



Land and Environment Court  
New South Wales

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Case Name: Prolet Constructions Pty Limited v Canterbury City Council

Medium Neutral Citation: [2015] NSWLEC 1021

Hearing Date(s): 1, 2, 8 December 2014

Date of Orders: 12 February 2015

Decision Date: 12 February 2015

Jurisdiction: Class 1

Before: Pearson C

Decision: Appeal dismissed.

Catchwords: DEVELOPMENT APPLICATION – Mixed use development – B2 Local Centre zone adjoining R3 Medium Density Residential zone – Whether side or rear setback control applies – Whether setbacks adequate – Visual bulk, privacy and overshadowing impacts

Legislation Cited: Environmental Planning and Assessment Act 1979  
Land and Environment Court Act 1979  
State Environmental Planning Policy No 65 - Design Quality of Residential Flat Development  
Canterbury Local Environmental Plan 2012

Cases Cited: Architects Becerra v Council of the City of Sydney [2014] NSWLEC 1250  
Seaside Property Developments Pty Ltd v Wyong Shire Council [2004] NSWLEC 117  
Veloshin v Randwick Council [2007] NSWLEC 428  
Zhang v Canterbury Council (2000) 115 LGERA 373

Category: Principal judgment

Parties: Prolet Constructions Pty Limited (Applicant)  
Canterbury City Council (Respondent)

Representation: Counsel:  
Mr P Tomasetti SC (Applicant)

Solicitors:  
Mr C Gough, Storey & Gough (Applicant)  
Mr A Seton, Marsdens Law Group (Respondent)

File Number(s): 10641 of 2014

## JUDGMENT

- 1 This is an appeal under s 97 of the *Environmental Planning and Assessment Act* 1979 (the Act) against the deemed, and subsequent actual, refusal by the respondent Council of consent to development application DA-94/2014 for the demolition of existing structures and the construction of a mixed use development comprising 71 residential apartments, 8 ground level commercial tenancies, and basement car parking, at 570-574 New Canterbury Road Hurlstone Park (the site).
- 2 The site is located on the southern side of New Canterbury Road on the corner of Garnet Street, to the east of the intersection of New Canterbury Road with Canterbury Road. The land on the opposite side of Garnet Street, on the northern side of New Canterbury Road, and on the western side of Canterbury Road at the intersection with New Canterbury Road, is in Marrickville local government area.
- 3 The site is irregular in shape and comprises 6 allotments with a combined site area of approximately 2600 sqm. The corner section of the site on New Canterbury Road and Garnet Street was previously used as a service station, which has been demolished and remediation works undertaken. The western section of the site currently accommodates three single storey brick dwellings and ancillary structures. Vehicle access to the site is provided from New Canterbury Road and Duntroon Lane, which runs off Duntroon Street.
- 4 Adjoining the site to the west is 578-580 New Canterbury Road. The Council is currently assessing a development application lodged for a mixed use development with 23 residential apartments and 2 commercial tenancies. To

the south of the site along Garnet Street and Duntroon Street are low density one and two storey dwellings and older style residential flat buildings. Adjoining the site to the south is No 8 Garnet Street; the dwellings further south at Nos 12-20, 24 and 30 Garnet Street are heritage items. To the north on the opposite side of New Canterbury Road is St Pauls Primary School, and low rise commercial and shoptop housing.

## **Issues**

- 5 In its Statement of Facts and Contentions (exhibit 1) the Council contended that the application should be refused because the setbacks of the proposed development are inadequate and inconsistent with the provisions of the Canterbury Development Control Plan 2012 (the DCP); the proposed development does not comply with the requirements for visual privacy in the DCP; consideration had not been given to the impact on the heritage listed properties in Garnet Street; and the proposed development would set an undesirable precedent and is not in the public interest. The Council identified three matters on which there was insufficient information to enable a proper assessment of the application, being inconsistencies in the plans, compliance with the waste management provisions of the DCP, and compliance with the landscaping provisions of the DCP.
- 6 During the course of discussions between the parties in a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (the Court Act) the contentions relating to insufficient information were resolved. As a consequence of amendments to the plans the Council's contention relating to heritage was resolved. After the termination of the s34 conciliation conference, the parties consented to my determining the appeal. Leave was granted on 29 November 2014 for Prolet to amend the application to rely on the amended plans.
- 7 At the hearing the Council identified the issues in dispute as being inadequate setbacks and impacts on the properties to the rear of the development, visual privacy, and precedent.

## Evidence

- 8 The hearing commenced on site with a view. Four objectors made submissions on site: Mr Brett McEwee on behalf of the Hurlstone Park Association, and Mr Markus Lambert, Ms Margaret Fasan, and Mr Malcolm Campbell, residents in Duntroon Street and Garnet Street. A written submission was provided on behalf of the owner of 10 Garnet Street. Notes of the objectors' submissions are exhibit 10. The objectors' concerns related to the height of the proposed development; solar access for 8 and 10 Garnet Street; bulk and scale; impact on the heritage listed houses in Garnet Street; impact on traffic flow with vehicle egress on to Garnet Street; overdevelopment of the site having regard to height and setbacks; and amenity of future residents in terms of light and solar access. Ms Fasan, Mr Campbell, Mr Lambert, Ms Kirsten Ockenden, and Ms Jane Fitzgerald made submissions at the s 34 conciliation conference on 30 September 2014, and notes of those submissions are exhibit 9. The Council's bundle of documents (exhibit 3) includes copies of written submissions made to the Council during its assessment of the development application, including a submission from the owners and occupiers of 8 Garnet Street, and a petition signed by residents of Duntroon Street and Garnet Street. The written submissions raise concerns similar to those expressed on site, and concerns relating to overlooking of the school playground, traffic generation, waste management, and acoustic privacy.
- 9 Expert evidence on heritage issues was provided on behalf of Prolet by Mr David Logan and on behalf of the Council by Ms Sally Charalambides. Mr Logan and Ms Charalambides prepared a joint report (exhibit 7), and attended the site view. In their joint report the experts agreed that the amended plans appropriately address the sweeping corner of New Canterbury Road and Garnet Street, with views along Garnet Street to the heritage properties from New Canterbury Road, and the revised eastern elevation is satisfactory in the streetscape and in relation to the neighbouring single dwellings; the design changes address the concerns relating to articulation and materiality and streetscape; and the design changes reduce the bulk and visual prominence of the balconies on the eastern end of the proposed development. The heritage

experts considered the amended proposal acceptable from a heritage viewpoint.

