 105 minutes but more typically ranges between 60 minutes and 90 minutes. Whilst the solar access to these dwellings is unaffected until between 12:30 p.m. and 1:30 p.m. the loss of solar access will, in my opinion reduce the amenity of the affected rooms and balconies.

57 In the case of *Nuts 'n Berries v North Sydney Council* [2006] NSWLEC 516 Roseth SC in dealing with cl 28D(2)(d) [32] accepted that *there can be some leniency in interpreting the subclause*. I understand that he reached this conclusion relying on the opinions of Mr. Mossemeneer and Dr King and accepted that it would, in a town planning sense be reasonable to adopt this approach. However, in this case I do not accept that the subclause can be interpreted in this way. Once one reaches a conclusion that the amenity of a dwelling is reduced, cl 28D(2)(d) requires that there be *no increase in overshadowing*. Whilst it might be possible to adopt a lenient approach where the resultant loss of amenity is very small I do not accept that, at the winter solstice, the losses of solar access described above are indicative of a very small loss of amenity. In this context, I note the concerns of the objectors and accept that not all of the affected bedrooms are used as bedrooms and that some are used as sun rooms, reading rooms studies and the like. I also accept that from time to time the owners of these dwellings will close blinds and curtains to prevent solar penetration and that this is not a reason to conclude that they do not value sunlight.

58 The proposed development, and in particular the affected dwellings, therefore fails the reduction of amenity test in cl 28D(2)(d). However because cl 28D(2)(d) is a

development standard (see *Castle Constructions Pty Ltd v North Sydney Council* [2006] NSWLEC 468), variation is possible subject to an objection under *State Environmental Planning Policy No. 1 - Development Standards*. To this end such an objection has been provided.

59 The SEPP 1 objection identifies the objective of cl 28D(2)(d) as:

to ensure that dwellings which are already overshadowed by existing buildings in the centre do not have their amenity materially affected by further overshadowing caused by new development, even though the increase in overshadowing may in itself be considered not unreasonable in other circumstances. In other words the impact sought to be considered is not only that which is caused by the additional overshadowing, but that which is the total sum of the effects caused by the additional as well as the existing overshadowing.

60 Reference is also made to the objectives of the building height and massing controls in clause 28D(1) including *to minimise overshadowing of land in the residential... zones*, explaining that this is about ensuring that there is no unreasonable loss of sunshine for the living areas of the dwelling. In this case there is said to be no such loss given the orientation of the dwellings, particularly their living areas, to the southeast and southwest. The affected bedroom windows of the dwellings will be overshadowed in the early afternoon when these rooms are least likely to be used. Despite this the bedrooms on all levels will still retain at least two hours of sunshine with at least one bedroom retaining three hours of sunshine. As a consequence the amenity loss will be negligible and therefore the objective of the standard is achieved.

61 The SEPP 1 objection also deals with the planning objectives for the locality, including those for the *Mixed Use* zone and the *North Sydney Centre* making a number of points including the following:

- Apart from some additional overshadowing and taking into account its height and massing the proposed building meets the objectives of the *North Sydney Centre* and is responsive to the desired future character requirements.
- The manner in which the development provides commercial and residential floor space represents a high-quality urban design and results in numerous public benefits.

62 In relation to the aims of SEPP 1, the objection contends that the proposed development represents the orderly and economic use of the land and that the variation of the standard as sought is an appropriate use of the flexibility endorsed by the policy. It also makes reference to the planning principle established by the Court in relation to sunlight, and in particular raises the question of whether the proposal complies with applicable planning controls and if not, how much of the impact is due to the non-complying elements of the proposal. In this regard it was argued that this is not a case where, if the height of the proposal is reduced, the impact diminishes. This is because the dwellings concerned are located vertically above each other and a reduction in height

simply reduces the number of units affected but has no effect on the impact on any one dwelling. If the impact on one dwelling is acceptable a similar impact on another similar dwelling must also be acceptable.

63 The SEPP 1 objection concludes that the availability of sunshine for the affected bedrooms of at least 2-3 hours is adequate for living areas and must therefore be considered to be generous for these rooms. In addition the amenity of the dwellings, particularly the living areas, is retained taking into account the available views of Sydney Harbour. In these circumstances given the expected density and development pattern of the North Sydney Centre the remaining availability of sunshine to the affected dwellings could be seen to be generous. Also, notwithstanding that some of the affected rooms are used for purposes other than bedrooms, most of them will be expected to be used as such and that other uses will occur in the living areas that have the harbour outlook. Consistency with the objectives of the E P & A Act is thus achieved and the application of the standard is unnecessary given that its objectives are met.

