



## **Land and Environment Court New South Wales**

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**Case Title:** Botany Development Pty Ltd v Council of the City of Botany Bay

**Medium Neutral Citation:** TBA

**Hearing Date(s):** 5,6,9 December 2013

**Decision Date:** 31 January 2014

**Jurisdiction:** Class 1

**Before:** Brown C

**Decision:** Directions for amendments to plans

**Catchwords:** DEVELOPMENT APPLICATION: demolition of all improvements and the construction of a multi level residential flat building, containing 158 units, basement car parking and landscaping and ancillary works – non compliance floor space ratio development standard – whether acceptable transition to lower density residential development - inadequate off street parking - poor solar access and natural ventilation – inadequate unit size

**Legislation Cited:** Botany Bay Local Environmental Plan 1995  
Botany Bay Local Environmental Plan 2013  
Environmental Planning and Assessment Act 1979  
State Environmental Planning Policy No 1  
State Environmental Planning Policy No. 65

**Cases Cited:** Blackmore Design Group Pty Ltd v North Sydney Council [2001] NSWLEC 279  
Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) NSWCA 289  
Wehbe v Pittwater Council [2007] 156 LGERA 446

Texts Cited:

Category: Interim judgment

Parties: Botany Development Pty Ltd (Applicant)  
Council of the City of Botany Bay  
(Respondent)

Representation

- Counsel: Mr I Hemmings SC (Applicant)  
Mr J Robson SC (Respondent)

- Solicitors: TressCox Lawyers (Applicant)  
Houston Dearn O'Connor (Respondent)

File number(s): 10360 of 2013

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## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the refusal of Development Application No 2012/233/1 by the Council of the City of Botany Bay (the council) for the demolition of all improvements and the construction of a 3-6 storey residential development, containing 158 units, basement car parking, landscaping and ancillary works at 72-86 Bay Street, Botany (the site).
- 2 The council maintains that the development should be refused as:
  - the variation to the floor space ratio (FSR) development standard is not well founded,
  - the proposal does not provide an acceptable transition to the lower density residential development to the south,
  - the proposal has inadequate off street parking,
  - the proposal has an excessive number of units that have poor solar access and natural ventilation, and
  - the proposal has units of inadequate size.

## **The site**

- 3 The site consists of Lot 7 in DP 19083 (72 Bay Street), Lots 1 and 2 in SP 52116(74-76 Bay Street), Lots A and B in DP 314930 (78-80 Bay Street) and Lot 1 in DP 740756 (82-86 Bay Street). It is irregular in shape with a 126.35m southern boundary to Bay Street, an irregular rear northern boundary of 126.45m, a eastern side common boundary (with 90-92 Bay Street) of 52.275m, and a western side boundary (with 70 Bay Street) of 74.455m, giving a total site area of 7,775sq m.
- 4 The site is surrounded by a mixture of residential and light industrial uses. To the north are residential flat buildings and townhouses and one remaining industrial building. Further to the north is the Botany Aquatic Centre. To the west along Jasmine Street is a residential development under construction. The area to the south of the site is made up primarily of single storey detached dwellings along Bay Street. To the east along Bay Street are two industrial buildings.

## **Relevant planning controls**

- 5 The site is zoned R3 - Medium Density Residential under *Botany Bay Local Environmental Plan 2013* (LEP 2013) which came into effect on 21 June 2013. The proposed development is permissible with consent in this zone. The zone objectives are:
  - To provide for the housing needs of the community within a medium density residential environment.
  - To provide a variety of housing types within a medium density residential environment.
  - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
  - To encourage development that promotes walking and cycling.
- 6 Clause 2.3(2) states:
  - (2) The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.
- 7 The council raised no issue in relation to cl 2.3(2).

- 8 Clause 4.3(2) provides that the height of a building is not to exceed 10m however cl 4.3(3) states that despite subclause (2) the height of a building on land that exceeds 2000sq m may exceed the maximum height but must not exceed 22 metres. There was agreement that the proposal satisfied the 22m maximum height standard but disagreement on whether the height was acceptable in its context.
- 9 Clause 4.4(2) provides that the floor space ratio (FSR) of a building is not to exceed 0.85:1 however cl 4.4(3) states that despite subclause (2) the FSR of a building on land that exceeds 2000sq m may exceed the maximum height but must not exceed 1.5:1. Clause 4.4B provides that the maximum FSR is 1.65:1, if certain matters are satisfied. There was agreement that the FSR of the proposal was 1.6.0:1 but disagreement on whether the design was acceptable in its context.
- 10 The development application was lodged with the council on 10 December 2012 and not determined prior to 21 June 2013, and as such, the application falls within the provisions of cl 1.8A that state:

**1.8A Savings provision relating to development applications**

If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.

- 11 The environmental planning instrument in force prior to LEP 2013 was *Botany Bay Local Environmental Plan 1995* (LEP 1995) where the site was zoned 2(b) Residential 'B'. The proposed development is permissible with consent in this zone. The zone objectives are:

The primary objective is to provide for the development and use of housing, other than detached housing, in appropriate locations, together with community and service uses of a type and scale appropriate to the enjoyment of such housing.

The secondary objectives are:

- (a) to provide scope for high-quality residential development in innovative forms on identified sites,
- (b) to improve the quality of the residential amenity by encouraging landscaping and good design in both new developments and renovations,

- (c) to encourage the revitalisation and improvement of older established residential areas by rehabilitation and suitable development,
- (d) to allow non-residential development which provides services or employment for residents and which is of a type and scale which does not interfere with the amenity of surrounding residential areas,
- (e) to encourage the preservation of buildings which are of heritage significance and within a heritage conservation area, and
- (f) to encourage energy efficiency and energy conservation in all forms of development permissible within the zone.

12 Clause 10(3) states:

- (3) The Council may only grant consent to the carrying out of development of land to which this plan applies if the Council is of the opinion that the carrying out of the development is consistent with the primary objective of the zone in which the development is proposed to be carried out. In granting consent, the Council must take into account other relevant objectives of the plan and the

13 The parties disagreed on whether the development satisfied cl 10(3).

14 Clause 12(1) provides that the floor space ratio (FSR) of a building is not to exceed 0.5:1 however cl 12(2) states that despite subclause (2) the FSR of a building on land that exceeds 2500sq m may exceed the maximum height but must not exceed 1:1 subject to the satisfaction of the matters in the subclause. The parties disagreed on the appropriate FSR.