- 10 Expert planning evidence was provided on behalf of Prolet by Mr Michael Harrison and on behalf of the Council by Mr Hassan Morad. Mr Harrison and Mr Morad prepared a joint report (exhibit 6) and gave oral evidence.
- 11 Mr Steve King, an architect with expertise in solar access, provided expert evidence on behalf of Prolet. Mr King prepared an expert report on solar access (exhibit A, p 55) comparing the overshadowing impacts on specific neighbouring properties by the proposed design with the potential overshadowing impact of building envelopes complying with alternative setbacks, and a Supplementary Report (exhibit D). During the course of oral evidence Mr King annotated a version of exhibit D (exhibit F), and demonstrated his modelling on his computer. Mr King subsequently provided printouts of some of those images (exhibit H).

### **Planning controls**

- 12 *State Environmental Planning Policy No 65 - Design Quality of Residential Flat Development* (SEPP 65) applies, and cl 30 requires consideration of design quality when evaluated in accordance with the design quality principles in cl 7-18, and the Residential Flat Design Code (RFDC). The draft *State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development (Amendment No 3)*, and its associated draft Apartment Design Guide (exhibit 4) were publicly exhibited until 31 October 2014.
- 13 The site is in the B2 Local Centre zone under *Canterbury Local Environmental Plan 2012* (the LEP), and the proposed development is permissible with consent as “shop top housing”, defined to mean “one or more dwellings located above ground floor retail premises or business premises”. The objectives of the B2 zone, to which regard must be had under cl 2.3(2) of the LEP, are:
  - To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
  - To encourage employment opportunities in accessible locations.
  - To maximise public transport patronage and encourage walking and cycling.
  - To facilitate and support investment, economic growth and development for active, diverse and well-designed centres.

- 14 Clause 4.3(2) of the LEP provides for a maximum height limit of 18m. The proposed development is 21.6m, and Prolet has provided a written request to vary the height development standard under cl 4.6 of the LEP (revised during the course of the hearing, exhibit G). The report by the Director City Planning to the Council's Independent Hearing and Assessment Panel meeting on 29 September 2014 (exhibit 3, tab 19) noted (p 149) that the variation to the height control relies on the major development sites provisions under section 3.1.3 of the DCP (extracted below); and that the proposed development meets the requirements of those provisions as the land area is greater than 2000sqm, the additional height does not exceed one storey and does not exceed a maximum of 15% of the overall site area. The report noted that the length and depth of the site allows for an appropriate transition in height along the site from the north and south; that the additional seventh storey had a 5m setback from New Canterbury Road, 11m from Garnet Street and 12m from the rear boundary; and concluded that the variation to the height standard would not create unreasonable overshadowing, privacy or amenity impacts for occupants of the surrounding locality, and the cl 4.6 variation could be supported. That position was maintained in reports to the Council's City Development Committee meetings of 9 October 2014 and 13 November 2014 (exhibit 3, tab 20, 21). The Council does not raise an issue as to height in this appeal.
- 15 Clause 4.4(2) of the LEP provides that the maximum floor space ratio (FSR) for any site is as identified in the Floor Space Ratio Map. The area of land in the B2 zone on the southern side of New Canterbury Road, including the subject site, is not subject to a maximum FSR on the Floor Space Ratio Map.
- 16 The land to the south of the site on Garnet Street and Duntroon Street is in the R3 Medium Density Residential zone under the LEP. The maximum height is 8.5m, and maximum FSR is 0.5:1.
- 17 Clause 5.10(5)(c) of the LEP provides that a consent authority may require a heritage management document to be prepared when considering an application for development on land in the vicinity of land on which a heritage item is located. The Council did not require such a document for this development application, however the impact of the proposed development on

the heritage items in Garnet Street was the subject of expert heritage evidence in this appeal, as noted above.

- 18 The Canterbury Development Control Plan 2012 (the DCP) applies. Part 3 Business Zones applies to land in the B2 Local Centre zone. Part 3 identifies four business zone characters: Neighbourhood Centres, Local Centres, Canterbury Road, and Roselands. The Objectives for Business Centres are:

- O1. Lively business centres accommodating a mix of retail, commercial and community activities, and catering to locals and the wider community, relative to their size and intended function.
- O2. Long-term social and economic viability of business centres is maintained and they remain significant to the community for their individual character, ease of access, and urbane appeal.
- O3. Retail and business activity is maintained at ground level to promote pedestrian activity and contribute to lively streets in centres
- O4. Facades are maintained in the business centres where they contribute to the character of the traditional main streets.
- O5. Frontage type is appropriate for the location and will maximise activity at the public/private interface, and provides weather protection for pedestrians.
- O6. Impacts of commercial development on adjacent residential properties are minimised.

- 19 The building envelope controls are provided in section 3.1:

### **3.1 ENVELOPE CONTROLS**

#### **3.1.1 Building envelope components**

Note: Building envelopes define a three-dimensional form that limits the extent of a building. The height, length and depth of building envelopes are defined in metres. Building envelopes are at least 20-25 percent greater than the achievable floor area of a building.

#### **Objectives**

- O1. The form and shape of new buildings is defined by building envelope controls.
- O2. The appearance and performance of development is an important consideration in designing, rather than building to the maximum building envelope.

#### **Controls**

- i. Building envelopes are defined by a combination of controls that include:
  - building height,
  - building depth,
  - building separation,

- building setbacks,
- side and rear setbacks to residential zones.

ii. More complex building envelope diagrams are provided for the following master plan sites:

- Canterbury Town Centre – mainly for the Riverside Precinct,
- Campsie Civic Centre Precinct,
- Undercliffe Bridge,
- Roselands.

iii. The maximum building envelope is not always achievable due to the need to comply with other requirements of the CDCP; as a general guide 75 -80% of the specified building envelope will be achieved to allow for building articulation and the particular circumstances of a site or proposal.

20 Section 3.1.3 deals with major development sites:

### **3.1.3 Major development sites**

#### **Objective**

O1. Facilitate development to the full potential of land, and accommodate higher densities on sites where it is appropriate.