64 It is now well established that overshadowing (and other) impacts from a complying building can more readily be justified and accepted by the owners of the affected dwellings. By comparison the overshadowing impacts from a proposal that fails to comply with the applicable planning controls are much less likely to be able to be justified or accepted. Indeed this is an approach adopted by Mr. Mossemenear. In this regard, taking into account my earlier conclusions, the building the subject of this application would not be a complying building and as a consequence the additional overshadowing of the Century Plaza building would contribute to its unacceptability. However this is not determinative of the requirement of cl 28D(2)(d) that seeks to avoid reducing *the amenity of any dwelling*. As submitted on behalf of the applicant the approach to be taken is to consider each dwelling separately rather than considering all of the affected dwellings together.

65 As I have already indicated the affected Type D dwellings fail this test because they will suffer an increase in overshadowing that would reduce their amenity. In this regard it is to be noted that a building of a height acceptable to Mr. Mossemenear would result in the overshadowing of the Type D dwellings on the lower six or eight floors of the Century Plaza building and that this overshadowing would reduce the amenity of those dwellings also resulting in a failure to comply with cl 28D(2)(d).

66 In accepting the principle that the amenity test in cl 28D(2)(d) is to be applied on a dwelling-by-dwelling basis, it follows that the height of the building, in this context, is largely irrelevant. Despite this an important consideration in formulating SEPP 1 objection is whether the proposed development otherwise meets the applicable planning controls. At its proposed height, as discussed above, it does not meet the *notional arc* controls in the DCP and as a consequence is not responsive to the desired future character of the area. On this basis the SEPP 1 objection should fail.

67 However, having considered the SEPP 1 objection together with the evidence provided by Dr King and Mr. Byrnes, I believe that if the development were to be modified in accordance with the *notional arc* controls I could conclude that it is well founded and could be upheld. Similarly, I could accept that the underlying objective of the development standard to ensure that the existing dwellings should *not have their amenity materially affected by further overshadowing* is met. In reaching this conclusion I accept

that amenity includes more than just solar access. Hence, taking into account the outlook available from the Type D dwellings, the nature and use of the affected rooms and terraces, the reduction and remaining availability of solar access, that is of concern to a number of residents, this does not indicate a material affectation of this amenity.

Conclusion

68 Clause 14(2) of the LEP requires that the aims and objectives of the LEP be taken into account and that consent must not be granted for any development that is inconsistent with the relevantly applicable aims and objectives. Having considered all of the evidence in the light of the issues in contention it is my opinion that in its presently proposed form, the building satisfies the relevantly applicable aims and objectives of the applicable planning controls with the exception of those controls that relate to the height of the building (and consequently overshadowing). Those controls seek a transition of building heights from the tallest buildings towards the boundary of the *North Sydney Centre*. This objective when applied in conjunction with the applicable requirements of the DCP, particularly the height controls involving the *notional arcs* results in my conclusion that the proposed building, even with the proffered height reduction of five levels, is simply too tall. For this reason and the consequential failure of the SEPP 1 objection, the application should be refused.

69 As indicated above the draft LEP provides a maximum building height of RL 103. Whilst this lends some support to my conclusion that the building is too high I do not accept that it can attract sufficient weight to require the building to be any lower than the height that I have already decided could be acceptable.

70 In submissions the applicant asks that if I consider that the proposal could be approved with amendments that I refrain from making final orders so that the applicant can consider its position. Whilst a further lowering of the building could possibly be achieved by removing additional floors from the middle of the building (in the manner already suggested by Mr. Byrnes) the removal of a further six levels beyond the five suggested by Mr Byrnes would be so substantial that, in the context of this development application, this cannot be done.

71 The appeal must therefore be dismissed.

T A Bly
Commissioner of the Court
ljr

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Land and Environment Court of New South Wales

CITATION :	Castle Constructions Pty Limited v North Sydney Council [2008] NSWLEC 1456
PARTIES :	APPLICANT Castle Constructions Pty Limited RESPONDENT North Sydney Council
FILE NUMBER(S) :	11010 of 2005
CORAM:	Bly C
KEY ISSUES:	Development Application :- demolition of existing buildings and the construction of a multi-storey commercial/residential building, building height and associated planning controls.
LEGISLATION CITED:	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 State Environmental Planning Policy No. 65 North Sydney Local Environmental Plan 2001 North Sydney Development Control Plan 2002
CASES CITED:	Castle Constructions Pty Ltd v North Sydney Council [2008] NSWLEC 1168 Castle Constructions Pty Ltd v North Sydney Council [2008] NSWLEC 239
DATES OF HEARING:	15, 16 and 17 October 2008
DATE OF JUDGMENT:	12 November 2008
LEGAL REPRESENTATIVES:	APPLICANT Mr T. Robertson, S. C. Instructed by McLauchlan Thorpe Partners RESPONDENT Ms H Irish, barrister

