



Land and Environment Court
New South Wales

Case Name:	Landmark Group Australia Pty Limited v Holroyd City Council
Medium Neutral Citation:	[2015] NSWLEC 1071
Hearing Date(s):	25-27 February 2015
Decision Date:	27 March 2015
Jurisdiction:	Class 1
Before:	Morris C
Decision:	Appeal dismissed
Catchwords:	Staged Development Application: height of buildings, building orientation and amenity, non-compliance with Masterplan, building separation, impact on adjoining properties.
Legislation Cited:	Environmental Planning and Assessment Act 1979; State Environmental Planning Policy No 55 – Remediation of Land; Holroyd Local Environmental Plan 2013; Water Management Act 2000; 32 State Environmental Planning Policy (Infrastructure) 2006; State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development
Cases Cited:	Wehbe v Pittwater Council [2007] NSWLEC 827; Zhang v Canterbury City Council [2001] NSWCA 167; Botany Bay City Council v Premier Customs Services Pty Ltd [2009] NSWCA 226
Texts Cited:	Holroyd Development Control Plan 2013; Residential Flat Design Code
Category:	Principal judgment
Parties:	Landmark Group Australia Pty Limited (Applicant)

Holroyd City Council (Respondent)

Representation:

Counsel:

Mr A Galasso SC (Applicant)

Solicitors:

Mr S Patterson, Wilshire Webb Staunton Beattie
Lawyers (Applicant)

Mr A Seton, Marsdens Law Group (Respondent)

File Number(s):

10728 of 2014

JUDGMENT

- 1 Landmark Group Australia Pty Ltd (Landmark) lodged Development Application No 2014/133/1 with Holroyd City Council on 11 April 2014 seeking consent to a Stage 1 Masterplan for building footprints and envelopes for 6 residential buildings, basement parking, road network and open spaces and allocation of gross floor area across the site at Nos 1-11 Neil Street, Merrylands.
- 2 The application was lodged as a staged development application pursuant to the provisions of s83B of the *Environmental Planning and Assessment Act 1979* (EP&AAct).
- 3 The application had not been determined within the prescribed period and Landmark is appealing its deemed refusal.

The site and locality

- 4 The site is an irregular shaped parcel on the northern side of Neil Street with a 110m frontage to that street, an eastern boundary of 131.52m with the adjoining railway line, western boundary of 101.66m and northern boundary of 180.49m, part of which adjoins Holroyd Gardens, a district parkland. Total area of the site is 15,762sqm.
- 5 A'Becketts Creek runs through the centre of the site and flows in a northerly direction towards the Parramatta River. It presents constraints to development of the site due to flooding.
- 6 Neil Street rises across the frontage of the site to a bridge that crosses the railway line adjacent to the site.

- 7 Formerly, the site was used as a flour mill. All structures associated with that use have been demolished and the site is being remediated in accordance with a remedial action plan in accordance with the requirements of *State Environmental Planning Policy No 55 – Remediation of Land*. The suitability of the site for residential use is not in contention.
- 8 Land to the west of the site (13-15 Neil Street) currently contains industrial buildings however those are to be demolished in accordance with a recent consent granted by the council that would permit the construction of an 8 storey mixed use building and a part 7 and part 8 storey residential flat building above basement carpark. The southern building was approved on a zero setback to the common boundary with the site. New roads would be constructed through that site, one in an east/west direction linking to the western boundary of the site and one in a north/south direction that would provide a new access point off Neil Street.
- 9 A recent residential estate, developed on a former brickworks, is located to the north of the site. It also adjoins the railway line to the east and Holroyd Gardens to the west. Development within that estate comprises a mix of housing types ranging from attached two storey dwelling houses to multi-storey residential flat buildings up to 7 storeys. Two of those unit blocks adjoin the site, both of which front Dressler Court, a four storey building (No 25) on the western side and a seven storey building on the eastern side that also fronts Brickworks Drive (No 42-50 Brickworks). Those buildings are constructed 3.1m and 3.0m from the common property boundary with the site.
- 10 The Merrylands Town Centre is located to the south of Neil Street with the Railway Station approximately 400m walking distance from the site.

Background and the proposal

- 11 The application seeks consent to a development application that sets out a concept proposal for the development of the site, specifically for:
 - Building footprints and envelopes for six residential flat buildings ranging in height from four to ten storeys;
 - New internal road layout;

- Temporary vehicular access and driveway cross-over from Neil Street to proposed building 2, consistent with the existing site access until such time as the new road access is available from the adjoining site No 13-15 Neil Street;
 - Basement car parking
 - Landscape concept design, including communal parks and pedestrian walkways.
- 12 In accordance with the provisions of s83B(1) of the EP&AA Act subsequent development applications would be required in this case for the construction of individual buildings on the site as the application does not seek consent for any physical works.
- 13 There are six buildings proposed around a central roadway that links the new roads to be constructed off Neil Street through No 13-15 to Dressler Court. A public park and drainage swale would be constructed to the south and east of the new road. Building 1 would be located in the north-western corner of the site and is an irregular shaped building of 8 and 9 storeys. It would be constructed to the boundary of the new road, 6m from the western boundary with No 11-13 and varying distances from the northern boundary being 4.6m where the boundary adjoins Holroyd Gardens and 6m where it adjoins No 25 Dressler Court. The building is an irregular U-shaped structure that wraps around a centrally located, north facing, landscaped podium.
- 14 Proposed building 2 (9 storey) would be sited in the south-western corner of the site fronting Neil Street, with a varying setback to that road of approximately 2.5m to 6m. The 6m wide temporary access point off Neil Street would separate the building from the southern building approved on the boundary of No 13-15 and is shown as providing access to the basement of that building. As discussed later, Roads and Maritime Services (RMS) has only approved temporary access off Neil Street at this point so alternate access to that basement would be required and would involve either use of part of the proposed public park or a connection through the basements of buildings 3 and 4 however the latter option is constrained by the location of the culverts that will enclose that part of A'Becketts Creek in this location. This constraint was not discussed during the hearing however the council proposes a condition of

consent (condition 22) to address the need for resolution of the issue of access to building 2.

