



## New South Wales

<b>Medium Neutral Citation:</b>	<b>Urbis Pty Ltd v Inner West Council and Transport for NSW [2016] NSWLEC 1444</b>
<b>Hearing dates:</b>	30 & 31 March, 1 & 8 April 2016
<b>Date of orders:</b>	28 September 2016
<b>Decision date:</b>	28 September 2016
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Tuor C
<b>Decision:</b>	(1) The appeal is dismissed; (2) The development application (D/2015/438) for the demolition of existing buildings, remediation of the site and construction of a mixed use development including retail, commercial, club and residential uses at 138-152 and 154-156 Victoria Road, 697 and 699 Darling Street, and 1, 3, 5 and 7 Waterloo Street, Rozelle, is refused; (3) The exhibits, except Exhibit 6, are returned.
<b>Catchwords:</b>	<b>DEVELOPMENT APPLICATION:</b> mixed use development including retail, commercial, club and residential. Compliance with objectives in site specific local environmental plan, urban design, amenity, integration and transition with existing development and street activation, economic impacts, traffic impacts, adequacy of solar access and cross ventilation, owner's consent, long term viability of club use.
<b>Legislation Cited:</b>	Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Roads Act 1993 State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development State Environmental Planning Policy (Infrastructure) 2007 Leichhardt Local Environmental Plan 2000 Leichhardt Local Environmental Plan 2013
<b>Cases Cited:</b>	Botany Bay City Council v Premier Customs Services Pty Ltd [2009] NSWCA226 Conservation of North Ocean Shores Inc v Byron Shire Council (2009) 167 LGERA 52 Fabcot Pty Ltd v Hawkesbury City Council (1997) 93 LGERA 373 Friends of Malula Bay Inc v Perkins (2014) 203 LGERA 14 Jonah Pty Limited v Pittwater Council (2006) 144 LGERA 408 South East Forest Rescue Inv v Bega Valley Shire Council & Anor (2011) 211 LGERA 1 Zhang v Canterbury Council [2001] NSWCA 167

**Category:** Principal judgment

**Parties:** Urbis Pty Ltd (Applicant)

Inner West Council (First Respondent)  
Transport for NSW (Second Respondent)

**Representation:** Counsel:  
Mr C Leggat, SC (Applicant)  
Mr A Galasso, SC (Respondent)  
Ms C Novak, (Respondent)

Solicitors:  
Mr C Shaw of Swaab Attorneys (Applicant)  
Mr M Bonanno & Mr S Turner of Inner West Council (First Respondent)  
Ms H Kalarostaghi of Hunt & Hunt (Second Respondent)

**File Number(s):** 2016/153147 (formerly 10997 of 2015)

## JUDGMENT

- 1 Urbis Pty Ltd (applicant) is appealing under s 97(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of a development application (D/2015/438) by the Joint Regional Planning Panel (JRPP). The application was made on behalf of Rozelle Village Pty Ltd, the owner of the site (owner). The application is for the demolition of existing buildings, remediation of the site and construction of mixed use development including retail, commercial, club and residential uses at 138-152 and 154-156 Victoria Road, 697 and 699 Darling Street, and 1, 3, 5 and 7 Waterloo Street, Rozelle (site). The application also involves the construction of a pedestrian bridge over Victoria Road and works in the footpath in the north-eastern side of Victoria Road.
- 2 The site is within the Inner West Local Government Area, formerly Leichhardt Municipal Council (council), which is the First Respondent in the appeal.
- 3 Transport for NSW (TfNSW) has a concurrence role in the application pursuant to cl 88 of *State Environmental Planning Policy (Infrastructure) 2007* (ISEPP), as the CBD Metro Corridor is protected under the ISEPP and the proposal is located in proximity to the corridor. TfNSW was joined as a party in the proceedings and is the Second Respondent. At the commencement of the hearing, the parties agreed on conditions sought by TfNSW and, on this basis, TfNSW was excused from further participating in the proceedings.
- 4 The contentions raised by council are set out in the Amended Statement of Facts and Contentions (Exhibit 6). The contention in relation to housing diversity has been resolved (Contention 3). There is considerable overlap in these remaining contentions and, in response to the evidence and the submissions of the parties, the key contentions can be summarised as whether the proposed development:

- (a) contributes to the vibrancy and prosperity of the Rozelle Commercial Centre with an active street life while maintaining residential amenity (Contentions 1, 4, 5, 6(b) and 8);
- (b) is well designed and provides a high quality transition to the existing streetscape (Contention 1, 2, 4 and 5);
- (c) would have an unacceptable impact on the local area due to traffic generation (Contention 7);
- (d) provides acceptable solar access and cross ventilation to the residential units and solar access to the Plaza (Contention 2);
- (e) should include a pedestrian bridge over Victoria Road as owner's consent has not been provided and the acceptability of the bridge design (Contention 1, 4, 5 and 9); and
- (f) would promote the long term viability of the Balmain Leagues Club on the site (Contention 6(a));