JUDGMENT:

**THE LAND AND
ENVIRONMENT COURT
OF NEW SOUTH WALES**

Bly C

12 November 2008

**11010 of 2005 Castle Constructions Pty Limited v North Sydney
Council**

JUDGMENT

Introduction

1 On 7 May 2008 I gave judgment in *Castle Constructions Pty Ltd v North Sydney Council* [2008] NSWLEC 1168 being a merits appeal against the North Sydney Council's refusal of a development application for a 36 storey mixed-use (mainly residential) development at 136 - 140 Walker Street North Sydney. In short the appeal was dismissed and the development application refused because, taking into account the requirements of the *North Sydney Development Control Plan 2002*, the proposed building was too tall.

2 On 29 August 2008 Biscoe J gave judgment (*Castle Constructions Pty Ltd v North Sydney Council* [2008] NSWLEC 239) upholding Castle Constructions' subsequent appeal against my decision pursuant to s 56A of the *Land and Environment Court Act 1979*. That appeal was upheld for reasons essentially involving denial of procedural fairness and failure to consider relevant evidence and was thus remitted back to me for determination in accordance with the decision.

3 The parties have now provided additional evidence in relation to the building height issue. Taking this evidence into account together with the evidence provided in the initial hearing I have decided that, in the light of the applicable planning controls that the appeal should again be dismissed.

The remittal hearing

4 When the remittal hearing began, evidence in addition to the evidence tendered at the original hearing was provided and given by:

- Mr G. Mossemeneer, council's executive town planner
- Mr J Mills, council's three-dimensional modeling consultant

- Mr J Aspinall, the applicant's architectural modeling consultant
- Dr R Lamb, the applicant's visual analysis consultant
- Mr T. Burns, the applicant's consultant architect and town planner

5 On behalf of the respondent council, Ms Irish submitted that the effect of Biscoe J's decision to remit the matter to me for determination in accordance with his decision, means that it is necessary for me to consider not only the particular deficiencies in my judgment but to do so in the context of a revisiting of the whole of the assessment process indicated by s. 79 C of the *Environmental Planning and Assessment Act 1979*. This includes all of the previously considered provisions of *State Environmental Planning Policy No. 65, North Sydney Local Environmental Plan 2001, North Sydney Development Control Plan 2002* and the residents' objections. She also submitted that the concern expressed by me in my judgment in relation to the north-east corner of the building must also be included in the reconsideration.

6 Mr Robertson disagreed, submitting that because the remitter specifically requires determination in accordance with Biscoe J's decision as distinct from a remittal for re-hearing, what is necessary is the rectification of the deficiencies in my judgment and anything that flows from that. As for the matter of the north-east corner of the building this should no longer be of concern now that the applicant proposes that the building be set back an additional distance of 1.2 m from Walker Street.

7 In my opinion, for the reasons that he has given, the approach suggested by Mr Robertson is correct.

8 In the circumstances I adopt those parts of my original judgment that are not otherwise affected by Biscoe J's decision.

Biscoe J's relevant findings

9 The basis for Biscoe J's decision to remit the matter can be found in the conclusions that he reached in relation to the two grounds of appeal that involve procedural fairness and consideration of relevant evidence.

10 The first at [28] of his judgment is as follows:

The concept of a three dimensional umbrella generated by the notional arcs in DCP figures 1.1 and 1.2 was fundamental to the Commissioner's decision. I accept Castle Construction's submission that had there been any contention or submission by the council before the Commissioner that the proposed building did not satisfy the three dimensional arcs umbrella or any specific suggestion by the Commissioner to that effect at the hearing, Castle Constructions would have made a submission on the point including referring to Exhibit N and the evidence of Dr Lamb and Mr Byrnes. In the circumstances, I am persuaded that the Commissioner made his critical findings without giving Castle Constructions a proper opportunity to do so.