- 15 Proposed buildings 3 and 5 are both four storeys and would be constructed to the south east of the drainage swale. That swale would contain an extension of the culverts that drain across Neil Street and has been designed to cater for the overland flow associated with the 1 in 100 year flood event. Each building would adjoin the swale across its north-west elevation. The main pedestrian access point to these buildings and also buildings 4 and 6 would be located between buildings 3 and 5 and comprises a 5.01m wide area with entry gate structure. That pathway connects to a proposed central landscaped podium that would separate buildings 3 and 5 from buildings 4 and 6. These buildings effectively run parallel to each other and the railway line with the exception of that portion of building 4 where it faces Neil Street. The central podium area varies in width from 12m to 17m and is proposed to provide the communal open space for the development.
- 16 Buildings 4 and 6 would comprise 10 storeys and be constructed 6m from the boundary with the railway line. Due to the angled frontage of the site to Neil Street, a minimum setback of 2.5m is provided which increases to approximately 4m at the eastern end of the site. A 9m separation is proposed between these two buildings with a 6m setback provided to the northern boundary with No 42-50 Brickworks Drive.
- 17 Vehicular access to buildings 3-6 would be from a common driveway adjacent to the pedestrian access point off the new internal roadway.
- 18 According to the Statement of Environmental Effect, the gross floor area (GFA) of the development would be 44,392sqm and the floor space ratio 2.8:1 and 3.0:1.
- 19 The plan of the concept proposal, amended to increase the setback of building 1 to the proposed road, is shown below. It is this plan that the applicant seeks consent.

building height. The proposed building envelopes are said to be compliant with the relevant FSR standards.

- 24 No 1-7 Neil Street is listed as an archaeological site and the provisions of clause 5.10(7) require the consent authority to notify the Heritage Council of its intention to grant a consent and take into consideration any response received from the Heritage Council within 28 days after the notice is sent. No action in relation to that provision has been taken to date however, it is noted that all buildings associated with the previous historical use have been demolished and the council has issued consent for remediation works so would have had to satisfy that requirement prior to that consent being issued.
- 25 Other relevant provisions of the LEP have been addressed by the applicant and the proposed consent conditions would ensure compliance.
- 26 *Holroyd Development Control Plan 2013* (DCP) applies to the site and includes General Controls in Part A, Residential Controls in Part B and Merrylands Centre Controls in Part M relevant to determination of the application. General controls relevant to the application include acoustic assessment where sites are adjacent to railways and near busy roads; landscaped area (30% required); sunlight access; site coverage (not to exceed 30% of the site); setbacks and separation; height (equates to storeys, in the case of 24m – 7 storeys); building depth (maximum 18m unless it can be demonstrated satisfactory solar access and ventilation is achieved); open space (ground floor dwellings to have a 10sqm courtyard with minimum dimension of 2.5m) and building entry.
- 27 In addition to the general controls, the Part M – Merrylands Centre provisions are to be read in conjunction with the relevant parts above. Part M applies to the Merrylands Centre and includes land in Neil Street and Pitt Street that do not currently form part of the centre, including the site. These provisions include, relevant to the application, Urban Design Strategies and site specific designs for roads and pedestrian links, open space, building location, indicative street sections; building and ceiling heights; storey controls; street setback controls; building depth and length; setbacks and separation; active street frontages, street address and building use and landscaping and open space.

- 28 There are block by block controls for the Neil Street Precinct (Part M Section 5). The site incorporates Blocks 5 and 6. The following are the descriptors of these blocks together with the building envelope plans:

Block 5 is currently bound by the old brickworks site on the north, Neil St on the south, and the railway on the east. No 1 Neil Street (Millmaster site) is listed as a site of potential archaeological significance. On this site are located mill buildings and silos which are the only remnants of the industrial past of Merrylands. The proximity of Block 5 to the town centre, transport and the park (Holroyd Gardens, provides it with a high level of amenity.

The proposed plan for the block shows the introduction of two new roads, New Road 1 (north), on the western boundary of the block, with a public park adjacent to the road, and New Road 2, on the northern boundary of the site.

These new roads and park area:

- Provide access to the block
- Provide an address to any future development on the block
- Help in increasing the developable area on the site
- Increases connectivity between the Merrylands transit interchange and the park (Holroyd Gardens)
- Provides a public park which improves the amenity of the area.

A building height of 6-8 storeys is allowed on the block. 8 storeys is allowed along the railway line due to the following factors:

- The precinct is a high hazard flood zone due to which a 40m floodway is required through the middle of the site, which in turn results in a large loss of developable land from the site which has to be compensated to some extent by a slightly higher built form
- The location of the site parallel/adjacent to the railway means that there is minimal overshadowing of other neighbouring developable sites.

A maximum building depth of 18m (15m glassline to glassline) is allowed for residential floors (See section drawings and written controls for details on allowable building depths).