15 *City of Botany Development Control Plan 2013* (DCP 2013) had not come into force at the time of the hearing but was adopted by the council on 11 December 2013 and came into effect on 17 December 2013, after the hearing was completed on 9 December 2013. The Court (and the applicant) were helpfully advised of the coming into effect of DCP 2013 by the councils solicitors and that there were no changes to DCP 2013 that affected the proposed development. No leave was sought to make further submissions on the coming into effect of DCP 2013.

16 DCP 2013 has been prepared to complement LEP 2013 and contains no savings provisions. Clause 1.1 of DCP 2013 states that it "replaces all the DCP's and Policies that apply to the land that the BBLEP 2013 and SEPP

(State Environmental Planning Policy (Port Botany and Port Kembla) 2013 applies to". Part 3A.2 provides requirements for parking, pt 4C.2 provides requirements for Site Design, pt 4C.3 provides requirements for Building Design, pt 4C.5 provides requirements for Site and Building Amenity and pt 4C7 provides requirements for Large Development Sites (in excess of 2000 sq m). Part 8 provides Character Precincts with the site located within pt 8.7, the Mascot Character Precinct.

- 17 *City of Botany Development Control Plan No 35 Multi Unit Housing and Residential Flat Buildings* (DCP 35) applied at the time of LEP 1995 and the hearing and until DCP 2013 came into effect. Even though the expert evidence addressed DCP 35, it no longer applied at the time of the determination of the appeal because of cl 1.1 of DCP 2013 and the absence of any savings provisions in DCP 2013.
- 18 *State Environmental Planning Policy No. 65 - Design Quality of Residential Flat Development* (SEPP 65) applies to the proposed development. Clause 30 requires consideration to be given to the design quality principles in Part 2 (cl 30(2)(b)) and the publication *Residential Flat Design Code* (RFDC) (cl 30(2)(c)).
- 19 Clause 6 of SEPP 65 states:

In the event of an inconsistency between this Policy and another environmental planning instrument, whether made before or after this Policy, this Policy prevails to the extent of the inconsistency.

### **The weight to be given to the different planning documents**

- 20 The weight to be attributed to a draft environmental planning instrument will be greater if there is a greater certainty that it will be adopted (*Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) NSWCA 289 at par 5). Relevantly, in *Terrace Tower*, Spigelman CJ states at pars 6 and 7 that:

6. Notwithstanding 'certainty and imminence', a consent authority may of course grant consent to a development application which does not comply with the draft instrument. The different kinds of

planning controls would be entitled to different levels of consideration and of weight in this respect.

7. Where a draft instrument seeks to preserve the character of a particular neighbourhood that purpose will be entitled to considerable weight in deciding whether or not to reject a development under the pre-existing instrument, which would in a substantial way undermine that objective.

21 The findings in *Blackmore Design Group Pty Ltd v North Sydney Council* [2001] NSWLEC 279, are relevant where Lloyd J states:

30. Whether one applies the test of “significant weight”, or “some weight”, or “considerable weight” or “due force” or “determining weight” to the later instrument is not, however, the end of the matter. The savings clause still has some work to do. The proposed development is a permissible development by dint of the savings clause. In giving the 2001 LEP the weight of being imminent and certain, that does not mean that there is no further inquiry. It is necessary to look at the aims and objectives of the later instrument and then see whether the proposed development is consistent therewith. Various expressions have been used to define this concept, but the approach which has been favoured in the Court of Appeal is to ask whether the proposal is “antipathetic” thereto (*Coffs Harbour Environment Centre Inc v Coffs Harbour City Council* (1991) 74 LGRA 185 at 193).

31. This approach was adopted in the cases to which I have referred. In *Mathers v North Sydney Council* Talbot J (as noted in par [22] above) attributed significant weight to the then draft LEP to the extent the Court ought to be satisfied that approving the development would not detract from its objectives as expressly stated or reflected in the proposed controls.

32. In that case Talbot J refused the appeal on the ground that the proposed development was inconsistent with the proposed planning controls in the draft local environmental plan.

33. Similarly, in *Architects Haywood & Bakker v North Sydney Council* after stating that significant weight should be placed upon the provisions of the draft plan, Pearlman J considered whether the proposed development accorded with the planning approach and objectives of the proposed controls in the draft local environmental plan. It was the fact that the proposed development ignored the planning approach adopted by the draft LEP that led Her Honour to refuse the application in that case.

34. In *Edward Listin Properties v North Sydney Council* Talbot J said (at par [15]):

Although it may not be appropriate to dwell too heavily upon the detailed controls implemented by the draft LEP, it is certainly important to have regard to the broad objectives which the draft planning instrument seeks to achieve.

35. His Honour further stated (at par [35]):  
...If what is proposed is unsatisfactory in general terms and inconsistent, in particular, with the expressed future planning objectives for the area, then it should be rejected.

36. In *Walker v North Sydney Council* Cowdroy J found that the evidence established that the development application was contrary to the planning objectives of the locality, for which reason His Honour rejected the development application.

- 22 The questions to be answered are firstly, whether the draft LEP (or LEP 2013, in this case) is imminent and certain and if so, what weight should the draft LEP be given in the consideration of the application and secondly, whether the proposal undermines the expressed future planning objectives for the area in the draft LEP.
- 23 First, on the question immanency and certainty, the draft LEP must be imminent and certain given that it has been gazetted and is currently in force.
- 24 On the second question, it is necessary to look at the aims and objectives of the draft LEP and then see whether the proposed development undermines the relevant aims and objectives, in a substantial way. In this case, the proposed use is permissible under both the draft LEP and the LEP 1985 although the different planning instruments contemplate a different form of development with the draft LEP envisaging a denser form of residential development through increased height and FSR. In this case, I accept that the draft LEP should be given significant weight in determining the application as it reflects the expressed future planning objectives for the area. It could not be said that the proposed development undermines the relevant aims and objectives of the draft LEP, in a substantial way, given that it is substantially in accordance with its objectives and controls. To do otherwise would be to ignore the strategic direction the council has adopted in the draft LEP.
- 25 At the hearing, the weight to be given to DCP 2013 and DCP 35 was in dispute between the parties. Mr Robson SC, for the council, and Mr



Hemmings SC accepted that DCP 35 was the development control plan currently in force and that DCP 2013 was only in draft form as it has not been adopted by the council. Mr Robson placed more weight on DCP 2013 as he maintains that it provides the detailed planning necessary for the proper understanding of LEP 2013 while Mr Hemmings noted its draft status and while accepting that it is not an irrelevant consideration, the weight is less than suggested by Mr Robson. Ultimately, the question of the weight to be given to DCP 2013 and DCP 35 was answered with DCP 2013 being adopted by the council on 11 December 2013 and coming into effect on 17 December 2013, albeit after the hearing was completed on 9 December 2013.