11 The second at [34] of his judgment is as follows:

The council criticises that evidence (Exhibit N and the evidence of Dr Lamb and Mr Byrnes) and makes submissions as to why (if the matter were to be remitted)

the Commissioner should not accept it and should adhere to the conclusions expressed in his existing reasons for judgment. It is true that, if the matter were to be remitted, the Commissioner may well be unmoved by any of that evidence or any submissions by Castle Constructions relating to it, and may adhere to the conclusions that he has already expressed. However, for present purposes, that is not the point. The point is that the Commissioner did not refer to that evidence. The Commissioner decided that the building did not fit within the three-dimensional umbrella. Yet Exhibit N and Dr Lamb's evidence, at least, were to the contrary. It is less clear whether Mr Byrnes was referring to the three-dimensional arcs or only to the two-dimensional arcs. Be that as it may, in my opinion, Exhibit N and Dr Lamb's evidence, at least, were of sufficient importance to the Commissioner's decision that they should have been referred to and considered by the Commissioner. I am prepared to draw the inference that as the Commissioner did not refer to that evidence, he overlooked or failed to consider it. That may well have been because neither party referred him to it in submissions, in the circumstances discussed at [27] – [28] above.

The relevant evidence

12 In relation to the findings of Biscoe J, I particularly note and take into account the evidence of Dr Lamb and Mr Byrnes and Exhibit N which evidence continues to be relied upon by the applicant in the proceedings.

13 In section 2.3 of his report Dr Lamb explained that he had studied the two notional arcs (figures 1.1 and 1.2 of the DCP) in context and detail and observed that the proposed building is well below both of the arcs. As a consequence it is compliant with the desired future character insofar as these arcs represent this character. He also explained that whilst the two arcs do not produce a three-dimensional shape, such a shape can nevertheless be inferred as being ... *umbrella like but not symmetrical*. The principal that emerges from these arcs is that a building should have a lower height in relation to buildings ... *located more centrally under the umbrella*. He concludes that the proposed building is well below ... *the three dimensional surface which can be surmised to join them into an umbrella-like surface*.

14 At sections 2.13 and 2.99 of his report Mr Byrnes said that *the proposal is well within the heights of buildings depicted in the notional arcs* that represent the desired heights for buildings in the North Sydney Centre.

15 Exhibit N includes an architect's plan showing a *notional dome* that was generated using a three-dimensional computer generated model based on the DCP's notional arcs. Interpretation of this model revealed that a building height of RL 175.0 would remain within the envelope created by this notional dome.

My previous judgment

16 In my previous judgment at [24] - [26] I acknowledged that the superimposition of the proposed building on the two notional arc diagrams seemingly indicated comfortable compliance. Despite this I said, taking into account the building heights and massing objective in cl 28D(1)(a) of *North Sydney Local Environmental Plan 2001*, that the views

of built form as a whole in the North Sydney Centre are very important and that ...*the two notional arcs need to be considered and applied together.* To this end I explained that:

When the arcs are combined, this produces a three-dimensional "umbrella" shaped height or skyline envelope. Even taking into account that the site is not positioned directly under either of the arcs, (that have been drawn along Miller Street and Berry Street respectively) I expect that the proposed building would project well beyond the envelope when considered in its three dimensional form.

17 In order to understand this three-dimensional form I noted at [26] the importance of the existing and potential heights of buildings at the edges of the North Sydney Centre as shown on the notional arc diagrams. At the extremities of the Berry Street notional arc, these top of building heights are in the order of RL135 m - RL145 m and at the extremities of the Miller Street arc these are in the order of RL110 m - RL125 m.

18 I then concluded at [27] - [28] that:

Taking into account the location of the site vis-à-vis the North Sydney Centre boundaries and accepting as I do that these RL's are broadly indicative of a range of appropriate building heights anticipated by the DCP for these boundaries, with the top of the proposed building being at RL 162.5, I conclude that it is much too high. In this context Mr. Byrnes expressed the opinion that a better response to the notional arcs would be to reduce the building by five storeys or 15m to a top of building RL of 147.5m. (These five storeys would be removed from the middle of the building rather than of the top because the top has been carefully sculptured and would be a good element to retain). Even with such a reduction in height the three-dimensional envelope would be infringed.

Unless the proposed building is lowered significantly it does not meet the requirements of the DCP and would have an unacceptable visual dominance. In my opinion this is sufficient to warrant refusal of the application.

19 I also concluded at [35] that:

Considering the position of the site vis-à-vis the boundary of the North Sydney Centre this would indicate a building with a top of building RL of about 130 m...