### Site and locality

- 5 The site is known as the Balmain Leagues Club Precinct. It comprises the following allotments:

Lot 1 DP 528045 (138 -152 Victoria Road, Rozelle);  
 Lot 1 DP 109047 (154 -156 Victoria Road, Rozelle);  
 Lot 104 DP 733658 shown as Lot 104 DP 629133 on the survey (697 Darling Street, Rozelle);  
 Lot 102 DP 629133 (699 Darling Street, Rozelle);  
 Lot 101 DP 629133 (1 Waterloo Street Rozelle);  
 Lot 38 DP 421 (3 Waterloo Street, Rozelle).  
 Lot 37 DP 421 (5 Waterloo Street, Rozelle); and  
 Lot 36 DP 190866 (7 Waterloo Street, Rozelle).

- 6 The construction of a pedestrian bridge over Victoria Road and works on the footpath on the north eastern side of Victoria Road extend into land that is declared as public road and owned by council and is partially occupied by a public toilet block. Owners consent for these works has not been obtained, which is discussed later in this judgment.
- 7 The site is irregular in shape with an overall area of 7,330sqm. It has frontages to Victoria Road, Waterloo Street and Darling Street and a reasonably significant fall from the southern boundary (Darling Street frontage) to a low point in the northern corner, adjacent to the Victoria Road frontage.
- 8 Existing development on the site includes:
- Two-storey brick commercial building at 154-156 Victoria Road;
- Balmain Leagues Club building and car park structure at 138-152 Victoria Road. The Club building is a two-storey 1963 building which has had alterations. It has approximately 5948sqm of floor space but has been vacant for a number of years. A car park structure surrounds 154-156 Victoria Road and extends from the Victoria Road frontage to the Waterloo Street frontage. There are approximately 200 parking spaces on the Club lot;
- 3-7 Waterloo Street accommodates the 'at grade' car park associated with the Balmain

Leagues Club.

1 Waterloo Street accommodates a part 1 and part 2 storey brick commercial/industrial style building. This building connects to the rear of the shop at 699 Darling Street and formerly accommodated the 'back of house' operations of Byers Meats; and

Two commercial buildings address the Darling Street frontage. The building at 699 Darling Street is an early 20th Century, single-storey shop known as the 'Byers Meat' butchery and 697 Darling Street is a two storey c1920 shop;

- 9 In total, including the Club component, there is approximately 7,538sqm of commercial floor area on the site.
- 10 On Victoria Road, the site adjoins a single storey commercial building to the north-west (168 Victoria Road) and a narrow informal laneway to the south-east (Laneway), which adjoins the rear of a number of commercial buildings that front Darling Street (671 to 695 Darling Street). The owner of the site has a right of way over a section of the Laneway that runs behind 681-695 Darling Street. That part of the site with a frontage to Darling Street (697-699 Darling Street), adjoins a pair of two storey commercial buildings (693-695 Darling Street) and a single storey commercial building (701-703 Darling Street). Adjoining the site in Waterloo Street, is a pair a recent two storey semis (17-19 Waterloo Street).
- 11 The site is within the Rozelle Commercial Neighbourhood and development in Darling Street is mainly two storey buildings with ground floor retail. On the opposite side of Victoria Road, is the Bridge Hotel, Rozelle Public School, a public toilet block and a row of two storey shops (665-669 Darling Street). Waterloo Street is predominantly residential dwellings of various architectural styles and one and two storey scale.

### Statutory framework

- 12 The site is a deferred matter under *Leichhardt Local Environmental Plan 2013* (LEP 2013) and is subject to site specific controls in Schedule 1, Part 3 of *Leichhardt Local Environmental Plan 2000* (LEP 2000). The site is within the Business Zone under LEP 2000 and the development is permissible with consent.
- 13 Schedule 1, Part 3 of LEP 2000 provides:

#### **Part 3 Amended controls on specific sites**

##### **Balmain Leagues Club Precinct site**

(1) For the purposes of this Part:

*building height* (or height of building) means the vertical distance between ground level at any point to the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

*mixed use development* means a building or place comprising 2 or more different land uses that are permissible in the Business Zone.

*the site* means the site comprising all of the following land:

- (a) 138–152 Victoria Road, Rozelle (being Lot 1, DP 528045),
- (b) 154–156 Victoria Road, Rozelle (being Lot 1, DP 109047),
- (c) 697 Darling Street, Rozelle (being Lot 104, DP 733658),
- (d) 1–7 Waterloo Street, Rozelle (being Lots 101 and 102, DP 629133, Lots 37

and 38, DP 421 and Lot 36, DP 190866),

as shown edged heavy black and lettered "SSP" on the map marked "Leichhardt Local Environmental Plan 2000 (Amendment No 16)" deposited in the office of Leichhardt Municipal Council.