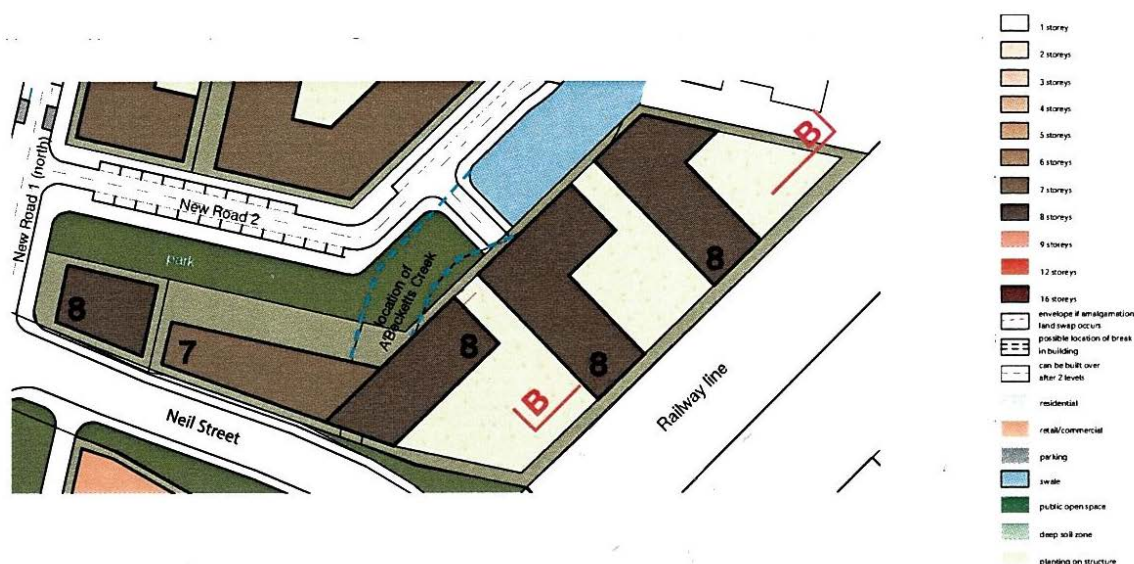
Development applications for buildings next to the railway line will be required to demonstrate how noise and vibration impacts will be managed. Buildings in this block adjacent to the railway line are required to be oriented perpendicular to, not parallel with, the railway line to minimise the area of building, and hence the number of apartments, impacted by railway noise and vibration.

On-street parking has been provided on New Road 2 and New Road 1 (north). On street parking may also be provided on internal/private streets. These have not been indicated on the building envelope plan. On-site parking for future development is envisaged to be provided in basement/sub-basement floors, and/or at ground level (screened from the street by a skin of residential uses on the street frontage). This is better explained in the cross sections provided.

Landscaping is to be provided on top of basement/sub-basement car parks. These will act as communal open space for the developments. Deep soil zones are to be provided, as indicated in the building envelope plan. Future

development on this block is to take maximum advantage of its view and close proximity to the park (Holroyd Gardens).

Building envelopes will be required to accommodate a 19m riparian corridor to ensure the retention of A'Becketts Creek. A portion of the creek is shown within the swale/park area and the location of the Creek is indicated on the plan diagram.



Block 6 is currently bound by the old brickworks site and Holroyd Gardens on the north, and Neil Street on the south. The proximity of block 6 to the town centre, transport, and the park (Holroyd Gardens), provides it with a high level of amenity.

The proposed plan for the block shows the introduction of two new roads. New Road 1 (north), on the eastern boundary of the block, and New Road 2, on the southern boundary of the site. These new roads:

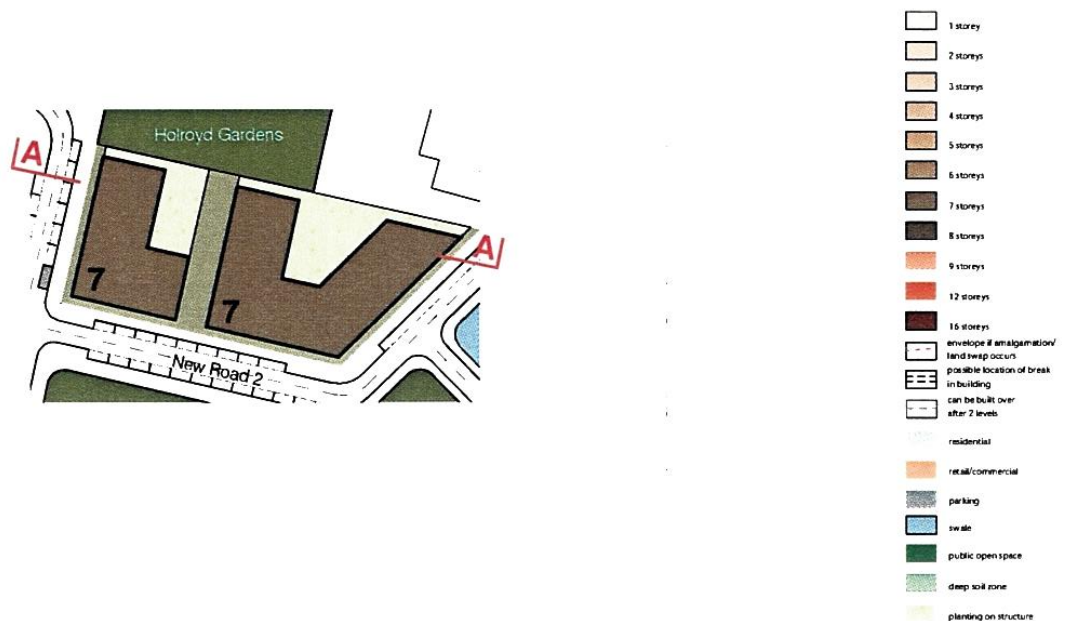
- Provide access to the block
- Provide an address to any future development on the block
- Help in increasing the developable area on the site
- Increases connectivity between the Merrylands transit interchange/Merrylands town centre and the park (Holroyd Gardens).

A maximum building height of 6 storeys is allowed on the block. A maximum building depth of 18m (15m glassline to glassline) is allowed for residential floors. (See section drawings and written controls for details on allowable building depths).

On-street parking has been envisaged to be provided in basement/sub-basement floors, and/or at ground level (screened from the street by a skin of residential uses on the street frontage).