### **The SEPP 1 objection**

- 26 The FSR requirement in cl 12(1) in LEP 1995 applies by way of the savings provisions in cl 1.8A of LEP 2013. As the maximum FSR under cl 12(2) is 1:1 and the proposal has an FSR of 1.74:1 based on the calculation of gross floor area (GFA) in LEP 1995 (or an FSR of 1.60:1 based on the calculation of GFA in LEP 2013), the applicant has provided an objection under *State Environmental Planning Policy No 1 – Development Standards* (SEPP 1) to show why strict compliance is unreasonable and unnecessary, in this case.
- 27 The SEPP 1 objection adopts an FSR of 1:1 as the criteria in cl 12(1) are satisfied although this is not a conclusion accepted by the council. As LEP 1995 does not have any specific objectives for the FSR development standard, the SEPP 1 objection assumes that one objective is “to permit a higher FSR on any site with an area of more than 2500 sq m than on a site of less than 2500 sq m”. The SEPP 1 objection also assumes another objective is “to control the bulk and scale of new buildings”.
- 28 When the proposal is tested against the assumed objectives, the SEPP 1 objection states that strict compliance would be inconsistent with the aims of SEPP 1 as the bulk and scale of the development is compatible with

other developments in the precinct. Also, strict compliance would hinder the attainment of the relevant objects of the *Environmental Planning and Assessment Act 1979* (EPA Act) as the development is consistent with the desired future character of the locality. On the question of whether strict compliance is unreasonable and unnecessary, the SEPP 1 objection concludes that the object or purpose of the standard can be achieved notwithstanding the non-compliance with the standard in that;

- the bulk, scale and height of the proposal are all acceptable and reasonable,
- the proposal is compatible with the likely future context of the site,
- the impacts of the proposal are reasonable,
- the FSR development standard of 1:1 has been significantly breached, elsewhere in the precinct by council, indicating that the standard has not been consistently applied. For example, the council approved FSR on the adjacent site to the west under LEP 1985 is 1.51:1.
- the council has prepared LEP 2013 and which sets an FSR limit for sites of more than 2,000sq m at 1.65:1, with which the proposal will comply, and
- any DA's within the precinct lodged subsequent to the coming into force of LEP 2013 for sites over 2,000sq m will be subject to an FSR limit of 1.65:1 (and a height limit of 22.0m).

29 For these reasons, the SEPP 1 objection is well founded.

30 Ms Phoebe Mikhie, the council's expert town planner, comes to a different conclusion. In the absence of any specific objections, she adopts the following objectives for the FSR standard:

- to ensure that development is in keeping the local area;
- to ensure generation of vehicular and pedestrian traffic etc is acceptable;
- to ensure that building bulk and scale is consistent with the existing and future intent of the precinct; and

- to minimise adverse environmental effects on the use and/or enjoyment of adjoining properties and the public domain.

31 Ms Mikhiel maintains that the relevant FSR is 0.5:1 (cl 12(1)(a)) and not 1:1 as suggested by Mr Chambers, as in her opinion, the criteria in cl 12(2) are not satisfied. Clause 12 relevantly states:

**12 Floor space ratios**

(1) The Council may only consent to the erection of a building if the ratio of the gross floor area of the building to the site area of the land on which the building is to be erected does not exceed:

- (a) 0.5:1 within Zone No 2 (b),
- (b) 1:1 within Zone No 3 (a), and
- (c) 1:1 within Zone No 4 (a), 4 (b), 4 (b1), 4 (c1) and 4 (c2).

(2) Notwithstanding the provisions of subclause (1), the Council may consent to the carrying out of residential development on land within Zone No 2 (b) to a maximum floor space ratio of 1:1 where the allotment exceeds 2,500 sq m, and where it is of the opinion that:

- (a) the proposed development will satisfy the primary objective of the zone,
- (b) the scale of the proposed development, if above 2 storeys in height, is compatible with the scale of existing residential development in the locality,
- (c) the architectural character and design of the proposed development does not adversely affect existing residential development in the locality,
- (d) the provision of off-street parking for residents and visitors adequately meets the needs of the development,
- (d1) the provision of on-site car parking does not dominate or detract from the appearance of the proposed development or the streetscape,
- (e) the provision of private and communal open space on the site is adequate for the proposed development,
- (e1) the proposed development includes landscaping that screens and softens the visual effect of the buildings on the site, and creates useable and comfortable open space areas,
- (f) the environmental amenity of the proposed development and of the immediate locality includes measures to confine or reduce noise and to maintain privacy,
- (g) the proposed development ensures adequate sunlight, ventilation and privacy to its residents, to residents of adjoining development and to users of nearby public and private open space,
- (h) the proposed development makes provision for the adequate absorption of stormwater, and includes deep root zones for tree planting,
- (i) the proposed development incorporates pedestrian links at points where they are most prominently and safely connected to the existing street and pedestrian network, and

(j) the proposed development provides a safe and secure environment for its residents.

32 Ms Mikhiel states that the SEPP 1 objection is not well founded as the development:

- exceeds the 0.5:1 FSR by a considerable amount,
- is not in keeping with the height of the existing and proposed development in the surrounding area,
- does not competently address the zone interface of the low density housing located opposite the subject site,
- does not comply with DCP 35 in terms of site coverage; building heights; building depths; building separation; building setbacks; parking; site facilities; apartment layout, mix and sizes; balcony sizes; storage; landscaping; and solar access, and with consequential impact on internal and external amenity,
- does not comply with SEPP 65 in terms of the planning principles relating to Context, Scale, Built form, Density, Landscaping, and Amenity,
- where council has allowed an increased FSR, the developments have provided a form that is compatible with the existing character, and ensured that satisfactory amenity is provided, internally and externally, and
- has excessive FSR that is not compatible with the existing and future development in the area and combined with the unacceptable zone interface means this development cannot be compatible with the existing and future intent for the precinct.

### **SEPP 1 - findings**

*What is the appropriate FSR?*

33 In this case, there is an initial dispute over the relevant FSR requirement in LEP 1995. Clause 12(1) provides that the FSR of a building is not to exceed 0.5:1 however cl 12(2) states that despite subcl (2) the FSR of a building on land that exceeds 2500sq m may exceed the maximum height but must not exceed 1:1 subject to the satisfaction of the matters in the

sub cl (2). Ms Mikhiel maintains that the appropriate FSR is 0.5:1 while Mr Chambers maintains that an FSR of 1:1 is the appropriate FSR. The difference in approach between the experts essentially represents the fundamental differences between the parties.