(2) Despite any other provision of this Plan (except clause 19 (6) and (7) or a provision of this Part), consent may be granted for mixed use development on the site, but only if, in the opinion of the Council, the following objectives are met:

- (a) the development integrates suitable business, office, residential, retail and other uses so as to maximise public transport patronage and encourage walking and cycling,
- (b) the development contributes to the vibrancy and prosperity of the Rozelle Commercial Centre with an active street life while maintaining residential amenity,
- (c) the development is well designed with articulated height and massing providing a high quality transition to the existing streetscape,
- (d) the traffic generated by the development does not have an unacceptable impact on pedestrian or motor vehicle traffic on Darling Street, Waterloo Street and Victoria Road, Rozelle,
- (e) any residential development at street level has a frontage to Waterloo Street, Rozelle and, when viewed from the street, has the appearance of no more than three storeys.

(3) A consent under subclause (2) must not be granted if the application for the development does not apply to the whole of the site.

(4) A consent under subclause (2) must not be granted if the development will result in any of the following:

- (a) the floor space ratio for the site exceeds 3.9:1,
- (b) the floor space ratio for all shops on the site exceeds 1.3:1,
- (c) the floor space ratio for all commercial premises on the site exceeds 0.2:1,
- (d) the floor space ratio for all clubs on the site exceeds 0.5:1,
- (e) the floor space ratio for all residential development on the site exceeds 1.9:1,
- (f) in relation to a building on the site that is less than 10 metres from Waterloo Street, Rozelle—the building height exceeds 12.5 metres above the existing road level,
- (g) in relation to a building on the site that is less than 36 metres from Darling Street, Rozelle—the building height exceeds a reduced level of 52.0 metres relative to the Australian Height Datum or exceeds two storeys,
- (h) a building height on the site exceeds a reduced level of 82.0 metres relative to the Australian Height Datum or exceeds twelve storeys.

14 The Site Specific Controls for the Balmain Leagues Club Precinct in Part D1 of *Leichhardt Development Control Plan 2000* (DCP 2000) are also relevant. The General Objectives for the site (D1.4) provide:

- To provide a planning and urban design framework that guides the redevelopment of the Balmain Leagues Club Precinct.
- To enable the redevelopment of the Balmain Leagues Club Precinct as a consolidated parcel.
- To encourage well designed development with articulated height and massing.
- To promote development that links to and contributes to the ongoing vibrancy and viability of the Rozelle Commercial Centre.
- To promote the long term viability of the Balmain Leagues Club on the site, for the

benefit of the local community.

- To promote low and moderately priced housing through a mix of dwelling types.
- To ensure an integrated and well designed public domain environment that supports the existing Rozelle commercial area.
- To promote ecologically sustainable development.

- 15 Part D1 of DCP 2000 includes Objective, Rationale, Design or Planning Principles and Controls for Layout and Massing (D1.5), Land Use (D1.6), Building Language (D1.7), Development within the Conservation Area (D1.8), Public Domain and central plaza area (D1.9), Access and Management (D1.10), Traffic Management (D1.11) and Parking (D1.12).
- 16 *State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development* applies to the residential development. Clause 28 requires consideration of the advice (if any) obtained from the design review panel, the design quality of the development when evaluated in accordance with the design quality principles in Schedule 1 and the *Apartment Design Guide* (ADG).
- 17 Under LEP 2013, the surrounding land along Victoria Road and Darling Street is zoned B2 - Local Centre and on the opposite side of Waterloo Street is zoned R3 - Medium Density Residential. The maximum FSR for the land in the B2 zone is 1:1 (cl 4.4) up to 1.5:1 (cl 4.4A) for mixed use development that incorporates active frontages, subject to satisfaction of certain criteria. The R3 land has a maximum FSR of 0.5:1. The land in Darling Street and the opposite side of Victoria Road is within a Heritage Conservation Area and in the vicinity of a number of heritage items.