#### **Controls**

- Major development sites are sites within neighbourhood and town centres that, because of their size and location, may be able to accommodate increased heights over that specified in the CLEP and the CDCP.
- To qualify as a major development site the land area must be greater than 2000m<sup>2</sup>.
- The density bonuses do not apply to the master planned sites and areas such as Campsie Civic Centre Precinct, Canterbury Road Corridor, and Undercliffe Bridge Precinct, which have had potential density bonuses factored into the master plans and controls.
- Any increase in height beyond that specified in Part 3.1.6 must not exceed one storey, and must not exceed a maximum of 15% of the overall site area.
- To avoid creating the appearance of an additional storey do not locate the additional floor space at the front of the site. Locating the additional floor space to accentuate a corner may be acceptable.
- Incorporate design measures (including setbacks and stepping down levels) to minimise the impacts of height and bulk).

21 Section 3.1.6 deals with height:

### **3.1.6 Height**

Note: Maximum height of buildings, in metres, is provided in the CLEP (for all land in the business zones except for Roselands and the Campsie Civic Centre Precinct).

#### **Objectives**



- O1. New buildings have a scale that is visually compatible with adjacent buildings and heritage buildings, where this may require height of new development to lower than the permitted height.
- O2. Transition in scale and bulk from highest in the middle of centres to lower at the interface with residential zones and residential buildings.
- O3. Greater guidance as to the required built form through the provision of maximum storeys controls.
- O4. Floor to ceiling height is adequate for the operation of the intended and potential use.
- O5. Good residential amenity within buildings and externally, including natural light access for dwellings.

## **Controls**

### **Building height**

- i. Refer to the CLEP for maximum height of buildings in metres.
- ii. For proposed new buildings in a traditional streetscape, the building height at the street wall is to be compatible with the height of adjoining and nearby two storey buildings.

### **Floor to ceiling heights**

- iii. Provide a minimum 3.3m floor to ceiling height for the ground floor.
- iv. Provide a minimum 2.7m floor to ceiling height for residential floors.
- v. Minimum car parking floor to ceiling height 2.8 m:
- vi. The floor to ceiling height may need to be increased to meet the requirements of the intended use, however, the maximum building height will still need to be complied with.

### **Floor to ceiling height – B6 Zone Enterprise Corridor**

- vii. A floor to ceiling height 3 m per storey is required.

22 Section 3.1.8 deals with setbacks. The Objectives and Controls are:

## **Objectives**

- O1. Establish the desired spatial proportions of the street and define the street edge.
- O2. The traditional street building wall is maintained where this is the existing or desired future character.
- O3. Minimise building size and bulk by setting back upper storeys.
- O4. Minimise amenity impacts on adjoining properties.
- O5. Increased setbacks along Canterbury Road provide for possible future implementation of street parking and assist in reducing traffic noise impacts.

## **Controls**

- i. Comply with the street level setback, number of storeys at the street level, and upper level setback in the following table.

ii. A rear setback is not required if the land adjoins a lane.

...

- 23 The applicable provision for the subject site in the accompanying table is 1-3 storeys at the street level and build to front boundary, and for upper level setbacks, 3m for a fourth storey, and 5m for greater than 4 storeys (all storeys to be set back this distance including the fourth storey).
- 24 There are specific provisions for side setback, side setback on a boundary with a residential zone, and rear setback on a boundary with a residential zone:

**Side setback**

vi. Do not provide a side setback in the B1 or B2 zones when the desired character is for a continuous street frontage, unless (vii) – (xii) below apply.

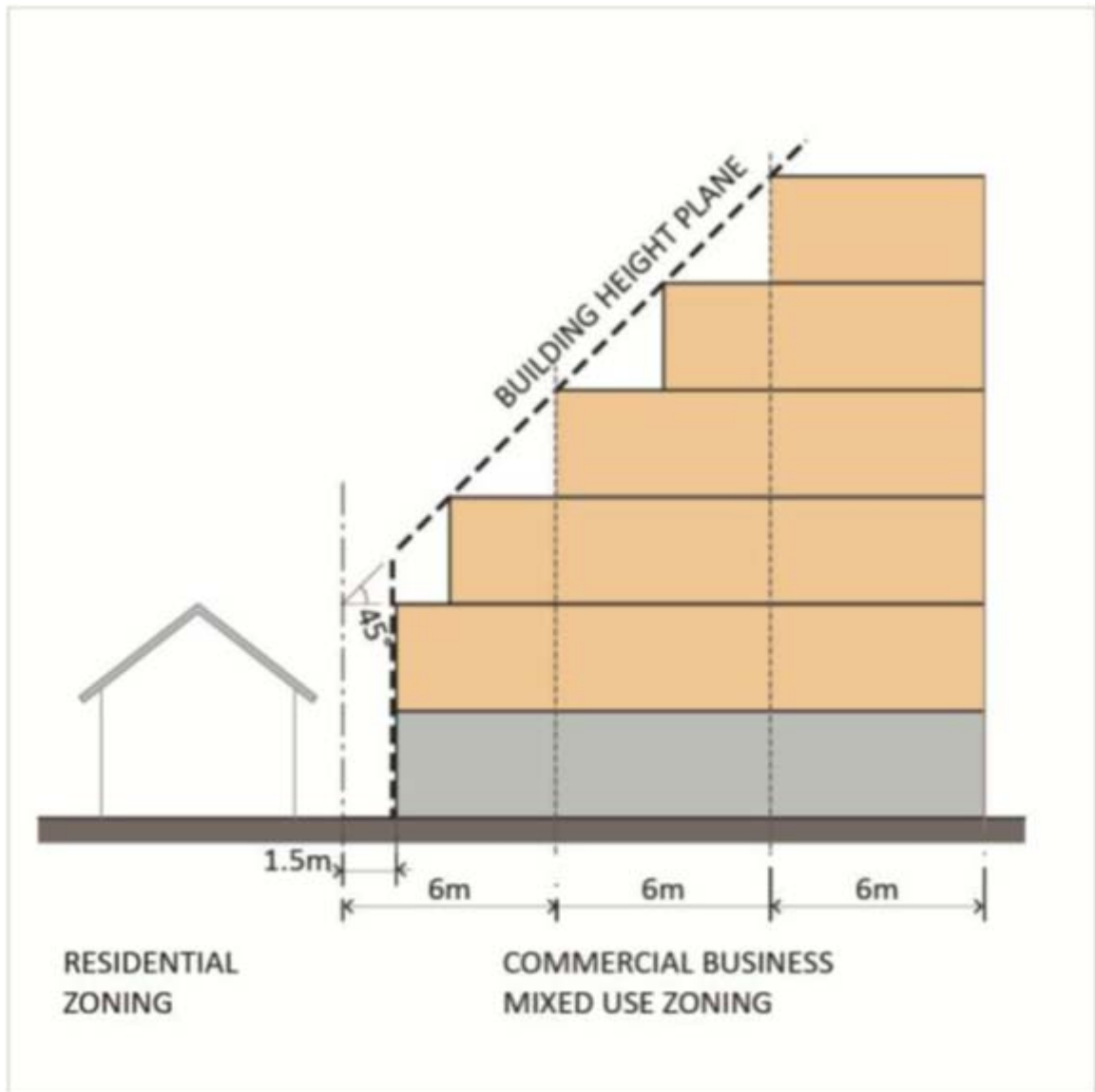
vii. A minimum side boundary setback of 4.5m in the B5 zone with SEPP 65 separation requirements for height of 4 storeys and above (see section 3.1.9 (i)).