Planning controls

20 Under the *North Sydney Local Environmental Plan 2001* the site is zoned *Mixed Use* and in this zone the proposed development is permissible with development consent. Under *North Sydney Development Control Plan 2002* the site is included in the *North Sydney Centre Planning Area*. Being, in part, a residential flat building, *State Environmental Planning Policy No 65 Design Quality of Residential Flat Development* is also applicable. Also said to be relevant is draft *North Sydney Local Environmental Plan - Amendment No 28*.

The additional evidence

21 In response to those aspects of my judgment dealing with the three-dimensional envelope generated by the notional arcs both Mr Aspinall and Mr Mills have provided a

number of of different computer-generated three-dimensional models (Exhibits 41 and LL) that show how the proposed building might or might not comply with such an envelope. During the hearing these envelopes were discussed and it was decided that they needed to be modified, again utilising the notional arcs but using instead the particular relative levels associated with the built forms (depicted on the diagrams as existing or achievable buildings) that appear to have generated these arcs.

22 These relative levels were determined by Mr Mossemeneer and Mr Byrnes and are shown in Exhibit 43. At the extremities of the Berry Street arc these are in the order of RL137 m - RL141 m and at the extremities of the Miller Street arc these are in the order of RL112 m - RL128 m. These relative levels very close to the levels in my judgment and referred to at [17] above.

23 Mr Aspinall and Mr Mills have now produced several computer-derived three-dimensional models (Exhibits 45, 46 and MM) that are based on the now agreed relative levels for the two notional arcs. The shape of the envelopes produced by these models vary depending upon which relative levels are adopted for the top most height of the arcs. They also vary depending upon which boundaries of the North Sydney Centre are utilised in locations that do not fall precisely under the arcs themselves and the adopted relative levels in those locations.

24 The proposed building has been incorporated into these models revealing that it variously projects beyond the envelopes by as much as 7 m. Mr Byrnes and Mr Mossemeneer considered the likely margin of error in these models and Mr Byrnes estimated that this might amount to two storeys. It is to be noted however that, as a result of the now proposed additional 1.2 m setback from Walker Street, the projection beyond the envelopes is reduced.

25 On this basis the applicant submits that it is prepared to agree to a condition to limit the height of the proposed building to RL 156.8 m (the applicant's plans presently show a top of building RL of 162.5 m) and that this would comply with the envelopes produced by Mr Aspinall and Mr Mills.

26 Despite having previously agreed that five levels could be removed from the proposed building, Mr Byrnes now says that this is unnecessary; particularly taking into account that the technical breach of the latest envelopes generated by the notional arcs is marginal. Also because of the likelihood that the draft LEP that seeks to achieve the necessary non-residential additional floor space in the North Sydney central business district (as required by the Department of Planning) is likely to require taller buildings and possibly rezonings.

27 Mr Mossemeneer has also changed his position in relation to the height of the building, having previously contended that no portion of the building should exceed RL 103 m. He is now prepared to accept: *considering an envelope based on the two notional arcs that follows the edge or boundary of the centre, an appropriate height would appear to also be around RL 130 m.* In reaching this conclusion I understand that he has taken into account the likely provisions of the proposed draft LEP. He has also taken into account the provisions of the existing DCP that have the dual role of providing a district skyline control within a regional view catchment and what he says is the more important immediate local context.

28 He did not accept that the three-dimensional envelopes generated from the notional

arcs by Mr Aspinall and Mr Mills were appropriate for the determination of an appropriate maximum building height for this site. This is because the envelopes have not properly taken into account the local context and the fact that the site is at or very close to the boundaries of the North Sydney Centre. As he said in his report, in relation to a three-dimensional envelope: the edge of the envelope must be the edge of the North Sydney Centre and:

If the data from the edge of the arcs and other existing buildings on the edge of the centre can provide an average height, it might be appropriate to at least consider that height as a maximum height for development particularly where the site adjoins lower scale residential development.

29 In this context he refers to a number of relative levels that are not dissimilar to those referred to in Exhibit 43:

- The maximum building height (100 Arthur Street) at the edge of the commercial centre of RL of 130.15 m,
- The southern end of the Miller Street arc that has an RL of 126.34 m,
- The northern end of the Miller Street arc (237 Miller St) that has an RL of 125.56 m

Conclusions

30 It has now become clear that with a relatively small adjustment to the height of the proposed building and taking into account the additional proposed setback from Walker Street, compliance with the three-dimensional envelopes developed by Mr Aspinall and Mr Mills would be achieved.