- 34 For reasons set out in more detail later in the judgment, I am of the opinion that an FSR of 1:1 is available to the applicant. The disputed criteria in sub cl 2(a), (b) and (c) are addressed at pars 42 to 66, sub sec 2(d) at pars 67 to 79 and sub sec 2(g) at pars 80 to 97 where I have found, with some amendment, that the criteria are satisfied.

*Is the SEPP 1 objection well founded?*

- 35 Preston CJ in *Wehbe v Pittwater Council* [2007] 156 LGERA 446 identifies a number of ways of establishing that compliance with a development standard is unreasonable or unnecessary. The most commonly invoked way, and the way relied upon by the experts in this case, is to establish that compliance with the development standard is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard.

- 36 As stated in *Wehbe*, the Court must be satisfied of three matters before it can uphold the SEPP 1 objection and then consider the merits of the application. The three matters are:

1. the Court must be satisfied that “the objection is well founded” (clause 7 of SEPP 1).
2. the Court must be of the opinion that “granting of consent to that development application is consistent with the aims of this Policy as set out in clause 3” (clause 7 of SEPP 1). The aims and objects of SEPP 1 set out in clause 3 are to provide “flexibility in the application of planning controls operating by virtue of development standards in circumstances where strict compliance with those standards would, in any particular case, be unreasonable or unnecessary or tend to hinder the attainment of the objects

development anticipated by the council for the site, then strict compliance with the development standard, in this case, is unreasonable and unnecessary, as it would tend to hinder the attainment of the objects specified in section 5(a)(i) and (ii) of the Act and there is a significant public benefit in supporting the planning controls adopted by the council for the site given their recently adopted status and the public consultation associated with their adoption by the council. Consequently, the SEPP 1 objection is well founded so the merits of the application can be considered.

**Does the proposal provide an appropriate transition to the development on the opposite side of Bay Street?**

*The evidence*

- 42 Ms Mikhie states that the proposal is out of scale with the existing area, has not addressed the zone interface and is not in keeping with the existing and approved development in the area. The proposed development exceeds the height limit to Bay Street, which is two-storey (plus attic) under DCP 35. The existing approved development to the west at 8-32 Jasmine Street meets this requirement as does the DA lodged to the east at 90-92 Bay Street. The proposed built form is a part 3 and part 4 storey building to Bay Street and rises up to a 6 storey building to the rear. This is not in keeping with or compatible with the surrounding development in terms of building mass and bulk as the building is one large and imposing mass where the adjoining developments are smaller buildings. These buildings, which take the form and scale of two storey townhouses, plus attic to the street and the residential flat building varying between a building depth of 18m to 21.5m. The adjoining development along the northern side of Bay Street, Jasmine Street and Myrtle Street is primarily two storey plus attic, with a taller separate building located to the rear. The development to the south of the subject site is single and two storey detached dwellings.

- 43 Mr Baker, the councils architect and urban designer, agrees with the conclusions of Ms Mikhiel. He states that the proposal will have a dominating presence on Bay Street. The desired future character of the north side of Bay Street is a townhouse type and scale of development, which requires a maximum of two storeys plus attic to the street frontage. The proposal has a height of 3 storeys plus podium on Bay Street. This height is not only significantly greater than that of the single and occasional two storey dwellings opposite, but also in excess of the townhouses either built or under construction on the north side of Bay Street, which have a 2 storey street wall.
- 44 The unacceptable impact of the development on Bay Street is not confined to its 3 storey plus podium street wall height. The fourth level of the proposal, which is set back about 6.3m from the front of the structure above the Level 3 balconies and 4.3m from the Level 3 glass line, would be clearly visible from the houses on the opposite side of Bay Street. The portions of Levels 3 and 4, which span over the gaps in the building on Levels 1 and 2 are seen in their entirety from Bay Street. The architectural treatment of these elements and their draping with vines cannot prevent them being perceived as built form. The Level 6 portion of the building facing Bay Street, which is set back about 12.0m from the front of the structure above the Level 3 balconies and 10.0m from the Level 3 glass line, would be clearly visible from the footpath on the south side of Bay Street. Residents on the south side of Bay Street would see significant parts of the 6 storey part of the development from their front rooms and yards.
- 45 Of particular concern is the fact that the type of residential development proposed is incompatible with the neighbours on the opposite side of Bay Street. The proposal presents to Bay Street as a residential type which is much more intense than the detached dwellings opposite or the adjoining town houses, existing, under construction or proposed. The proposal has three separate apartments above one another other at all points along the Bay Street frontage, which presents a significantly greater level of

residential use than the neighbouring building types. A town house, which comprises one dwelling over two or three floors, would only have one courtyard or balcony in use at any one time, only one living area with the potential to project noise and activity to the street, whereas in the same unit width or "module" the proposal could project three such events to the street. Again, there is an unacceptable degree of incompatibility with the context.

- 46 Adverse impacts are not only confined to the visual consequences of excessive building mass, but perhaps more importantly to the extent of overlooking of the front yards and rooms of the houses opposite. Compared to townhouses, there would be three times as many sets of eyes looking across Bay Street to the southern neighbours.
- 47 Mr Chambers, the applicants town planner, states that the proposal will provide housing other than detached housing in a location, which is appropriate for development of this type. The scale of the proposal which is part 3, part 4 and part 6 storeys, is compatible with the scale of other existing and approved medium density residential development on nearby sites, including on 9-19 Myrtle Street, 4-32 Jasmine Street, 68-70 Bay Street and 21-23 Myrtle Street, and with the proposed development on 90-92 Bay Street. The contemporary architectural character and high quality design of the proposal is appropriate to the emerging medium density residential character that is anticipated for the precinct.
- 48 Ms Morrish, the applicants architect and urban designer, states that as Bay Street has different zonings and different planning controls on each side of the street, development on the site will not be the same as the low scale single dwellings on the opposite side of the street. By definition there will be a scale and density difference. Bay Street has a street reserve of approximately 20m plus the front garden setbacks to each property. This delivers a total separation from the proposed 3 storey development to the existing single storey and future 2 storey plus attic forms on the southern side of Bay Street of approximately 29 - 32.4m. Ms Morrish considers that



this separation is more than enough to achieve compatibility between a future form that will likely be 2 storey plus attic and a 3 storey development, particularly when combined with street trees and landscaping in front garden areas.