## Background and proposal

### *Draft LEP and DCP*

- 18 The site has an involved history which is set out in Exhibit 3 and the Amended Statement of Facts and Contentions (Exhibit 6), which is briefly summarised below.
- 19 On 3 June 2008, council considered a report on *Draft Local Environmental Plan - Amendment 16* to LEP 2000 (Draft LEP), which applied to the site. It resolved to request the Minister to make the Draft LEP. Council also resolved to adopt the draft Development Control Plan to include the Site Specific Controls for the site in Part D.1 of DCP 2000. The Draft LEP was gazetted on 29 August 2008.
- 20 In conjunction with the making of the site specific amendments to LEP 2000 and DCP 2000, a Voluntary Planning Agreement (VPA) for the site was entered into on 26 June 2008, which included the requirement for a pedestrian bridge over Victoria Road, contributions for public domain works and public benefits to be included in the development.
- 21 On 26 August 2015, council forwarded a Planning Proposal (PP) to the Department of Planning and Environment (DPE) which sought to reduce the FSR for the site to 1:1 for commercial and 1.5:1 for mixed use development. The DPE declined to proceed with the PP noting that the Planning Assessment Commission (PAC), in its refusal of the earlier application, had confirmed that the planning controls for the site under LEP 2000

provide an appropriate framework for the site's future development. Furthermore the PP would be inconsistent with *A Plan for Growing Sydney*, as the site is included in the Parramatta to Sydney CBD via Ryde urban renewal investigation corridor because of its location as a cross city corridor and access to transport. The parties agree that the PP should not be given weight.

#### *Previous applications*

- 22 On 9 July 2010, a development application (D/2009/352) was refused by the JRPP. The application sought approval for demolition; excavation; remediation of the site; construction of a mixed use development including: 145 dwellings within townhouses and apartments on Waterloo Street and three residential apartment buildings located on the northern, southern and western portions of the site, retail shops, restaurants, a supermarket and commercial offices, a public plaza, a new leagues club and a new infill building on Darling Street; parking for 550 cars and loading and unloading bays; and construction of a pedestrian bridge across Victoria Road located partly on Rozelle Public School.
- 23 On 19 March.2014, a development application (D284/14) was refused by the PAC. The application sought approval for a mixed use residential and retail development on the site which included two towers comprising 24 and 20 storeys with a total gross floor area of 36,587 square metres comprising residential apartments; retail (including a supermarket, mini-major and specialty retail); club; community and commercial facilities, including a child care centre, medical centre and commercial office space and 488 on site car parking spaces.

#### *Development application (D/2015/438)*

- 24 The current development application (D/2015/438) was lodged on 14 August 2015 for a mixed use development on the site. The development includes demolition of existing buildings and remediation of the site and construction of:
- (a) Four basement levels and a mezzanine that include Specialty Retail 12 (Basement 1) and Specialty Retail 1 (Basement 1 Mezzanine) and parking for 369 car spaces accessible off Victoria Road for retail, commercial and club uses and Waterloo Street for the residential component. A loading dock and waste storage areas are accessible off Victoria Road;
  - (b) Lower ground level with a through site link between Victoria Road and Waterloo Street; supermarket and back of house, Specialty Retail 2, 3 and 4; the residential lobby for the West Tower, the western forecourt and six three level town houses with access off Waterloo Street;
  - (c) A public plaza with Specialist Retail 8 and 10; a retail arcade to Darling Street with Specialty Retail 6 and 7; the eastern forecourt which provides access to the residential lobby of the East Tower and to the Plaza from Waterloo Street. The East and West towers comprise:
    - (i) East Tower with Specialist Retail 9 and 11 (Plaza Level), commercial (Level 1) and ten residential levels above. The tower will be 12 levels from the Plaza; and
    - (ii)



West Tower with two club levels (Plaza and Level 1) with six residential levels above. The tower will be eight levels from the Plaza.

(iii) The East and West Tower accommodate 135 apartments.

(d) a two storey infill retail/commercial building at 697-699 Darling Street, which includes the retail arcade;

(e) a pedestrian bridge across Victoria Road.

- 25 The documentation supporting the development application states that the height and FSR of the development comply with the requirements of Schedule 1, Part 3 of LEP 2000. The FSR for each of the proposed uses is set out in the table below:

Use	Floor Space Ratio (FSR)	Gross Floor Area (GFA)
Retail/shops	1.3:1	9529sqm
Commercial	0.2:1	1466sqm
Club	0.5:1	3658.5sqm
Residential	1.9:1	13927sqm
TOTAL	3.9:1	28580.5sqm

- 26 Although not raised by the parties, for the reasons which are discussed later, the GFA of the club use is not clear and consequently the GFA of other uses would need to be verified, if consent were to be granted.
- 27 The application was notified and a number of submissions supporting and objecting to the proposal were received. The Design Review Panel (DRP) considered the application and its draft report was provided to the applicant but the report was not finalised.
- 28 The application was referred to the Roads and Maritime Services (RMS) for concurrence in accordance with s138 of the *Roads Act 1993*. The RMS advised on 23 March 2016 that it had reviewed the application and would provide concurrence subject to certain conditions being included in any consent issued. The conditions principally relate to the dedicated slip lane on Victoria Road, the left in left out access driveway and the pedestrian bridge.
- 29 As discussed above, TfNSW has a concurrence role in the application pursuant to cl 88 of ISEPP as the proposal is located in proximity to the CBD Metro Corridor. TfNSW provided its concurrence on 24 March 2016 subject to conditions being incorporated into any consent so as to provide adequate protection for the CBD Metro corridor. The conditions principally relate to the construction and maintenance of any structure that may affect the proposed alignment of the Metro corridor.