Landscaping is to be provided on top of basement/sub-basement car parks. These will act as communal open space for the developments. Deep soil zones are to be provided, as indicated in the building envelope plan. Future development on this block is to take maximum advantage of its view and close proximity to the park (Holroyd Gardens).

A contamination pit may affect part of this block. Investigation is needed to determine the exact extent of building envelopes and car parks. On-grade car parking may be provided where contamination pit has been capped.



- 29 There is an inconsistency between the written description and the building envelope plan for Block 6 as the descriptor speaks of 6 storey development whereas the plan shows 7 storeys.
- 30 The DCP contemplates four buildings adjoining the central road/open space across the site whereas the application is for six buildings with centralised open space. The difference in layout can be seen when comparing the diagrams above.
- 31 The development is *integrated development* pursuant to s91 of the EP&AA Act. The Department of Primary Industries, Office of Water has issued General Terms of Approval (GTA) under the *Water Management Act 2000* and these requirements are reflected in the draft conditions of consent (condition 10). RMS has also agreed to the provision of temporary vehicular access to the site (Exhibit 4).
- 32 *State Environmental Planning Policy (Infrastructure) 2006* (SEPP Infrastructure) also applies to the application due to the site having frontage to Neil Street, a classified road and being adjacent to a rail corridor. The RMS authority in Exhibit 4 addresses the requirements of this policy and Sydney

Trains has granted its concurrence. The council's draft consent conditions reflect the agency responses.

- 33 *State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development* (SEPP65) applies to development being the erection of a new residential flat building as defined under that policy. Whilst the application does not involve the erection of any buildings, the concept proposal is one that contemplates such development and therefore, it is appropriate to have regard to the policy to ensure that future development of the site would be consistent with its provisions.
- 34 SEPP65 calls up the *Residential Flat Design Code* (RFDC) and this document is also a matter that is raised in the council's contentions.

The issues

- 35 Of the contentions in the case as outlined in the council's Statement of Facts and Contentions (Exhibit 1), contention 1 has been resolved through the RMS approval to temporary access of Neil Street, consistent with the advice contained in Exhibit 4 and draft conditions of consent have been prepared consistent with that approval. Contentions 3 and 4 which relate to road design, width, on-site parking, traffic and road safety can be resolved through conditions and these have also been incorporated into the draft consent conditions.
- 36 The remaining contentions are:
- Building height is excessive and inconsistent with the development standards contained in the LEP and the written request pursuant to clause 4.6(3) does not demonstrate that compliance with those standards is unreasonable or unnecessary or that there are sufficient planning grounds to justify contravening the standard.
 - Building orientation is unsatisfactory and inconsistent with the building envelope plans contained in the DCP.
 - Inadequate information provided to allow assessment of residential amenity and quality of development.
 - Non-compliance with Principles 1 Context, 3 Built Form, 6 Landscape, 7 Amenity and 10 Safety and Security of SEPP65.

- The development would compromise the amenity of adjoining residential development to the north of the site.
- The proposal would set an undesirable precedent for similar inappropriate development in terms of excessive height, scale and built form, inadequate orientation and design of future buildings, inconsistency with the principles for development in SEPP 65 and the RFDC and is therefore not in the public interest.

The evidence

37 The hearing commenced with a site view and the Court inspected the site, the creekline, observed the site and the Merrylands Town Centre from the railway overbridge and also inspected the residential development to the north of the site that has been constructed on the former brickworks site. Objectors to the development did not attend the site view or provide any submissions to the Court. The issues raised in submissions related to the breach of the height of buildings development standard.

38 Expert evidence was prepared by:

	Applicant	Respondent
Traffic	Andrew Johnson	Roy El Kazzi
Acoustics	Rodney Stevens	William Wang
Town Planning	David Hoy	Lydia Markham
Urban Design	Geoff Baker	Russell Olsson
Amenity	Steve King	
Landscape	Ross Shepherd	

Traffic

- 39 The traffic experts were not required for cross examination as the contentions that relate to these issues have been resolved through the approval of the RMS to provide temporary access off Neil Street and conditions of consent that apply to internal roadways and pedestrian access points.

Acoustics

- 40 The acoustic consultants assisted the Court during the site view and agreed that the change in the orientation of building footprints to Buildings 4 and 6 so that they are parallel rather than perpendicular to the railway line would have positive acoustic benefits as it is likely less apartments would have a direct line of sight to the line and the orientation of those buildings would act as a noise barrier for the buildings and the communal open space behind. They agreed that the L-shaped buildings shown in the DCP would be likely to cause reverberation affecting the buildings and common open space areas. They also agreed that the apartments in the vicinity of the rail corridor would require acoustic treatment however disagreed whether adequate information was available to determine the level of treatment required. Mr Stevens recommended criteria whereas Mr Wang says there is a need to carry out further acoustic assessment at the time development applications were lodged. These experts were not required for cross examination.
- 41 Concurrent evidence was heard from the remaining experts.
- 42 The planning and urban design experts agree that buildings 3 and 5 are substantially below the height limit and that the height of building 2 and 4 is acceptable, despite exceeding the building height development standard. They also agree that the proposal would comply with the appropriate FSR standards, there is a need to require articulation of the buildings and ensure amenity is achieved to individual apartments through the proscription of use of lightwells as the only source of light and ventilation for a habitable room and that this could be achieved through a consent condition. They agree that the concept proposal is significantly different to the building layout in the DCP. There was

no agreement on the other contentions in the case. These are discussed below.