- 49 The maximum height of development on the southern side of Bay Street is 8.5m and the proposed height of the development on the northern side of Bay Street is 9.26m to the roof slab and 10.26m to the top of the expressed roof feature (frame pergola) and 10.2-11.2m to the west. This is a compatible scale and is in character with the future development height in the street. It also represents a far more sensitive outcome than other approvals in the block at the street edge.
- 50 In her opinion, the proposal is also expressed in a form similar to townhouses. The 3 residential floors are expressed with balconies and the top floor has been expressed with an architectural character that is similar to the 'mansard' type forms seen elsewhere in the block and proposed by the development to the east (which also has a 3 storey expression). Ms Morrish considers that the 'grain' of the proposal is very similar to the adjacent developments and appropriate in the streetscape.
- 51 The 4<sup>th</sup> floor components occur over the top of the 3 storey elements and at the bridges. The 4<sup>th</sup> floor apartments addressing Bay Street are setback 9.98m from the site boundary. They are recessed from all sides of the 3 storey form to ensure that they are recessive and not perceived from Bay Street. The 4<sup>th</sup> floor is not visible at the entry portals and it is not visible from the western end of Bay St near the intersection with Jasmine Street. From the eastern end of the site, the landscape terrace to Level 5 can just be perceived over the top of the roof forms to Level 3 but this is recessive and as the landscape in the street matures, even this small part will not be visible.
- 52 The 6<sup>th</sup> floor and its roof form of the development at 90 -92 Bay Street will be visible to Bay Street, as will the taller development to 8-32 Jasmine

Street. Ms Morrish rejects any suggestion that the development will be seen as one large single site as the 3 storey apartments to the street frontage will be seen as 3 different buildings with the portals creating visual and landscape breaks between these buildings. The 6 storey portion will be perceived as a backdrop form behind these apartments and will only be seen as connected when one is adjacent to the portal itself.

## **Findings**

- 53 In considering the general question of whether the development provides an acceptable transition to the residential development on the opposite side of Bay Street, I prefer the evidence of Mr Chambers and Ms Morrish although not in full.
- 54 As a starting point, there are two important factors that are relevant in determining whether the proposal provides an acceptable transition. First, I accept the proposition of Ms Morrish that as Bay Street has different zonings and different planning controls that apply to each side of the street, it cannot be reasonably expected that development on the site will be the same as the development on the opposite side of the street. The critical question is how well the development deals with the transition between the two different zonings.
- 55 Second, any assessment should have regard to the form of development anticipated by LEP 2013 or using the words SEPP 65, "in the case of precincts undergoing a transition, the desired future character as stated in planning and design policies". This must include consideration of LEP 2013 and DCP 2013, particularly as they are both currently in force and clearly represent the desired future character for the site and adjoining land. The opposite side of Bay Street is zoned R2 - Low Density Residential under LEP 2013. This zone permits attached dwellings, semi-detached dwellings, multi dwelling housing and residential flat buildings with a maximum height of 8.5m. It is this form of development that should be the basis for comparison and not the existing single storey detached dwellings.

- 56 There are a number of specific areas where the experts disagreed. Control C1(i) in cl 4C7.2 requires development “along a street frontage must consist of multi unit dwellings with a maximum height of two storeys plus attic”. While the dwellings that face Bay Street have a 3 storey appearance, I am satisfied that they are acceptable in the streetscape. Ms Mikhiel accepted that her concern did not necessarily relate to typology, (that is, a townhouse development where there may be multiple storeys but the storeys are all part of one dwelling) but had more to do with the obvious third level at the street. I agree that the development will present as three residential floors with balconies however this presentation is not so dissimilar to other recently approved developments that it could be said to be inconsistent, incompatible or so foreign to the form of development anticipated by DCP 2013 and with other new developments nearby that it would warrant the refusal of the application. There is a consistency with street setbacks of new developments and it appears that the concept of an attic has clearly been given a flexible interpretation, based on developments, such as 21 Myrtle Street.
- 57 Mr Bakers concerns over increased activity from multiple dwellings rather than townhouses at Bay Street was ultimately and correctly, in my view, not supported by Ms Mikhiel or the other experts. Mr Bakers other concern over the increased loss of privacy from multiple dwellings rather than townhouses at Bay Street also cannot be supported given the minimal change in residential character between a townhouse and number of units of similar height and the separation distance between the properties on each side of Bay Street.
- 58 Control C1(ii) and C2 in cl 4C7.2 require residential flat buildings to be located at the rear of the site. Ms Mikhiel's concerns related to the location of the residential flat buildings closer to the centre of the site however I do not accept that this is a valid criticism as the location optimises solar access to the proposed units and creates an acceptable building separation with the development at the rear (a situation created largely by

the inadequate rear setback of this building) and at the same time, not unacceptably impacting on the appearance from Bay Street.

- 59 The suggestion by Mr Baker that to achieve an acceptable transition to the buildings on the southern side of Bay Street it is necessary for the 6 storey component of the development to be hidden from view from Bay Street and the properties on the southern side is unreasonable and not supported by any requirements in LEP 2013 and DCP 2013. Such a position is also inconsistent with the Botany Character Precinct that seeks to “promote” medium residential development that has a FSR of 1.5:1 and 2 to 6 storeys (a maximum height of 22 metres). It is difficult to imagine a design that would satisfy Mr Bakers approach and achieve a development that would satisfy the form contemplated by the Botany Character Precinct.
- 60 Ms Mikhiels concerns that building mass and bulk will read as one large and imposing mass from Bay Street has some merit although it is not a matter that could not be addressed through some amendments. Control C3 in cl 4C.2.3 in relation to Streetscape provides that the maximum length of any building must be 24m, (C3(i)) and where external wall lengths exceed 12m, the façade must be stepped by at least 0.3m (C3(ii)).
- 61 While the central block of units at Bay Street has a width of 34m and could be said to exceed the external wall length requirement of 24m, this group of units is sufficiently modulated and articulated to not create an impression of unacceptable bulk and scale when viewed from Bay Street. A similar conclusion could be drawn for the northern group of units that have a width of 25m.
- 62 Of greater concern are Levels 3 and 4 where these levels extend largely for some 100m in length. Even though the full extent of the building is only likely to be observed from locations directly opposite and while attempts have been made to break down the massing of this part of the development through modulation, features such as the vertical garden and architectural features to the facades, the physical extent of Levels 3 and 4

creates a level of bulk and massing that is unacceptable. In my view, this can be addressed through the deletion of units B3.08 and B3.09 on Level 3 and B4.08 and B4.09 on Level 4 to allow a full physical break between the three significant building forms that make up the development.