A letter from NSW Transport - State Transit dated 10 March 2016 in response to letters from an objector to the proposal, raised concerns about any delays to buses that may result from the development. Following further enquiry from council, RMS clarified by email on 7 April 2016 that "Roads and Maritime consulted with Transport for NSW. Roads and Maritime confirms that State Transit Authority's letter of 10 March 2016 was not considered as part of its assessment process. Roads and Maritime's position in terms of providing its concurrence for access on Victoria Road has not changed".

- 31 The Class 1 appeal against the deemed refusal of the application was filed on 8 October 2015. A conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) commenced on site on 15 December 2015. The parties did not reach agreement and the conciliation conference was terminated. The parties did not object to my hearing the appeal and agreed that the site view and objector's comments (Exhibit 11), but not the discussions in the conciliation conference, would be evidence in the proceedings.
- 32 The applicant was granted leave to amend the application on 16 February 2016. The main changes included the deletion of the pedestrian bridge, changed car parking, ramp and vehicular access arrangements and extension of the lift to the basement retail car park. The applicant was granted leave to further amend the application on 16 March 2016 to reinstate the pedestrian bridge, as a result of a contention being raised by council regarding the proposal's compliance with the VPA, without the bridge.
- 33 The application remains undetermined by the JRPP.

### The evidence

- 34 The Court heard from objectors, including representatives of the Rozelle Chamber of Commerce, Rozelle Residents Action Group and the Rozelle-Iron Cove Precinct. The main concerns include that the Balmain Leagues Club has a special significance for the local community and there is strong support for its return to the site. However, there is doubt about the long term viability of the Club on the site due to reduced amenity, space and commercial rents. The Club is legally bound to support the application but members have not been informed about the proposal in a transparent manner and hence their support is questionable. The site specific planning controls that were adopted in 2008 permit significant development on the site, within a context of 1-3 storey built form, on the basis that the development would provide a viable home and income stream for the Club into the future as well as enhancement and connectivity to the existing retail shopping strip in Rozelle and minimise unacceptable impacts on local amenity. The proposal may comply with the numerical controls in LEP 2000 but does not achieve their intent and will have a number of adverse impacts, including:
- the height, bulk and scale of the proposal being out of character with the area and with other recent mixed use developments;
  - the increased traffic generation, particularly from the supermarket will impact on the traffic congestion and pedestrian and cyclist safety. Concerns were raised about the adequacy of the traffic modelling, in particular whether it underestimated retail demand and consequently the predicted performance of

the traffic network post development. Also there has been no analysis provided on the delays to bus services, modelling outside the Saturday peak or safety assessment;

- noise and privacy from the proposed outdoor terrace of the club and communal area of the residential on properties in Waterloo Street.
- the size of the retail component and its impacts on the Rozelle "high street", in particular, the loss of on street parking to service the existing retail and the proposal's lack of integration and connectivity, which will result in a decline in the "high street" and adversely affect the community both economically and socially;

35 The level of integration was a common theme of objector concerns. Ms Stewart, the owner of a local business "Beyond Life" and speaking on behalf of the Rozelle Chamber of Commerce did not consider her business would be greatly affected but raised concerns regarding the poor interface with the local high street shops on Darling Street. She stated "...all the connections from the retail parking up to the ground level retain shoppers within the development complex-so the expectation is that they will shop preferentially in the development's retail precinct. It shows zero intention to provide integration with the high street...the centre is designed to keep people in it/not facilitate flow to the high street....If the current businesses are worried about the threat of this much extra retail-they can be much more concerned about a shopping centre, that by design, does not see itself as part of-or complementary to-the high street.....'

36 A number of written submissions were made in response to the notification and advertising of the application. Many of these were from Balmain Leagues Club members who supported their club being accommodated within the development.

37 The Court heard expert evidence for the applicant from:

- Mr G Pindar, traffic consultant
- Mr C Oswald, economic consultant
- Mr J Koopman, architect of the proposal
- Mr T Blythe, planning consultant

38 The Court heard expert evidence for the council from:

- J Milston, traffic consultant
- Mr P Leyshon, economic consultant
- Mr P Thalys, architect and urban designer
- Mr S Harding, planning consultant

#### *Proper planning approach*

39 The site specific controls introduced into LEP 2000 in Schedule 1, Part 3 provide at cl 2 that "[d]espite any other provisions of this plan....consent may be granted for mixed use development on the site, but only if, in the opinion of Council, the following objectives are met". This is a precondition to the exercise of the Court's power to grant consent (see *South East Forest Rescue Inv v Bega Valley Shire Council & Anor* (2011) 211 LGERA 1, *Friends of Malula Bay Inc v Perkins* (2014) 203 LGERA 14 and *Conservation of North Ocean Shores Inc v Byron Shire Council* (2009) 167 LGERA 52).