Building Height

- 43 Two different building height standards apply to the site, buildings 1 and 2 are subject to 26m standard with buildings 3, 4, 5 and 6 subject to the 29m control. A 15m height standard applies to No 25 Dressler Court (No 25) with 24m applying to No 42-50 Brickworks Drive (No 42-50). Land on the southern side of Neil Street adjacent to the railway line has a 41m height standard with the land to the west of that strip subject to a 32m standard.
- 44 It is common ground that buildings 3 and 5 comply with the development standards (being less than the maximum permitted) and buildings 1, 2, 4 and 6 exceed the relevant standards. Building 1 exceeds the maximum height to the roof by 2.6m and the lift overrun by between 2.72m and 3.3m. Similarly building 2 exceeds the standard by 2.1m and 3.15m respectively, building 4 by 2.17m and 3.26m and building 6 by 2m and 3.05m. The applicant relies on a written objection to the building height development standard.
- 45 That objection forms Appendix B to the Statement of Environmental Effects lodged with the Development Application and included in Exhibit A. the objection concludes that compliance with the height standard is unnecessary because:
- The proposal complies with the FSR standard and ensures compatibility with the desired future character of the locality;
 - The context of amenity, privacy and solar access;
 - The variation addresses the practical difficulties in achieving a viable development as a result of the DCP's requirements for floodways, public roads and parks which provide a significant infrastructure benefit to the community;
 - The objectives of the height standard are achieved despite non-compliance with the numeric standard itself;
 - The development, despite the non-compliance, still achieves the Objects of the EP&AAAct;
 - Non-compliance will not undermine the public benefit and legitimacy of the standard;

- No matters of State or regional planning would be affected by varying the standard.
- 46 The applicant's experts agree that the variation sought is 11% above the standard and all experts agree the difference is reflection of an additional storey. Mr Olsson says the heights are acceptable as they only overshadow the railway line and Neil Street and the one additional storey above the LEP height limit has a minimal visual impact. He conceded in cross examination that the additional 2m to building 6 would have a perceptible impact on the occupants of No 42-50 however, because that impact is from bedrooms, the impact is not unreasonable with the building being marginally more imposing. He does not consider the additional 9th storey across the southern portion of building 1 would be perceptible from No 20 as that building is only 4 storeys and the top floor is setback 15m from the northern wall of the building. He agrees it would be seen from within the site and would be very similar to the height of the building approved on the site to the west which is 0.2m lower so marginally less than proposed and that this is a good principle as the heights work together and have the building aligning with the adjoining development.
- 47 Mr Olsson says that the proposed building height exceeds the LEP building height limit by less than one storey, and is acceptable, as 4 storey and 10 storey buildings are proposed, where the LEP would allow 9 storey buildings. There are distinct advantages in having 4 storey buildings, in terms of pedestrian scale near the New Street, and maximising solar access to buildings. These advantages outweigh the height of less than one additional storey, particularly because the additional storey has minimal effect on adjoining buildings, either on other sites or on the subject site.
- 48 Ms Markham agrees that it is appropriate for buildings 1 and 2 to be of similar height to that approved on the land to the west provided appropriate building separation was provided to accord to the RFDC. She accepts that the LEP contemplates a transition in height between No 42-50 and building 6 and that difference is 5m, the proposed difference being 6m would, apart from the building separation distances, not be a material matter.
- 49 Mr King says the additional height does result in overshadowing of the proposed public park and that difference is between parts of it getting sun at

all. Mr Olsson says as an alternate to reducing the height of building from 9 to 8 storeys, would be to setback the upper floor by 3-4m and that would solve the solar issue. Mr Baker agrees that this could be a solution.

- 50 Mr Galasso, for the applicant, asked the experts whether there was any opportunity to provide additional height on the site so that if the Court found it necessary to increase the building separation, the additional floor space could be relocated. Mr King says that it should be in the north eastern end of building 4 and could also be picked up in the southern end of building 6 if needed. Mr Baker was concerned about having more floor space in that location as it would increase the façade facing the railway but agreed there would be some scope to increase floor space in building 4.

Building Orientation

- 51 The experts agree that the orientation of buildings 2, 3, 4, 5 and 6 are not strictly in accordance with the envelope plan contained in the DCP. They also agree that the DCP relating to building 5 discusses orientation adjacent to the railway line in terms of noise and vibration and that building 4 demonstrates a longer building length and higher building allowing more apartments along the railway line.
- 52 The applicant's experts say that there is no other planning objective to warrant the envelope layout as expressed in the DCP apart from the noise and vibration issues and that this objective does not appear to have been consistently applied along the railway. Mr Hoy sites Block 4, immediately to the south of the site where a substantial building envelope extending parallel to the railway corridor that is both longer and higher than any of the elements within the site, thereby maximising the potential exposure of future built form to the rail corridor in that instance. He says provided that noise and vibration can be adequately addressed in future design of buildings 4 and 6, then the intent of the envelope control can be addressed.
- 53 Mr Baker says that orientation relates to acoustics and solar access and whilst he accepts the acoustic experts agree that the proposal is better than the DCP layout in terms of railway noise and impacts on communal open space, no other options have been tested. His solar access concerns are that the site is a

large site oriented to the cardinal compass points with the longest site dimension facing virtually due north. Whilst other building orientations (primarily north-west in the proposal) can be treated to control solar penetration, northerly aspect is best because it optimises sun shading in summer and sun penetration in winter without the need for additional control devices. Even with the railway noise constraint, it should be possible to orient more of the total building mass north on this large site.

- 54 Mr King says the DCP block controls do not lend themselves to achieve complying proportions of dwellings for either solar access or cross ventilation, estimating that the concept proposal provides for over 75% of apartments with prescribed minimum solar access between 9am and 3pm on 21 June whereas a maximum of 50% of apartments under the DCP would comply. The RFDC requires 70% compliance. He makes similar findings in relation to cross ventilation with his estimates of 64% compliance under the concept proposal, 55% under the DCP scheme and 60% required under the RFDC. He concludes that the applicant had no choice but to vary the DCP building envelopes because they do not lend themselves to, or actually preclude achieving compliance with SEPP65 amenity guidelines.
- 55 Mr Baker says Mr King's analysis relies on the apartments within the concept proposal incorporating unusual design devices to increase performance whereas the DCP layouts are conventional and demonstrate no particular effort to optimise internal amenity.