63 In relation to SEPP 65, I find that the proposal (with amendment above) is consistent with Principle 1: Context in that the development “responds and contributes to its context, Principle 2 in that the development “provides an appropriate scale in terms of the bulk and height that suits the scale of the street and the surrounding buildings” based on its location in a precinct undergoing a transition, Scale, Principle 3: Built form in that the development “achieves an appropriate built form for a site and the building’s purpose, in terms of building alignments, proportions, building type and the manipulation of building elements” and Principle 4: Density in that the development “has a density appropriate for a site and its context” based on its location in a precinct undergoing a transition.

64 I also find that the proposal is consistent with the following relevant objectives in DCP 2013:

**O2** To ensure residential flat development is compatible and complimentary to the streetscape and consistent with the relevant Character Precinct;(cl 4C.1.2 General Objectives)

**O4** To maintain and encourage compatible architectural styles within residential areas ;(cl 4C.1.2 General Objectives)

**O1** To ensure that development recognises predominant streetscape qualities (i.e. setbacks & design features); (cl 4C.2.3 Streetscape Presentation)

**O2** To encourage innovative design that responds to the character of the area and the streetscape context; (cl 4C.2.3 Streetscape Presentation)

**O1** To provide detailed design objectives and controls that encourage innovative design that positively responds to the character and context of the locality; (cl 4C.3.1 Design Excellence)

**O3** To encourage well designed buildings that minimise the bulk and scale of the built form. (cl 4C.3.1 Design Excellence)

65 I also find that the proposal is consistent with the Botany Character Precinct at cl 8.4 of DCP 2013 and the relevant Desired Future Character for Form, Massing, Scale & Streetscape, including:

- Promote medium residential development in areas adjacent/adjoining existing medium density housing development with an FSR of 0.85:1 and 2 storeys with attic (a maximum height of 10 metres) unless the site area is over 2000m<sup>2</sup> which then permits a FSR of 1.5:1 and 2 to 6 storeys (a maximum height of 22 metres).
- Encourage new development or alterations and additions to existing development to complement the height and architectural style found in the immediate vicinity, particularly where there is an established character.

**Is sufficient on site car parking provided?**

*The evidence*

66 Evidence was provided by Ms Mikhiel, for the council, and Mr Graham Pindar, a traffic engineer, for the applicant. The difference in their evidence centred on the appropriate parking rate for the 2 bedroom units. Their evidence largely addressed cl 3.2.13 in DCP 35 although identical parking provisions for the different number of bedrooms of a residential flat building are contained in DCP 2013. While the parking rates for the units are the same for DCP 35 and DCP 2013, visitor rates increase from 1 space/ 10 units to 1 space/ 5 units in DCP 2013.

67 Table 1 in cl 3A.2. Parking Provisions of Specific Uses in DCP 2013 provides:

1 space/ studio or one (1) bedroom dwelling;  
2 spaces / two (2) or more bedrooms dwelling;  
and 1 designated visitor space / 5 dwellings

68 For 158 units (69 x 1 bedroom, 81 x 2 bedroom and 8 x 3 bedroom), 279 spaces are required under Table 1 in cl 3A.2 (or 263 spaces are required if assessed under DCP 35) whereas only 208 spaces are provided in the single level parking area.

69 Ms Mikhiel states that the parking rate for 2 bedroom units has been in place since March 2004. This rate was taken from the council *Off Street Parking Development Control Plan*, which was adopted by council in

September 1993. The parking rates were based on the lack of public transport throughout the area, to an on-street parking problem and to improve environmental amenity.

- 70 Ms Mikhiel states that the surrounding area has specific demands on street parking. The site is located near to Booralee Park, which is used for football and soccer matches on the weekend and training in the evenings during the winter months. In summer, Booralee Park is used for cricket, and occasionally soccer training. Also, the Botany Aquatic Centre, is located nearby which also generates on-street parking when the car park is full. These uses affect the for demand on-street car parking.
- 71 Further, Botany Bay local government area has major arterial road and major facilities through its area, which include the Sydney Airport and Port Botany, which attract associated industries and place further demand for on street car parking in the area. In addition, the State Government has announced the Westconnex Project, which will see major roads works occurring in the Botany local government area. The Westconnex Project provides no works that improve public transport, pedestrian or increase the provision of bicycle links in the area but reinforce vehicular car movements.
- 72 Ms Mikhiel also states that the site and surrounding area have poor public transport. The site is within 250m of a bus stop that runs on an hourly timetable, and 750m to Botany Road. There is no intention by the State Government to provide any additional buses, or improve or provide bicycle paths through this area. The shopping facilities on Botany Road are local shops, in that there are no major supermarket or retailers hence increasing car dependence. For these reasons there is no justification to depart from council parking requirements for 2 bedroom units.
- 73 Mr Pindar states that council has provided no research or information that underpins the need for 2 parking spaces for every 2 bedroom unit. This rate is a historical requirement that appears to have been carried forward

from 1993. Given that this rate has been applied over such a long period, it is reasonable to assume that the resident parking demand, based on census data, reflects this level of provision. Based on his research of the most recent census data, the number of cars for all 2 bedroom units within the locality is 1.28 spaces. The proposal exceeds this by providing 1.32 spaces per 2 bedroom unit. Mr Pindar notes that the census data relates to car ownership and the question of where residents park; the built environment or on-street conditions generally, are irrelevant. The fact remains that the resident demand will be 1.28 spaces per 2 bedroom unit wherever they park. This takes full account of all factors, including any increase in car ownership rates and any transport improvements that have occurred since 1993.

74 Mr Pindar also considers that the Roads and Maritime Services (RMS) Guideline rate for medium density developments is a more appropriate rate compared to DCP 2013. The RMS Guideline rate is 1.2 spaces per 2 bedroom unit, which is exceeded by the development. This rate applies to irrespective of proximity to public transport.

75 For these reasons, Mr Pindar maintains that the parking provided for the 2 bedroom units is adequate.

### *Findings*

76 On this matter, I agree with the conclusions of Ms Mikhie. I am not satisfied that the parking provisions in DCP 2013 should be so quickly disregarded in the way suggested by Mr Pindar. I accept that the RMS Guidelines can be helpful as a method of comparing car parking rates but I would not accept that they should be used to overturn a well established parking rate, as suggested in this case. Similarly, census data is helpful in determining an appropriate parking however it should not be the sole measure in determining whether a parking rate is appropriate in a certain area. In the absence of a more comprehensive parking survey, census data alone, in my view, is an insufficient reason to abandon the parking rate in DCP 2013 for the site.