**On boundary with residential zone – side setback**

viii. Establish a 45o height plane projected at 1.5m from the residential boundary.

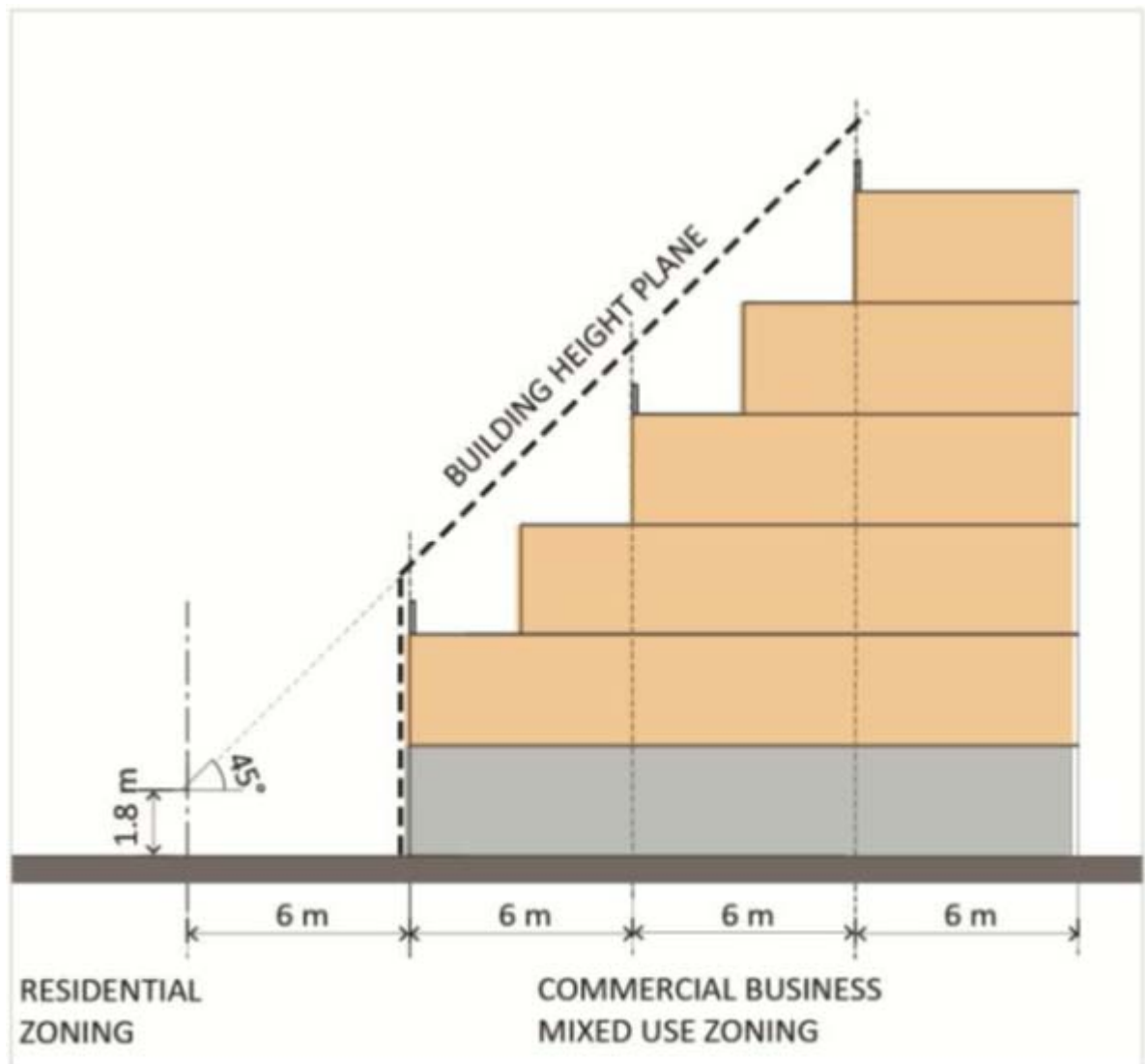
ix. Provide minimum 1.5m setback to the residential zone boundary.

x. A two-storey limit on the boundary with residential zone applies. (Refer to Figure 3.4)



**On boundary with residential zone – rear setback**

- xi. Establish a 45o height plane projected at 6 m from the residential boundary.
- xii. Provide minimum 6m setback to the residential zone boundary.
- xiii. A two-storey limit on the boundary with residential zone applies. (Refer to Figure 3.5)



25 Section 3.1.9 deals with building separation, and has the following objective:

O1. Separation between buildings promotes improved levels of residential amenity in new development, and preserves reasonable sunlight, privacy and general amenity for residents of existing dwellings.

26 The minimum separation specified between buildings on adjoining sites is provided in table form:

Storey	Habitable room/balcony to habitable room/balcony	Habitable room/balcony to non-habitable room	Between non-habitable rooms
Up to 3	6	4	3

Fourth	12	9	6
Fifth to Eighth	18	13	9
Ninth +	24	18	12

27 Section 3.1.10 provides exceptions to setbacks:

**Objective**

O1. To allow for flexible design and building articulation by permitting minor encroachments.

**Controls**

i. The following minor building elements may project into the minimum setback area:

- Underground parking,
- Awnings,
- Balconies and bay windows.

**Consideration**

28 The Council contends that the setbacks of the proposed development are inadequate and do not comply with the requirements in section 3.1.8 of the DCP, and that failure to provide adequate setbacks has impacts on visual bulk, privacy, and overshadowing of adjoining properties.