Amenity

- 56 The experts agree, in terms of building depth, the RFDC provisions should take precedence over the DCP and that the proposal is seeking approval for maximum envelope depth. They also agree that the proposal provides for buildings in excess of 18m depth.
- 57 The dimensions shown on the plan, Exhibit D, provide building depths as follows:
- Building 1 18.7m – 23.1m
 - Building 2 24.295m

- Building 3 13.695m
 - Building 4 21.35 – 26.15m
 - Building 5 13.695m
 - Building 6 21.35m
- 58 Mr Hoy says the envelope depth includes balconies on either side of the building and he and Mr Olssen agree that a condition of consent can be imposed that require future development applications to detail how the building envelope is filled out, including apartment layout, balcony projections and articulation zones, to be consistent with SEPP65.
- 59 Mr Baker says the DCP and RFDC set maximum building depths to ensure adequate internal amenity and the generally accepted standard is a maximum width from glass line to glass line of 18m. An additional “articulation zone” (balconies, bay windows, shading devices) is cited in the RFDC and included in the DCP “maximum permissible building envelope depth” of 22m. the DCP sets lesser dimensions for the site which he says are overly restrictive. He says the depths proposed above 22m could result in apartments with excessive depths and poor internal amenity or alternatively, the envelopes could be fully built out, with internal voids within the buildings. That would result in unnecessarily bulky buildings and reduced external open space. He says building envelopes should be restricted to a maximum of 22m and the maximum building width from glass line to glass line should be 18m.

Communal open space

- 60 The council’s contention is that the applicant has failed to demonstrate how the proposal can satisfy Principle 6: Landscape in clause 14 of SEPP65 nor indicate the extent of deep soil planting that can be achieved across the site. Mr Shepherd had included in the Joint Report, Exhibit 7, a series of plans entitled *Landscape Strategy*. Those plans detail proposed landscape treatment of the public park, swale and central communal open space area and include sections through those spaces to indicate the extent of deep soil planting. Indicative pathway locations are included with photographs of similar areas to indicate the treatment proposed. These plans were supplemented by a further

plan, Exhibit H, which indicated how private courtyards could be provided to ground floor units if required to meet DCP provisions.

- 61 It is common ground that neither the area for communal open space in the concept proposal or the DCP comply with the 25% of site area targeted by the RFDC.
- 62 Mr Baker says the area available on site for landscaping is woefully inadequate. He has regard to the U-shaped courtyard to building 1 and the long narrow space between buildings 3, 5 and 4, 6 and says that part of those spaces will have to be allocated as private courtyards for ground floor units. He prepared a diagram (Exhibit 9) that he says represents the area available and compares that to the area contemplated in the DCP and concludes that the proposal provides approximately 600sqm less than the DCP plan. He says the area between the buildings would be reduced to a width of approximately 3m when adequately sized courtyards were provided and the remaining area would have a number of serious or fatal shortcomings. Those include the circulation path along the length of the space that prevents the creation of usable space, its long, narrow proportions and the overshadowing of the space during mid-winter. He did not include the public park in his calculations.
- 63 Mr Shephard says the proposal is adequate having regard to its context and its proximity to a major public park, consistent with the Rules of Thumb in the RFDC and the provision of the smaller park within the site. He says the common open space proposed would vary in width from 12m – 17m and is a generous provision that has the benefit of outlook, the paths are the activation and positive influence in the area and make the space more interesting, provide surveillance, and security making it more inviting. His plan, exhibit H, provides a 4m x 2 m breakout space that complements the balcony area which he says adds amenity to the apartment and results in no practical spatial imposition to the common open space area.

Building Separation

- 64 The experts agree that the proposed building separations do not comply with the Primary Development Controls for Building Separation in the RFDC (unless all rooms are non-habitable) or those similar controls incorporated in the DCP

and that this includes the separation distances between building 1 and No 25 and buildings 5 and 6 and No 42-50. The objectives of the controls are:

- To ensure that new development is scaled to support the desired area character with appropriate massing and spaces between buildings.
- To provide visual and acoustic privacy for existing and new residents.
- To control overshadowing of adjacent properties and private or shared open space.
- To allow for the provision of open space with appropriate size and proportion for recreational activities for building occupants.
- To provide deep soil zones for stormwater management and tree planting, where contextual and site conditions allow.

65 In the case of a development of over three storeys, the Code recommends building separation increases in proportion to building height to ensure appropriate urban form, adequate amenity and privacy for building occupants for internal courtyards and between adjoining sites. The suggested separation distances are:

Up to four storeys/12 metres

- 12 metres between habitable rooms/balconies
- 9 metres between habitable/balconies and non-habitable rooms
- 6 metres between non-habitable rooms

Five to eight storeys/up to 25 metres

- 18 metres between habitable rooms/balconies
- 13 metres between habitable rooms/balconies and non-habitable rooms
- 9 metres between non-habitable rooms

Nine storeys and above/ over 25 metres

- 24 metres between habitable rooms/balconies
- 18 metres between habitable rooms/balconies and non-habitable rooms
- 12 metres between non-habitable rooms

Allow zero building separation in appropriate contexts, such as in urban areas between street wall building types (party walls).