77 As explained by Ms Mikhie, the same provisions have applied since 1993 and importantly have only been recently confirmed by DCP 2013 on 17 December 2013, presumably after public consultation. This alone must give the parking rate some force and when combined with the consistent application of this rate in the immediate locality and the unanimous concerns expressed by the residents about poor on street parking in their evidence supports the provision of parking rate in DCP 2013.

78 I am satisfied that the inadequate parking can be addressed through amended plans although the additional parking is likely to require an additional basement level.

#### **Solar access/natural ventilation/natural lighting**

79 Evidence was provided by Mr Alastair Colstock, for the council, and Mr Steve King, for the applicant. Like other experts, they address the requirements in DCP 35 although their evidence focuses on the RFDC.

#### *Solar access*

80 Clause 4C.5.8 Solar Access of DCP 2013 relevantly states:

##### **Objectives**

- O1 To provide all habitable rooms with access to daylight;
- O2 To provide all habitable rooms with access to sunlight where possible;
- O3 To minimize the need for artificial light sources;
- O4 To provide functional balconies;

##### **Controls**

C1 Residential flat buildings shall comply with the principles and provisions of State Environmental Planning Policy No 65 (SEPP 65) and the Residential Flat Design Code in relation to solar access.

C2 Development must demonstrate that living rooms and private open spaces for at least 70% of apartments in a development should receive a minimum of three hours direct sunlight between 9am and 3pm in mid winter.

81 The Rules of Thumb for Daylight Access in the RFDC (p 85) state:

- Living rooms and private open spaces for at least 70 percent of apartments in a development should receive a

minimum of three hours direct sunlight between 9 am and 3 pm in mid winter In dense urban areas a minimum of two hours may be acceptable

- Limit the number of single-aspect apartments with a southerly aspect (SW-SE) to a maximum of 10 percent of the total units proposed. Developments which seek to vary from the minimum standards must demonstrate how site constraints and orientation prohibit the achievement of these standards and how energy efficiency is addressed (see Orientation and Energy Efficiency).
- See Apartment Layout for additional rules of thumb

82 Mr King analysed each of the proposed units in terms of the Rules of Thumb and concluded that the development satisfies the 70% requirement based on:

Units achieve 3 hours or more sunlight 9-3	82	51.9%
Additional units which achieve 2 hours or more sunlight 9-3 June 21	19	12.0%
Additional units that achieve minimum 2 hours direct sun 8-4 June 21	10	6.3%
Total number of units	158	
<b>Units deemed to satisfy the RFDC control</b>	<b>111</b>	<b>70.3%</b>

83 Mr Colstock disagrees with Mr Kings assessment. He states that to achieve the 70% requirement, it has been necessary to extend the assessment hours to 8 am to 4 pm rather than the hours specified in the RFDC of 9 am to 3 pm. Mr Colstock maintains that the use of the extended hours is flawed as the low angle of the sun at these times will produce direct glare and consequently can be a problem rather than providing useful light. Also, Mr Colstock maintains that the use of the 2-hour standard is not appropriate in the circumstances. In his opinion, compliance should be measured against a 3-hour period, as the site is not within a "dense urban area(s)".

84 On the issue of solar access, I agree with the conclusions of Mr King. As a starting point, I accept that the site is located in a "dense urban area(s)". While the RFDC does not define this term, I am satisfied that an area that contemplates a maximum height of 22m and an FSR of 1.65:1 can be regarded as a "dense urban area(s)". On this basis, the appropriate requirement in the Rules of Thumb is at least 70% of apartments should

receive a minimum of 2 hours direct sunlight between 9 am and 3 pm in mid winter.

85 The proposal provides 64% and while this does not satisfy the 70% requirement, and while it is not optimal, it is acceptable in the circumstances. The site has a its long axis in an east–west direction and consequently a long south facing boundary to Bay Street. The site also has a 6 storey building near its northern boundary (9-19 Myrtle Street) that could compromise solar access to the northern aspect of any design however, In this case, I accept that the design is well considered through the location of the building away from the northern boundary so that solar access is maximised to its northern elevation.

86 I do not accept that the RFDC should be read as a development standard or a requirement that must be complied with. In the second dot point, the Rules of Thumb contemplate variations to the requirements. Also, the definition in the RFDC for of Thumb supports the application of a flexible approach where it states:

**rules of thumb** recommend minimum standards as a guide for local decision making. Minimum standards may vary depending on local context issues and/or if development applicants are able to demonstrate that they have addressed the better design practice guidelines and achieved the stated objectives.

87 In this case, I am satisfied that the minimum 70% standard can be varied given the relatively small variation (10 units out of 158 units excluding any benefit from the deletion of 4 units), the sunlight available between 8 am and 4 pm, the orientation of the site and the design that seeks to maximise solar access to the northern face of the building.

#### *Natural ventilation*

88 Clause 4C.5.6 Natural Ventilation of DCP 2013 states:

##### **Objectives**

- O1 To provide all habitable rooms with access to fresh air; and
- O2 To minimize the need for mechanical ventilation.

### **Control**

C1 Residential flat buildings shall comply with the principles and provisions of State Environmental Planning Policy No 65 (SEPP 65) and the Residential Flat Design Code in relation to natural ventilation as illustrated in Figure 17.

89 The Rules of Thumb for Natural Ventilation in the RFDC (p 87) state:

- Building depths, which support natural ventilation typically range from 10 to 18 metres
- Sixty percent (60%) of residential units should be naturally cross ventilated
- Twenty five percent (25%) of kitchens within a development should have access to natural ventilation
- Developments, which seek to vary from the minimum standards, must demonstrate how natural ventilation can be satisfactorily achieved, particularly in relation to habitable rooms

90 Mr King states that 101 of the 158 units are cross ventilated. This provides for 63.9% thereby satisfying the 60% requirement. The cross ventilation is achieved through different means and the details are set out in the table attached to Mr Kings report. The report relevantly states:

- Apartments are characterised as cross ventilated by virtue of having appropriate openings and air paths between the two principal facades and are included without further discussion.
- A number of top floor apartments that do not have conventional openings in two or more facades, are provided with appropriately positioned 'pop-up' monitors or skylights with controllable ventilation. These apartments are conventionally considered to have effective cross ventilation in conditions of any wind direction.
- Apartments with suitable high level ventilation openings to open gallery access.
- Apartments with ceiling ventilation plenums connected to the facade.