29 The parties differ as to whether the boundary of the subject site with 8 Garnet Street, which is in the R3 Residential zone, is a side or rear boundary for the purposes of the application of the setback controls specified in Figure 3.4 or Figure 3.5 of the DCP. The Council contends that the boundary of the site at 8 Garnet Street is a rear boundary, and Prolet contends that it is a side boundary.

30 Prolet submits that Figure 3.4 shows the intent of the DCP where a proposed development abuts a side boundary of a neighbouring property, and that the building in the figure in the residential zoning can be equated with 8 Garnet Street. As a consequence, where a building is proposed to be constructed on the side boundary of its neighbour, that is the outcome required by the Council: in 1.5m from the boundary up 2 storeys, and a building height plane at 45

degrees to the boundary above 2 storeys. Figure 3.5 does not have a diagrammatic representation of a dwelling in the residential zoning, and shows a rear yard of the property in the residential zoning, so that when building onto the back yard of the property in the residential zoning a larger setback has to be applied for a better relationship between the development in the two zones. Prolet submits that a commercial mixed use does not need to have a rear yard, and the focus is on the lower density and scaled building in the residential zone. Prolet submits that howsoever the boundary is characterised as a question of fact, a reasonable relationship must exist between the proposed development and the neighbouring development having regard to the existing and/or desired future character of the locality, an assessment under s 79C of the Act, and a reasonable outcome having regard to the application planning controls.

- 31 The Council submits that the boundary with 8 Garnet Street is a rear boundary, on the basis that the development is oriented to new Canterbury Road which is the front of the site, and that consolidation of the lots will change what was otherwise a side boundary with 8 Garnet Street to a rear boundary. The Council submits that whether it is a side or rear boundary, the proposed development does not comply with either setback control. The Council submits that the non-compliances are not insignificant or inconsequential when considered against the objectives of the controls.
- 32 The planners addressed this issue in their joint report (exhibit 6). Mr Morad was of the opinion that the shared boundary is a rear boundary because it is part of the rear of the site as the boundary extends from Duntroon Lane, and the rear of the site is defined with respect to the primary street frontage which is New Canterbury Road. Mr Harrison was of the opinion that the shared boundary is a side boundary, including because it is a side boundary to 8 Garnet Street, regardless of the subject site, and is perpendicular to Garnet Street; it is not an extension of Duntroon Lane; an observer walking along Garnet Street would see a side fence between a single storey cottage and the proposal; and the building fronts both New Canterbury Road and Garnet Street by its elevation designs that are specific for each street.



the boundary with 8 Garnet Street is a side boundary. However, other lots, namely the three lots on the western part of the site fronting New Canterbury Road, are clearly oriented with their primary frontage to New Canterbury Road and with rear access for two of them to Duntroon Lane. Given that the proposed development occupies the entirety of the site, and the existing six lots are to be consolidated, the existing subdivision pattern is, in my view, of limited relevance.

- 36 The starting point for application of the general setback provisions for Business zones as stated in 3.1.8 of the DCP is the development the subject of assessment, as reflected in objective O4 which identifies consideration of the amenity impacts of that development on adjoining properties. In that context, the Controls in (viii)-(xiii) for land with a boundary with a residential zone reflect additional requirements to respond to the sensitivity of that relationship, by reference to how the proposed development is configured on its site. The diagrammatic representation of a dwelling, and its orientation, in Figure 3.4, and the absence of one in Figure 3.5, do not detract from the focus in both figures on the text, and on the representation of the required building height plane on the site the subject of the proposed development.
- 37 Considering the proposed development, the vehicle entry to the development is from Duntroon Lane at its eastern end, at the boundary of the rear of 8 Garnet Street. The vehicle exit is on to Garnet Street on the boundary with No 8, with approximately 1.5m of landscaping to the boundary for approximately half its length. There is additional landscaping and communal open space at the side of the development closest to 8 Garnet Street. The pedestrian residential entry is on New Canterbury Road. The eastern most retail/commercial unit on the ground level has its entries on New Canterbury Road and onto the walkway leading to the vehicle exit, and the residential units above are generally in a north/south orientation accessed off a central walkway running west to east across the site. The units on levels 1, 2 and 3 have their balconies on the northern side (on New Canterbury Road), with bedroom windows facing east on levels 1 and 2, while level 3 has no window facing east. It is not until levels 4, 5 and 6 that there are balconies on the eastern elevation. Having regard to the development as proposed on the site as a whole, I would regard the



location of the vehicle exit and the ground level communal open space, and the general orientation of the retail and residential units, as supporting a conclusion that while the relevant boundary is clearly a side boundary for 8 Garnet Street, it is nonetheless a rear boundary for the proposed development. That relationship of the rear boundary of a property adjoining the side boundary of its neighbour can be observed on the opposite corner of Garnet Street where Lots 1 and 2 of DP314209 (and other adjoining development to the east) have their primary frontage on New Canterbury Road, with their rear boundary adjoining the side boundary of lot A DP418948.

38 However, if I am wrong in that conclusion, and the appropriate setback control to apply is that for a side setback in 3.1.8 (viii)-(x) and Figure 3.4, then on the evidence before the Court whichever setback control is applied, the proposed development does not comply.

39 That is demonstrated by sections through the proposal from the shared boundary with 8 Garnet Street providing side and rear setback height planes (Annexure 1 to the planners' joint report, exhibit 6), and confirmed by Mr Harrison's notations to the plans in exhibit A, agreed by Mr Morad. Mr Harrison was asked in oral evidence to indicate on the plans where the setback line would fall, based on Figures 3.4 and 3.5. For ground level and level 1, the proposed development would comply with both controls. For level 2, it would comply with the side setback control, but not the rear control. For levels 3, 4, 5 and 6, elements of the building would encroach within either setback: on level 3, balconies and planting (side setback), or parts of units 3.07 and 3.08; for levels 4, 5 and 6, parts of units 4.07, 4.08, 5.06, 6.06, and balconies and the central walkway; and at the roof level. Mr Harrison returned to the witness box on the third day of the hearing to clarify some aspects of his markings, stating that for level 6 the side setback line he had drawn on the previous day was approximately 1m further from the boundary than it should have been, based on interpretation of the 45 degree building height plane as stated in the text of the DCP, and he provided a diagram illustrating that interpretation (exhibit K). However, even on the basis of this revised evidence, the amended notation on drawing 209 shows that with a side setback line drawn closer to the boundary there would still be part of unit 6.06 and part of the central walkway within the

side setback. Based on the plans, those encroachments within the setbacks, whether side or rear, are not limited to balconies or awnings or other minor encroachments that might be permitted as exceptions to the minimum setback area under section 3.1.10 of the DCP.