66 It was agreed that the residential flat building at No 25 is 4 storeys and 14.6m in height and that the 3.1m setback of that building from the common boundary of the site does not provide for its “share” of the 9m or 12m separation distance that would be required between a building of similar height. The 8 storey element of Building 1 would adjoin No 25 with a setback of 6m to the northern

boundary which results in a total separation distance of 9.1m between the two buildings. Similarly, No 42-50, at 7 storeys and approximately 25m high, is setback 3m from the boundary in the vicinity of proposed buildings 5 and 6. The building separation distance between that building and buildings 5 and 6 would be 9m. Building 5 comprises 4 storeys and building 6 would be 10 storeys. The recommended separation distance would be either 13m or 18m.

- 67 The council experts say there should be a minimum 13m setback between building 6 and the building to the north. They anticipate that without setbacks that accord to those recommended in the RFDC there would be unacceptable amenity impacts. This setback assumes that there are no habitable rooms or balconies in building 6 along that boundary and they say this misses an important opportunity to provide north facing rooms/balconies. It is optimal to design buildings to provide habitable rooms/balconies facing north and this could be achieved and the RFDC standards met if building 6 were setback a further 6m above its fourth storey.
- 68 Ms Markham is not concerned with the separation to building 2 and the adjacent site to the west as that building does not have habitable rooms along the eastern elevation however Mr Baker says that because of the 24m length proposed in that location it is likely that bedrooms will occur along this elevation and these will look across a 6m wide and 9 storey high gap to the eastern wall of the neighbour to the west, resulting in unacceptable amenity impacts.
- 69 The council experts say the setback to building 1 from the western boundary and from No 25 should be increased from 6m to 9m to achieve the separation distance suggested in the RFDC for habitable rooms/balconies and to provide for north facing units in the building. The setbacks between buildings 2 and 4, 4 and 6 and 3 and 5 should be increased to at least 12m, to provide for satisfactory building separation and, if habitable rooms/balconies face these gaps, further increased separation would be required above 4 storeys in accordance with the RFDC. They also advocate a 2.5m setback of buildings 3 and 5 to the swale to allow for future useable ground floor terraces.
- 70 Mr Baker says that it would not be appropriate to restrict development options within the building and that any separation distance should have regard to the

habitable/habitable controls. This would allow north facing rooms and balconies and provide a transition to the north as looked for in the DCP. He also considers bedrooms to be an important space, particularly in apartments and says they are a place where you go to have peace and quiet or rest so it is important to provide an appropriate level of amenity to those spaces.

71 Mr Olsson says the proposed building envelope setbacks from side boundaries are greater than the setbacks of existing buildings to the north, west and south of the site and those buildings do not satisfy the requirements of SEPP65. No 42-50 contains bedroom windows and balconies off bedrooms oriented toward the site. He says the proposal resolves the side setbacks through the provision of the courtyard between buildings 5 and 6 that is adjacent to the balconies at No 42-50 and avoids potential privacy issues between the balconies and buildings 5 and 6. Windows to habitable rooms in those buildings are able to be oriented towards the courtyard, New Street and the railway corridor in the Stage 2 DA.

72 He says the 6m setback of building 2 to the western boundary is acceptable because there are no privacy issues because of the blank wall in the approved building. The approved building to the west of building 1 is approved on a minimum setback of 4.5m with a balcony at level 1 only. All of the windows in the eastern wall of that building are bedroom windows. The concept plan provides a 6m setback and windows to habitable rooms in building 1 are able to be oriented to the north and south, away from the western boundary. Where building 1 adjoins No 25, a setback of 6m is provided with No 25 adding a further 3.1m which would be compliant provided there were no habitable windows/balconies provided in the northern wall. All windows in the southern wall of No 25 are bedroom windows and windows to habitable rooms within the proposed envelope are able to be oriented to the east and west away from the side boundary. At levels above the fourth storey he says building 1 would provide views over No 25 and a different approach could be taken without incurring any amenity issues. He accepts that there may be a need for screening windows or using blade windows if north facing windows were required or other potential design issues that would address the inequitable setback caused by the reduced setback provided by No 25 and notes that the

significant trees along the boundary would be retained and provide some screening to the existing building however concedes they would not address acoustic issues.

- 73 He concludes that all building envelopes allow for future building room layouts so that habitable windows do not face directly across side boundaries generally, but are oriented to the front or rear of the building.
- 74 Mr King agrees and says the separation distances are acceptable with good design required to achieve appropriate amenity. In his opinion, the concept proposal provides for better solar access and has the potential for 75% of units to achieve the recommended sunlight whereas the DCP orientation would not. He agrees that by increasing the building separation by an additional 3m, more units would achieve solar access however, based on the DCP layout that would not be more than 2 units.

Conclusion and findings

- 75 For consent to be granted, the Court must be satisfied that the applicant's written request that seeks to vary the building height development standard meets the requirements of clause 4.6(3) of the LEP and the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. I must also have regard to those matters the Director General would consider in determining whether to grant concurrence to the exception.

The zone objectives

- 76 The objectives of the R4 zone are:
- To provide for the housing needs of the community within a high density residential environment.
 - To provide a variety of housing types within a high density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- 77 There is no contention that these objectives would not be met through the development of the site as proposed as it would provide a variety of housing types for the housing needs of the community in a high density residential

environment. Accordingly, I am satisfied that the development is consistent with those objectives.

The Building Height objectives

78 The objectives of the building height development standard are:

- (a) to minimise the visual impact of development and ensure sufficient solar access and privacy for neighbouring properties,
- (b) to ensure development is consistent with the landform,
- (c) to provide appropriate scales and intensities of development through height controls.

79 The differences between the experts is that the council says the height exceedances for buildings 1 and 6 are unacceptable due to the interface with the adjoining residential to the north and the approved development to the west and inadequate separation distances. The height of these building should be reduced to comply with the development standards. Whilst they consider the height of those two buildings should comply with the standards they do support the increased building height for buildings 2 and 4 to ensure the FSR for the site would be met. They acknowledged that to achieve the FSR there would be a need to increase the height of the buildings.