91 Mr Baker addressed the issue of cross ventilation for the council. He states that detail of the ventilation plenums were not provided and the skylights to the top floor units were shown as "light tubes", which would not facilitate cross ventilation. Also, any openings for cross ventilation in the common circulation spaces could result in unacceptable acoustic privacy issues. In his assessment, there are less than 50% of the units with cross ventilation.

92 On this matter, I accept that cross ventilation is acceptable. Based on Mr Bakers concerns over the design of the plenums, further details were provided during the hearing (Exhibit L). As I understand, It was also agreed that the change from light tubes to openings to allow for cross ventilation could be addressed by way of a condition and any concern over any openings for cross ventilation in the common circulation spaces could be addressed through a modified plenum design.

93 In this case, I am satisfied that the minimum 60% standard is achieved through the different methods of cross ventilation as described by Mr King.

*Natural lighting*

94 Clause 4C.5.3 Building Depth of DCP 2013 relevantly states:

**Objective**

O1 To provide adequate amenity for building occupants in terms of sun access and natural ventilation.

**Controls**

C1 Use building depth in combination with other controls in this Part to ensure adequate amenity for building occupants. For example a deeper floor plan may be acceptable where higher floor to ceiling heights allow solar access or where apartments have a wider frontage.

C2 For residential flat development the maximum building depth shall comply with Figure 15. The maximum depth of the building is 18 metres.

C3 The maximum depth of a habitable room from a window, providing light and air to that room, is 10 metres.

C4 Single aspect apartments are to have a maximum depth of 8 metres from a window

95 The Rules of Thumb for Apartment Layout in the RFDC (p 69) state:

- Single-aspect apartments should be limited in depth to 8 metres from a window
- The back of a kitchen should be no more than 8 metres from a window
- The width of cross-over or cross-through apartments over 15 metres deep should be 4 metres or greater to avoid deep narrow apartment layouts

- Buildings not meeting the minimum standards listed above, must demonstrate how satisfactory daylighting and natural ventilation can be achieved, particularly in relation to habitable rooms (see Daylight Access and Natural Ventilation)

96 Mr King accepts that there are a number of units that are deeper than 8m to the back of the kitchen however the maximum depth is 10m. In his opinion, the control is only meaningful in relation to daylight quality and natural ventilation and in this case, the units beyond 8m in depth still compare favourably for daylight quality and natural ventilation with units that satisfy the 8m depth. Mr Colstock disagrees and maintains that the 8m requirement is generous and that a more appropriate distance is around 6.75m.

97 The extent of the variation to the 8m requirement was not provided however I generally accept the conclusions of Mr King. I have previously found that the proposal is acceptable in regard to Daylight Access and Natural Ventilation based on the RFDC. An inspection of the application reveals that units that exceed 8m in depth have different orientations. The additional depth beyond 8m for north facing or generally north facing units is unlikely to be problematical given their desirable aspect. For other units, daylight quality is likely to be less desirable but not to the extent that this matter would warrant the refusal or redesign of the development.

#### *Unit size*

98 Clause 4C.5.1 Dwelling Mix, Room Size and Layout of DCP 2013 relevantly states:

#### **Controls**

#### **Apartment Size and Mix**

C1 Dwellings within residential flat buildings must be designed to provide the following minimum internal areas:

- Studio: 60m<sup>2</sup>
- 1 bedroom: 75m<sup>2</sup>
- 2 bedrooms: 100m<sup>2</sup>
- 3 bedrooms: 130m<sup>2</sup>
- 4 bedrooms: 160m<sup>2</sup>

Note: Dwelling size means the area inside the enclosing walls of a dwelling but excludes wall thickness, vents, ducts, staircases and lift wells.

99 The Rules of Thumb for Apartment Layout in the RFDC (p 69) state:

- 
- If council chooses to standardise apartment sizes, a range of sizes that do not exclude affordable housing should be used. As a guide, the Affordable Housing Service suggest the following minimum apartment sizes, which can contribute to housing affordability (apartment size is only one factor influencing affordability)

1 bedroom apartment	50m <sup>2</sup>
2 bedroom apartment	70m <sup>2</sup>
3 bedroom apartment	95m <sup>2</sup>

100 The Apartment Layout part of the RFDC also provides a range of unit sizes for different number of bedrooms and configurations which are generally equal to or greater than the minimum sizes set out in the Rules of Thumb.

101 Unit size was not raised as a significant matter until final submissions. The experts paid little attention to this matter in their oral and written evidence although it was identified in the contentions. Mr Chambers states that the proposed development fails to comply with DCP 2013 and provides for 1 bedroom units that are between 50.7sq m to 67.5 sq m, 2 bedroom units that area between 78.1 sq m to 93.8 sq m and 3 bedroom units that are 98.1 sq m to 98.9 sq m.

102 Mr Chambers states however that cl 6 of SEPP 65 means that the minimum size of units in SEPP 65 prevails over the size of units in DCP 2013 and as such the proposed unit sizes are not matters that can support the refusal of the application.

103 I concur with the comments of Mr Chambers on this matter.

#### **Other contentions**

104 The contentions also identified other matters, such as balcony size, deep soil planting, stormwater absorption and private open space however

these matters are not sufficient to warrant amendments or the refusal to the application.

### **Amended plans and conditions**

105 The judgment identifies a number of matters that require further consideration by the applicant by way of amended plans and conditions. These are:

4. the deletion of units B3.08 and B3.09 on Level 3 and B4.08 and B4.09 on Level 4,
5. the provision of parking in accordance with DCP 2013, and
6. the change from light tubes to openings to allow for cross ventilation.

106 On the filing of agreed amended plans and conditions that reflect the findings in the judgment, orders will be made in chambers that state:

1. The appeal is upheld.
2. Development Application No 2012/233/1 for the demolition of all improvements and the construction of a 3-6 storey residential development, containing 158 units, basement car parking, landscaping and ancillary works at 72-86 Bay Street, Botany is approved subject to the conditions in Annexure A.
3. The exhibits are returned with the exception of exhibit G.

### **Future directions**

107 Based on the interim findings, amended plans and amended conditions will need to be prepared. An appropriate timetable will be discussed with the parties when the interim findings are handed down.



**G T Brown**

**Commissioner of the Court**