- 40 The site specific controls in Part D of DCP 2000 are a relevant matter in determining whether the objectives in cl 2 are met. Section 79C(3A) of the EPA Act includes the requirement that the provisions in a DCP are to be applied flexibly and “allow reasonable alternative solutions that achieve the objects of those standards”. This is not inconsistent with the approach to the consideration of a DCP adopted by the Court of Appeal in *Zhang v Canterbury Council* [2001] NSWCA 167 where Spigelman at [75] establishes firstly that the Court has a wide ranging discretion but it is not at large and is not unfettered. Secondly, the provisions of a DCP are to be considered as a “fundamental element” in or a “focal point” of the decision making process. Thirdly, a provision that is directly pertinent to the application is entitled to significant weight in the decision making process but is not determinative. Furthermore, consistent with the decision of the Court of Appeal in *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA226 the Court is not entitled to take the view that a provision in a DCP is inappropriate and to apply its own standard of what is reasonable. Rather, consistent with s79C(3A), the Court is to consider the DCP provision and also whether an alternative solution would achieve its objectives.
- 41 The applicant’s submissions referred to the previous applications and the reasons for refusal, including PAC’s comments that “the provisions in Leichhardt Local Environmental Plan 2000 (as amended) provide an appropriate framework for the site’s future redevelopment” but did not refer to DCP 2000. While this is relevant background information, it provides no greater weight to the LEP controls, which regardless of whether or not they provide an appropriate framework for development of the site, are the controls that, under s79C(1)(a)(i), are relevant considerations in the assessment of the application, as are the DCP controls under s79C(1)(a)(iii), within the framework established by s79C(3A). Similarly, whether the proposal will have less impact than previous applications may be relevant background information but this application must be considered on its own merits.
- 42 The key dispute between the parties is whether the objectives in cl 2 of Schedule 1, Part 3 of LEP 2000 are met, which is discussed below. The parties also disagree on whether the proposal would satisfy the design quality principles for built form and landscape in Schedule 1 of SEPP 65 and requirements of the ADG including those relating to communal and public open space and mixed use developments. This disagreement largely reflects the consideration of whether the Objectives in cl 2 of Schedule 1, Part 3 of LEP 2000 are met. Therefore to avoid repetition, the discussion below would also address the matters in relation to SEPP 65 and the ADG.

*Does the development contribute to the vibrancy and prosperity of the Rozelle Commercial Centre with an active street life while maintaining residential amenity? (Objective 2(b))*

- 43 The urban design, planning and economic experts held different opinion as to whether Objective 2(b) in Schedule 1, Part 3 of LEP 2000 is met. This disagreement centred on the extent of internal integration within the development itself and externally with the Rozelle Commercial Centre.

44

The parties agree that the 'Rozelle Commercial Centre' is the area of land identified as the 'Rozelle Commercial Distinctive Neighbourhood' in the DCP, which is centred around the Darling Street on both sides of Victoria Road., and includes the site.

- 45 Mr Thalys and Mr Harding considered that the proposal has been designed as a stand-alone shopping centre, and does not facilitate access to the Rozelle Commercial Centre. Shoppers arriving by car could directly access the supermarket and other specialty shops from the retail/commercial car park and by-pass the plaza level, which provides access to the existing shops to the north and south along Darling Street.
- 46 Mr Thalys noted that access to and from the retail car park to the shops in Darling Street was not easy as only one lift provided direct access to the Plaza Level near Darling Street South (Lift 10). He considered that 'lift 10 by itself does not provide sufficient access between the car park and wider public domain, to the exclusive benefit of retailers within the centre and to the dis-benefit of retail on Darling Street.' Similarly, access to the supermarket for pedestrians from Darling Street South is a long and circuitous route through the Plaza to a single lift (Lift 8) or escalator that could "not be located in the development further from Darling Street".
- 47 Mr Harding believed that the most direct and easiest on-foot access for destination supermarket shoppers is by the through-site link off the primary entrances to the west on Victoria Road and the western forecourt on Waterloo Street. In his opinion, on-foot supermarket shoppers would avoid other circuitous routes and bypass the plaza. Furthermore, he considered that shoppers would also be dropped off by car in Waterloo Street to access the supermarket via the western forecourt as this is the most convenient route to the supermarket and other shops.
- 48 Mr Thalys and Mr Harding considered that the western forecourt design is inconsistent with the requirements of the DCP, which envisaged that the public plaza would extend to Waterloo Street in this location but only as a narrow 3m wide opening, thereby providing only limited connection between the retail uses in the development and the residential area to the south of the site. In Mr Harding's opinion, the design of the western forecourt and its direct access to the supermarket and through site link would make it a principal entry point to the site which would increase the intensity of non-residential use of Waterloo Street and thereby not maintain its residential amenity. Mr Thalys raised concern about the design of the western forecourt and its combined entry for residential and retail purposes. He acknowledged that the change in level between Waterloo Street and the Plaza made it difficult to have direct pedestrian connection between the two areas but considered there should at least be a visual connection.
- 49 Mr Thalys and Mr Harding were also concerned about the pedestrian bridge, which accesses the site at Level 1, and has only narrow stairs and a lift (Lift 8) to access the Plaza and other retail levels. Mr Harding considered that the DCP envisages a bridge with a ramp entering the site at grade, which would better integrate the plaza and the development with the Darling Street shops to the north.