80 The applicant's experts say the height variation is appropriate and consistent with the approved development to the west, would only overshadow the railway line and Neil Street and the additional one storey above the LEP height limit, although agreed to be perceptible, would have a minimal visual impact.

81 The DCP contemplates a transition in building heights and that transition is consistent with the philosophy of those controls. I agree with Mr Olsson that the concept proposal and in particular, the reduced height of buildings 3 and 5 means the visual impact of the development is substantially less than the DCP envelopes however this factor alone is not reason to allow variation to the standard as I must have regard to the impact of those portions of the buildings that exceed the standard. That is buildings 1, 2, 4 and 6. The visual and privacy impact of the built form of buildings 1 and 6 is more a consequence of the building separation than the building height. The shadow diagrams prepared by Mr King do show increased shadowing to the development to the west and to the building envelopes that would be constructed on the site on the

southern side of Neil Street. That impact is from 9am until after 1pm however, the extent of impact after noon is minor and not to such an extent where I would consider the impact would result in insufficient solar access to any development of that site.

- 82 The site, being relatively flat provides for a variety of building heights and for this reason, I accept the concept proposal would be consistent with the landform.
- 83 For these reasons, I am satisfied that the concept proposal is consistent with the objectives of the development standard.
- 84 Preston CJ, in *Wehbe v Pittwater Council* [2007] NSWLEC 827, established a number of ways of determining whether compliance with a development standard is unreasonable or unnecessary in the circumstances of the case. The most common approach is to establish that compliance with the objectives of the control is achieved notwithstanding non-compliance with the particular standard.
- 85 Having regard to the evidence and assessment of the written objection, it is apparent that there are sufficient environmental planning grounds to justify contravention of the height standard. Of particular importance is the agreement of the council's experts that even greater height may be appropriate across part of the site subject to a proper assessment of impacts so as to ensure that the FSR limits are achieved in a location with good accessibility to rail and bus transport, shops and community facilities.
- 86 For the reasons outlined in [76-85] and having regard to the written objection, I am satisfied that the applicant has justified contravention of the building height development standard and to do so would be in the public interest and would be consistent with regional environmental planning initiatives. In this case, there would be no public benefit in maintaining the development standard.

Merit assessment

- 87 The application is lodged pursuant to the provisions of s83B of the EP&AA Act. In accordance with subsection (1), a staged development application is a development application that sets out concept proposals for the development

of a site, and for which detailed proposals for separate parts of the site are to be the subject of subsequent development applications.

88 Section 83D(2) is in the following terms:

While any consent granted on the determination of a staged development application for a site remains in force, the determination of any further development application in respect of that site cannot be inconsistent with that consent.

89 The concept proposal therefore sets the parameters against which any future development application is to be assessed, such application having to be consistent with the staged development consent.

90 This application is seeking consent to establish building footprints and envelopes (height and storeys), boundary setbacks and building separations and location of roadways, parks, accessways and drainage swales.

91 It also seeks to, according to the agreed evidence, depart significantly from the DCP layout for the site. The DCP must be the focal point of assessment of the application – *Zhang v Canterbury City Council* [2001] NSWCA 167. It is not determinative, and there may be circumstances relating to the particular site and development that make it appropriate to depart from numerical or other requirements of the DCP - *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA 226. In accordance with the provisions of s79C(3A) of the EP&AA Act where a development application does not comply with those provisions set in the DCP in respect to an aspect of the development, the consent authority is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development.

92 The major changes to the DCP, apart from building height, are the re-orientation of the building envelope plan and the failure to provide specified building separation. This has the consequential effect of altering the location of common open space. All roads, public parks and drainage swales are consistent with the DCP provisions.

93 The objective of the building envelopes in Block 5 adjacent to the railway line is to manage noise and vibration and minimise the number of apartments impacted by these effects. The evidence from the acoustic consultants is that

the DCP layout would not achieve this objective and that the concept proposal is a better solution to address these issues. Accordingly, I am satisfied that it would be appropriate to apply a flexible approach to the building envelope controls provided other relevant aspects of the DCP are met.

- 94 However, I am not satisfied that the proposed building separations adequately achieve the amenity sought by the DCP or the RFDC. I agree with Mr Baker's comments "it is critical that if a new Masterplan is to replace the plan in the DCP, it is workable and will give rise to good apartment buildings with, at minimum, satisfactory levels of internal amenity. I also agree that the width of buildings is excessive and that a maximum building depth 22m and glass line to glass line 18m should apply. The orientation of buildings 3 – 6 does not optimise the northern aspect of the site and whilst there are positive benefits in the reduced heights of buildings 3 and 5, there is a consequential reduction in the area available for common open space. Other unsatisfactory impacts arise from the additional height in building 1 that overshadows the public park.
- 95 For these reasons, I am not satisfied that the concept proposal achieves the objects of the DCP. The proposal unnecessarily constrains the ability to provide good amenity to the apartments without the need to rely on amelioration measures to address impacts. This is not an appropriate resolution for a concept proposal.
- 96 Mr Galasso urged the Court to consider the "amber light" approach if the development was considered appropriate other than the issue of building separation. I do not find this is the case and therefore, it is not appropriate that consent should be granted. Such an approach would prevent the realisation of the FSR appropriate to the site and the assessment of any impacts of how that floor space was reallocated. It also would not address the shortfall in common open space.
- 97 For these reasons, consent should be refused.
- 98 The Orders of the Court are:
- (1) The appeal is dismissed.
 - (2) Development Application No 2014/133/1 for a Stage 1 Masterplan for building footprints and envelopes for 6 residential buildings, basement

parking, road network and open spaces and allocation of gross floor area across the site at Nos 1-11 Neil Street, Merrylands is refused consent.

- (3) The exhibits, other than exhibits A, C, D and 1, are returned

Sue Morris

Commissioner of the Court

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