- 40 The issue then is to consider the impacts of these non-compliances. The Council submits that the failure to provide adequate setbacks gives rise to additional visual bulk, privacy impacts, and overshadowing. Prolet concedes that there are minor breaches of the side setback control, however submits that there is substantial compliance, and to the extent that there are breaches, there are no consequential impacts. Prolet submits that applying a rear setback control would reduce the building footprint but not the scale of the building, and reducing the bulk of the building is inconsistent with the urban design outcome for a major development site, and that the breaches to the side setback control are minor and de minimis.
- 41 Mr Harrison was of the opinion that the non-compliances are marginal and acceptable, and that with the stepping nature of the southern façade there is much more unused space within the permissible envelope of the side setback control than protrudes: in his opinion the design is a skilful response to the complex configuration of the site, the street corner and the neighbouring buildings. The objectives of section 3.1.8 include “minimise building size and bulk by setting back upper storeys”, and “minimise amenity impacts on adjoining properties”. In Mr Harrison’s opinion the proposal does set back the upper storeys and does address amenity impacts by orientation of apartments away from the southern boundary and employing a range of privacy measures such as screens, planters, and window size and orientation.
- 42 The Council does not raise privacy as an issue. Mr Morad agreed in the joint report, and confirmed in his oral evidence, that the design changes provide sufficient additional privacy protection in terms of apartment orientation, screens, solid balustrades and planters. The planners agreed that visual privacy is also a function of building separation.
- 43 Prolet submits, based on the evidence of Mr Harrison, that the proposed development complies with the requirements of SEPP 65 in terms of building

separation, which requires separation of 12m at ground level between buildings, and that the proposed development meets the minimum requirements of 6m building separation from the boundary. Mr Harrison also relied on the draft Apartment Design Code, which in his opinion represents best practice. In his opinion the relevant separation distance, given that 8 Garnet Street is less than 4 storeys, is 12m building to building, with half the minimum separation measured from the boundary. In his opinion the separation distances specified in the RFDC and the draft ADC are about the relationship between balconies which face each other, and in this instance the primary aspect of the units on that southern side of the development is towards Garnet Street. Accordingly, this is not a situation with windows and primary balconies looking straight into each other.

- 44 It is not necessary to determine whether or not that is an appropriate approach to adopt to the RFDC or the draft ADC. If Mr Harrison's approach to the RFDC is applied, the proposed development does not in any event meet a 6m separation on the south eastern corner of level 5; and the objectives of the RFDC Building Separation provisions, which include appropriate massing and spaces between buildings, and controlling overshadowing of adjacent properties, would be relevant in considering the appropriateness of the building separation distances that are achieved. The draft ADC goes further, and provides additional considerations in setting building separation, including (at p 39) that separation may need to be increased to achieve adequate solar access, may need to increase at boundaries between lower and high density residential areas, and that the building setback should be increased by 3m at the boundary between a change in zone from apartment buildings to a lower density zone.
- 45 The overshadowing impacts of the setback non-compliances was the subject of detailed expert evidence by Mr King. In his expert report dated 7 October 2014 (exhibit A, p 55) Mr King explained his modelling, noting that his preferred analysis technique is to prepare "views from the sun" at appropriate intervals (hourly or half hourly), prepared from a 3D digital model of the development. Mr King was of the opinion that it makes little difference whether the common boundary with 8 Garnet Street is a side or rear boundary as it makes little

difference to the question of merit related to the overshadowing by a new development giving effect to the expected height and density of the designated zoning of the subject site. Mr King considered overshadowing of 8 and 10 Garnet Street, and he noted a slightly greater overshadowing by a building envelope for a side boundary when compared to a rear boundary, which he considered very small and arguably negligible. Mr King concluded that the design of the proposed building foregoes building bulk which would otherwise appear to be allowable under the DCP control, and preserves morning sun for the properties neighbouring the south east corner of the subject site.

- 46 As noted above, during the course of the hearing Mr King undertook additional modelling, which added a representation of 12 Garnet Street, and included deletion of the top floor, to produce a hypothetical version of the scheme which complies with the height without the extra floor bonus; and which took a single viewpoint from the south (exhibit D). In that additional analysis, Mr King addressed the comparison of overshadowing of the private open space of properties at 8, 10 and 12 Garnet Street between the proposed building and alternative building envelopes generated from the rear setback and side setback height controls; the comparison of overshadowing of those private open spaces by the proposed building and the same building with the top floor deleted; and clarification of the relationship between the south façade of the proposed building and the building envelopes resulting from the alternative setback controls. The latter was carried out by superimposing those hypothetical envelopes on the 3D model of the proposed building so that exceedances of the envelopes are shown protruding through their surfaces, and with hourly views showing when any such exceedance contributes to overshadowing.
- 47 Mr King's conclusions from this additional analysis, as recorded in exhibit D, and which he confirmed at the end of his oral evidence, were:
- the comparison of the proposed building as amended with the envelopes generated from alternative setback controls showed that the proposal creates less overshadowing of 8, 10 and 12 Garnet Street than does the side setback envelope, and retains comparable areas of sun from just before 12 noon to shortly after 1pm on June 21 for the rear private open space of 10 Garnet Street;

- the private open space of 12 Garnet Street retains over three hours of sun to a proportion of its area which may be considered to fully comply with the relevant DCP control, and the ground level private open space is unaffected by overshadowing from the proposed development for the duration, with shadows being from the dividing fences;
- the top floor of the amended proposal does not appear to generate any additional overshadowing of the relevant ground floor private open space of 8, 10 and 12 Garnet Street;
- the comparison of the proposed extents of the building on its south elevation show a number of small horizontal protrusions in comparison to the envelope generated from the side boundary setback control; while some of those protrusions do add marginally to the extent of the shadows of the proposed building envelope, in no instance did they appear to add to the overshadowing of relevant portions of the affected properties. In the comparison to the rear setback control envelope those horizontal exceedances were much greater; in Mr King's view the identifiable difference between the shadows of the proposed building and those of the complying rear setback envelope was marginal and negligible.