Mr Thalís also raised concerns about the lack of design details to demonstrate integration with the streetscape, including for the western and eastern forecourts and the infill building in Darling Street, given that it is within a heritage conservation area.

51 Mr Thalís and Mr Harding agree that due to the extent of traffic along Victoria Road, it is not suited to accessible retail use. However, greater exposure of the supermarket or the plaza could be provided to increase active street life. Mr Thalís was also critical of the relationship of the East Tower to the Laneway, which he considers has the potential to provide an active street frontage between Victoria Road and Darling Street. However, at the Plaza Level a significant proportion of the façade is occupied by a substation and Specialty Retail 11 does not open onto the Laneway.

52 Mr Koopman and Mr Blythe considered that the development would be well integrated both internally and externally with Rozelle Commercial Centre and thereby contribute to its vibrancy and prosperity. In their opinion, high quality access would be available to the Plaza from the eastern forecourt, the retail arcade from Darling Street and the pedestrian bridge via a lift or stairs. Although, access to the Plaza is not available from the western forecourt, this is a consequence of the difference in levels between that part of Waterloo Street and the Plaza.

53 In Mr Blythe's opinion:

....the proposed design response is appropriate having regard to the objectives of the DCP and the characteristics of the site..... the provision of the public plaza with grade access from Darling Street level with the supermarket located at the level below this represents a practical and appropriate design outcome given the spatial requirements for both elements.

...having the supermarket located at the level below the plaza will not detract from the vibrancy and vitality of the plaza level. The design will facilitate direct pedestrian connection from Darling Street through the retail arcade to the plaza. From the plaza level there is an escalator to the supermarket below.

54 The western forecourt is larger than that envisaged in the DCP, but in Mr Koopman's opinion, the space provides greater amenity and would increase permeability and encourage pedestrian access from Waterloo Street to the through site link and the Plaza. The western forecourt provides opportunities for casual interaction between residents and the public domain through the provision of seating and has been carefully designed to achieve an acceptable and positive design outcome which is superior to that envisaged in the DCP.

55 In response to issues raised by Mr Thalís about the lack of design detail, Mr Koopman stated that he considered the information, including the Design Review Report, to be adequate for a development application and that he had considered the details, which would be provided at later stages.

56 The economic evidence is that "there is a need for at least one additional full line supermarket in the Lilyfield/Rozelle/Balmain area of the scale proposed" and that the supermarket would be the main attractor in the development. Mr Ostwald's evidence is that some \$46M currently spent outside of the Rozelle Commercial Centre would be spent in the retail uses in the proposed development.

57

Mr Leyshon and Mr Ostwald disagreed on the extent of impact on the existing shops in Rozelle Commercial Centre resulting from the introduction of a supermarket, as an anchor tenant, and specialty shops in the development. Mr Ostwald estimated that post development, the total sales in the existing Rozelle Centre would decline by -\$2.1 million in 2018 (-3.9%) but that the centre would then be expected to experience growth in line with market and population growth. Whereas, Mr Leyshon, considered this underestimates the impact and that it is likely to be in the order of -\$4 to -\$5.5 million in 2018 (-7.1% to -10.7%) and it is unclear how enduring these impacts would be.

58 The experts agreed that the extent of impact would not be an “economic impact” that of itself would warrant refusal of the application consistent with the authority in *Fabcot Pty Ltd v Hawkesbury City Council* (1997) 93 LGERA 373 as, while the trade of existing shops may be impacted, their services would still be available to the community within the existing and/or the new development. Their disagreement centred on whether the development would contribute to the “vibrancy and prosperity of the existing centre” by people visiting the development also being attracted to the existing shops.