31 However, I am not convinced that these envelopes as constructed are sufficiently responsive to the boundaries of the North Sydney Centre. In deciding to give little weight such compliance, I have taken into account Dr Lamb's suggestion that whilst such an envelope could be umbrella shaped it would not be symmetrical. This is apparently because the perimeter of the North Sydney Centre is not circular, instead being irregular and rectilinear. Hence, whilst this consideration can be taken into account and given some weight, it does not overcome the concerns regarding visual dominance that I expressed in my earlier judgment at [27] – [28] regarding the location of the site vis-à-vis the North Sydney Centre boundaries.

32 In this reaching this conclusion, I find the evidence of Mr Mossemeneer persuasive. In particular I accept the correctness of his present approach in interpreting and applying the planning controls that deal with building heights at the edge of the North Sydney Centre. As he explained, the data and buildings at the edges of the arcs can be considered as a maximum height for development where the site adjoins lower scale development, as is the case here. I thus agree that such a height can be derived from the heights determined by him and Mr Byrnes when they determined the average relative levels for the arcs at the edges of the North Sydney Centre (Exhibit 43)

33 This approach is also consistent with the conclusion in my previous judgment at [33] (that I continue to adhere to) that the site need not be treated as an area of transition between multi-storey buildings and small-scale buildings beyond the boundaries of the North Sydney Centre. In this context I do not accept that because the notional arcs project beyond the boundaries of the North Sydney Centre, allowable building heights at the

boundaries should be commensurately increased, taking into account the different height controls that apply outside the centre.

34 Whilst the approach of applying an average height to the edges of the North Sydney Centre in locations other than underneath the two notional arcs is not straightforward, I nevertheless agree that this approach should attract significant and determinative weight. I have reached this conclusion notwithstanding that there is nothing in the planning controls other than the arcs themselves that would require a uniform building height around the boundaries. However, it is also important to remember that visual dominance and transition towards the boundaries of the centre are important considerations as are streetscape and topography and the area character statement in the DCP. In this context I accept that a reasonable interpretation of the notional arcs in the light of the planning controls is that there be reasonably uniform building heights around the perimeter of the centre.

35 Finally here, in terms of the North Sydney Centre's skyline it is possible, as conceded by Mr Mossemeneer, that the proposed building may not offend when contemplated from distant viewpoints. I have however been persuaded by his evidence that, taking into account the planning controls, because the site is positioned so close to the boundaries of the North Sydney Centre and giving appropriate weight to the site's context, that the proposed building would be too tall.

36 At [14] in my previous judgment I dealt with the draft LEP concluding that whilst it cannot be considered to be certain and imminent it can, in the public interest, be given some weight. The council has only recently requested the issue of a s 65 certificate for an amended draft LEP hence it can still cannot be considered to be certain and/or imminent. Nevertheless the planning process and considerations associated with the draft LEP can, in the public interest be taken into account. In this regard, discussions are continuing between the council and the Department of Planning in relation to the department's requirement that that "it will be clearly demonstrated" that the draft LEP has the capacity to achieve at least 250,000 square metres of additional non-residential floor space in the North Sydney Centre.

37 In the draft LEP the council seeks to promote a height and massing of buildings that will minimise impacts on residential development adjoining the North Sydney Centre. To this end, maximum building heights are proposed. Hence, if the Department's floor space requirements are to be met concurrently with the height limits of the kind that the council is seeking, other changes to the draft LEP, possibly rezonings within the North Sydney Centre may be necessary. Another possibility may be to allow taller buildings in locations other than adjacent to the North Sydney Centre boundaries.

38 Despite the apparent difficulties associated with meeting the department's floor space requirements, I accept the likelihood that that an amending local environmental plan could be prepared that produces the built form that the council seeks to achieve in the North Sydney Centre, where that form is significantly lower at the edges and meets reasonable floor space requirements. In these circumstances it is unlikely that a draft local environmental plan would permit a building for this site that is as tall as the applicant presently seeks approval for.

39 In my previous judgment at [39] I accepted the evidence of Mr Mossemeneer that an increase set back at the north-east corner of the building including the removal of the heavy frame around the balcony would be beneficial. Notwithstanding that the frame is to be retained, I now find the proposed additional 1.2 m setback to be a sufficient response

to this concern.

40 In all of the circumstances and having taken into account the previous and the additional evidence I have discovered nothing that would cause me to change any of the conclusions that I reached in my previous decision in relation to building height and generally. This includes my decision not to uphold the SEPP 1 objection. I have therefore decided that the appeal should be dismissed and the development application refused.

T A Bly
Commissioner of the Court
ljr

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