48 In oral evidence Mr King explained his additional analysis. He noted that for the addition of 12 Garnet Street to the model in the absence of survey data he had had to rely on limited cadastral information as to boundaries and had assumed levels to be similar to No 10, however he did not consider that any inaccuracy that might result would materially affect the analysis. Exhibit D has two Tables, both three dimensional aerial views. Table 1 compares the currently proposed height of the building with its top floor; then the same building with the top floor deleted, then the envelope generated from the side setback control (full height), and finally the envelope generated from the rear setback control. Table 2 starts with the proposed building, and the two images below are the horizontal protrusions beyond the side and rear setback controls. In the course of his oral evidence Mr King marked exhibit D to show the protrusions, and the areas where the protrusions cause shadows. Mr King further elaborated on his analysis by reference to particular views of the digital model on his computer, as observed by the Court and the parties' representatives; some of those images relating to 9.00am, 10.00am and 11.00am were subsequently printed (exhibit H). Mr King also addressed in his oral evidence additional shadow impacts to the rear yard of properties with frontage to Duntroon Street.

- 49 Mr King frankly acknowledged some limitations in this additional analysis, given the time he had to undertake the additional modelling and the information he had available as to surrounding properties, including properties with frontage to Duntroon Street. However, I am satisfied that the central aspects of his evidence were supported, and enable conclusions to be drawn. In considering that evidence, the significant factors are that while the modelling demonstrated the protrusions into the setback controls, what matters is the extent to which those protrusions are sunlit and so contributing to additional shadow; whether any additional shadow falls on private open space or onto a roof or other structures, and if onto private open space, whether that is a front or rear yard; and the self-shading of side walls and private open space of 8, 10 and 12 Garnet Street need to be taken into account in understanding the shadow consequences of any of the protrusions.
- 50 Based on that evidence, I accept that when compared with a compliant side or rear setback control envelope, the proposed development gives rise additional overshadowing to the private open space of the adjoining properties in Garnet Street in the morning. In particular, at 9.00am and 10.00am the proposed development shadows the rear yard of 12 Garnet Street where compliance with the rear setback control would provide some solar access (limited at 9.00am and more substantial at 10.00am); and at 11.00am, compliance with the rear setback control would significantly increase solar access to the rear yard of No 12 when compared with the proposed development and the side setback envelope. For 10 Garnet Street, compliance with the rear setback would provide a small triangle of sun at the rear yard at 12 noon, and for approximately half that yard at 1.00pm, when compared with the proposed development or the side setback envelope. As noted by Mr King, the introduction of a glazed roof to the walkway on the top level provides for some additional sun to the private open space of No 10 at 1.00pm. No 8 and 10 retain some solar access to the front yard at 12 noon, when compared with the rear and side setback envelope, while that is retained for No 12 at 12 noon with a rear setback.
- 51 In their joint report, prepared before the hearing, Mr Harrison and Mr Morad agreed to rely on Mr King's analysis of overshadowing (referring to Mr King's

report of 7 October 2014), and assumed it to be correct in regard to compliant setbacks for both side and rear setback controls, noting the design change to reduce the width of the eastern part of the level 6 walkway by 50% and for the roof at that part to be clear frameless glazing. Mr Harrison and Mr Morad recorded their agreement that there was no further issue with overshadowing (exhibit 6, p 3). Mr Harrison and Mr Morad were in court during Mr King's oral evidence, and were asked whether anything in Mr King's additional modelling and clarification about the impact on solar access to properties to the south at 9.00, 10.00 or 11.00am changed the opinions they had expressed in the joint report. Mr Harrison stated that overshadowing has to be looked at for three hours between 9.00am to 3.00pm; all three properties receive three hours of sunlight to their street frontage, and while there is overshadowing of the rear yards the control is about solar access to the properties, not the whole of the properties. Mr Harrison accepted that there is an amenity impact to 12 and 14, which he described as minor. In Mr Morad's opinion there is an increase in the shadows as opposed to the drawings he originally had, showing an increase in No 12 in particular.

- 52 I accept, as noted above, that the three adjoining dwellings retain some sun to their street frontage in the morning. I accept, as confirmed in exhibit D, that those properties are in shadow in the afternoon with a compliant development. While Mr Harrison described the additional overshadowing of the rear yards as minor, in my view the impacts on solar access to the rear yards in the morning are significant in a context where solar access is already constrained by the existing development pattern and the orientation of lots, and in particular where those impacts are generated by non-compliance with the relevant controls.
- 53 The Council submits that the failure to provide adequate setbacks contributes to visual bulk, demonstrated on the plans that for levels 3 and above the proposed building is significantly closer to the Garnet Street properties than would be achieved applying either the side or rear setback controls, and that while the privacy screens proposed address the privacy concerns, they add to the visual bulk. The Council relies on *Veloshin v Randwick Council* [2007] NSWLEC 428, where Roseth SC noted:

30 The debate about height and bulk can be meaningful only against the background of local planning controls, such as maximum height, floor space ratio, site coverage and setbacks. While these controls are usually also based on subjective judgment, they have been through a statutory process involving exhibition and the consideration of public comment. They therefore express the subjective preferences of a local community and should be given greater weight than the subjective preferences of individuals.

- 54 Roseth SC went on, in paragraph [32], to formulate a planning principle for assessment of height and bulk, the first element of which is whether the impacts of the proposed development are consistent with impacts that might reasonably be expected under the controls; a further element of that planning principle is, where the planning controls are aimed at creating a new character in an area, whether the proposal is consistent with the bulk and character intended by the planning controls.
- 55 Prolet submits that everything possible has been done to minimise privacy loss to adjoining residential development, and the amenity impacts in terms of visual impact created by an entirely different future character in the B2 Local Centre zone are impossible to eliminate: one cannot hide from view a 7 storey building from a neighbouring single storey detached dwelling.
- 56 In the circumstances of this proposed development, the critical issue in considering bulk, in the sense of the mass of the proposed building (*Veloshin*), is the non-compliance with the setbacks. In his contribution to the joint report (exhibit 6, p 8) Mr Morad was of the opinion the bulk could be reduced at the eastern end by complying with the rear setback control to reduce building bulk as seen from the rear yards of 8 and 10 Garnet Street and reduce overlooking impacts onto those rear yards. In oral evidence Mr Morad accepted that visual privacy had been addressed, however he maintained that building bulk and scale were still an issue. Mr Morad accepted that the proposed landscaping would assist in ameliorating the impacts of building a 7 storey development in a different zone immediately adjoining a single storey cottage, for the first, second and third floors of that development.
- 57 Prolet accepts that the immediately adjoining sites at 8, 10 and 12 Garnet Street will experience some adverse “but frankly unavoidable” amenity impacts. Prolet relies on the planning principle in *Seaside Property Developments Pty Ltd v Wyong Shire Council* [2004] NSWLEC 117:



25. As a matter of principle, at a zone interface as exists here, any development proposal in one zone needs to recognise and take into account the form of existing development and/or development likely to occur in an adjoining different zone. In this case residents living in the 2(b) zone must accept that a higher density and larger scale residential development can happen in the adjoining 2(c) or 2(d) zones and whilst impacts must be within reason they can nevertheless occur. Such impacts may well be greater than might be the case if adjacent development were in and complied with the requirements of the same zone. Conversely any development of this site must take into account its relationship to the 2(b) zoned lands to the east, south-east, south and south-west and the likely future character of those lands must be taken into account. Also in considering the likely future character of development on the other side of the interface it may be that the development of sites such as this may not be able to achieve the full potential otherwise indicated by applicable development standards and the like.

- 58 Prolet submits that the development of the subject site, which is a narrow strip of land, must have been contemplated to be development that would be able to achieve the full potential for development in the zone. The LEP is a new environmental planning instrument and if development as permitted was not contemplated then the draftsman would have prescribed different development standards and lowered height and including a development standard fixing FSR and excluded the possibility of a major development allowing an additional storey.
- 59 I accept, as Prolet submits, that it is not possible to have a development to a height of 18m with no FSR limitation without making some physical change to the environment. The plans confirm that the proposed development is stepped back at the upper levels, and is not designed to the furthest extent of the envisaged building envelope at its eastern part, and is set back from the corner with Garnet Street. The latter is at least in part a consequence of the need to address the sweeping corner of New Canterbury Road and Garnet Street and to allow the heritage listed properties in Garnet Street to be viewed from New Canterbury Road, as agreed between the heritage experts (exhibit 7, heritage contention particular (a)).
- 60 Applying the reasoning in *Seaside Properties*, while the residents of Garnet Street, in the R3 zone, must accept that development on the subject site in the adjoining B2 zone will be at a higher density and scale than the previous or existing development, and that there may be impacts, the development of the subject site must also take into account the likely future character of

development on the other side of the interface, which may limit the full development potential of the site. For the R3 zone, while that is development of a greater height and density than the present development, it is still to provide a medium density residential environment. Prolet is not being required to limit the full development potential of the site that would otherwise be indicated by the applicable development standards and provisions of the DCP, but is seeking consent for a development that exceeds the standards provided in the DCP. To that extent the circumstances are distinguishable from those in *Architects Becerra v Council of City of Sydney* [2014] NSWLEC 1250.

- 61 The central issue in this appeal relates to the application of the building envelope controls in section 3.1 of the DCP, in particular the building separation and setback provisions. The provisions of the DCP must be taken into consideration as a fundamental element in, or a focal point of, the decision making process, without being determinative: *Zhang v Canterbury Council* (2000) 115 LGERA 373 at [75]). The objectives which the relevant provisions are intended to serve are relevant in undertaking the consideration required by s 79C(1)(a)(iii) of the Act: *Zhang* at [70]. Section 79C(3A) of the Act requires that if a proposed development complies with standards specified in a DCP the consent authority is not to require more onerous standards, and, if the development does not comply, is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards.
- 62 The exceedances of the setback controls result in a reduction in solar access to the adjoining properties in circumstances where solar access is already constrained and from that which could reasonably be expected under the controls. While the additional privacy measures have addressed overlooking and visual privacy, the additional screening has added to the bulk of the building on its southern side, as apparent from drawing 303 (exhibit A). The proposed development does not achieve the objectives of the DCP provisions, being to minimise impacts on the adjacent residential properties (objective O6 for Business Centres), to minimise amenity impacts on adjoining properties (objective O4 section 3.1.8 setbacks), and to preserve reasonable sunlight and general amenity for the residents of the existing dwellings (objective O1 section

3.1.9 building separation). The objective of section 3.1.3 Major development sites, under which increased heights may be able to be accommodated, is not, as Prolet submits, to maximise development, but is to facilitate development to the full potential of the land and accommodate higher densities on sites “where it is appropriate”. As noted in section 3.1.1 of the DCP at (iii), the maximum building envelope is not always achievable due to the need to comply with other requirements of the DCP, relevantly in this instance the setback provisions at section 3.1.8. In circumstances where those requirements are not complied with, the non-compliances impact on the adjacent residential properties, and the objectives of the controls are not met, consent should not be granted.

- 63 This conclusion makes it unnecessary to address the Council’s contention relating to precedent. In considering the other matters raised by the objectors, I note that some of those issues, including waste management and vehicle movements, were considered by the Council and in the case of traffic, by Roads and Maritime Services, and others, including potential physical impacts of construction, have been addressed in the draft conditions of consent. The objectors raised concerns as to height. The Council in its assessment of the development application regarded the site as a major development site under section 3.1.3 of the DCP, and supported the cl 4.6 variation to increase the height of the proposed development above the 18m height limit. Mr King’s evidence that the additional storey above the 18m height limit does not appear to create additional overshadowing of the ground floor private open space of 8, 10 or 12 Garnet Street (exhibit D, p16), was essentially supported by his modelling, with some qualification: at 10.00am solar access to the rear yard of 12 Garnet Street opens up earlier if the top floor is removed, and at 11.00am it is slightly increased, while for 8 and 10 Garnet Street removal of the top storey made no difference. Had I reached a different conclusion as to the impacts of the non-compliances with the setback controls, in order for there to have been power to grant development consent it would have been necessary to determine whether the cl 4.6 variation for the height development standard (exhibit G) should be upheld. It is unnecessary to consider that issue further.

## **Orders**

64 The orders of the Court are:

- (1) The appeal is dismissed.
- (2) Development application DA-94/2014 for the demolition of existing structures and the construction of a mixed use development comprising 71 residential apartments, 8 ground level commercial tenancies, and basement car parking, at 570-574 New Canterbury Road Hurlstone Park, is refused.
- (3) The exhibits are returned except for exhibits 1 and A.

**Linda Pearson**

**Commissioner of the Court**

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