59 The experts generally agreed that “vibrancy” related to activity and the number of pedestrians using the centre and the surrounding streets. This would increase if there was a flow on effect of foot traffic out of the development into Darling Street. Whereas “prosperity” is linked to turnover and that as the existing and proposed retail would all be in a market that is growing all have the opportunity to benefit.

60 Mr Leyshon considered that it is to be expected that the proposed supermarket would impact on other supermarkets outside the area, particularly the Woolworths in Balmain, but the concern is how the supermarket and the specialty shops in the development integrate with the existing specialty shops in the Rozelle Commercial Centre. He noted a number of features in the design of the development which would inhibit access to the existing shops, and consequently their vibrancy and prosperity. In particular, he considered it unlikely that destination supermarket shoppers would access the Plaza due to the escalator access and the size of Lift 8, which is the only lift that services the Plaza from the supermarket, as well as the circuitous route to Darling Street from the supermarket and the Plaza. He also raised concerns about internal aspects of the development, including the large separation between retail car parking and retail trading floors, and the multiple levels of retailing, some without an attractor tenant.

61 Mr Leyshon and Mr Ostwald agreed that Specialty Retail 2 was disconnected from the other retail and was likely to be used only as a “destination” use such as a gym or day spa. Mr Blythe acknowledged that those sorts of uses may not be classified as retail. This could have implications for the compliance of the proposal with the FSR requirements in cl 4 in Schedule 1, Part 3 of LEP 2000.

62 Mr Ostwald's stated that the site is constrained and therefore the parking and retail are located over a number of levels, which is similar to other centres in urban areas and would not deter people from using the development. He considered that the inevitable consequence of the planning controls, which envisage a supermarket on the site, is an

impact on the prosperity of the existing shops but that the proposed development is part of the centre and as additional people would be attracted to the area the prosperity of the whole of the Rozelle Commercial Centre would improve.

- 63 Mr Leyshon and Mr Ostwald in oral evidence, agreed that if the objective is to encourage integration by maximising pedestrian access to the streets, this would be assisted by options such as the retail in the development being all on one level and as close to Darling Street as possible; increased number and size of lifts to facilitate greater access between floors; at grade access to the Plaza from Victoria Street; and closer access between Darling Street and the supermarket.
- 64 Although currently not part of the proposal, if on street parking on both sides of Darling Street were to be removed, as promoted by the traffic experts, the economic experts agreed that this would impact on the existing retail. However, Mr Ostwald's opinion is that this would be partially mitigated by the provision of car parking spaces in the development. Whereas, Mr Leyshon considered that the proposed car spaces would not provide the same convenient access to retail on Darling Street as the on street spaces and this would impact on the long term viability of these shops.

## Findings

- 65 The site specific controls in cl 2(b) of Schedule 1, Part 3 of LEP 2000 provide:
- (2) ....consent may be granted for mixed use development on the site, but only if, in the opinion of the Council, the following objectives are met:
- (b) the development contributes to the vibrancy and prosperity of the Rozelle Commercial Centre with an active street life while maintaining residential amenity,
- 66 This objective does not focus on the impact of the development on the economic viability of the existing retailers but on the contribution of the development to the "vibrancy" and "prosperity" of the Rozelle Commercial Centre, which includes the site, "with an active street life while maintaining residential amenity".
- 67 The site specific controls in Part D of DCP 2000 provide General Objectives, which relevantly include "to promote development that links to and contributes to the ongoing vibrancy and viability of the Rozelle Commercial Centre" and "to ensure an integrated and well-designed public domain environment that supports the existing Rozelle Commercial Centre".
- 68 The concept of the "vibrancy" of the Rozelle Commercial Centre as a whole, not just the site, occurs in both the LEP 2000 and the DCP 2000. The economic experts generally agree that "vibrancy" relates to the activity and the number of pedestrians using the centre and the surrounding streets. Similarly the concept of "active street life" would be achieved by a design that encourages use of the centre and its integration with the surrounding streets by facilitating the flow on effects of people attracted to the supermarket, also using the existing shops.
- 69 In summary, the evidence of the applicant's experts is that the proposed development, particularly the supermarket, will be a major attractor for people and that as the development is part of the Roselle Commercial Centre this will add to its "vibrancy" and



"active street life", which of itself is sufficient to satisfy Objective 2(b) of Schedule 1, Part 3 of LEP 2000. Furthermore, the additional number of people will have flow on effects for the existing shops as the development is designed to integrate with the existing centre and that people using the centre will also use the streets.

- 70 The council's experts do not agree. In particular, they question whether, even if the supermarket is a major attractor, this will have positive flow on effects to the existing centre given the ease of access to the supermarket for destination supermarket shoppers, the location of the car parking and the retail levels and limited access between these to the Plaza and the existing shops, which is not sufficient to satisfy Objective 2(b) of Schedule 1, Part 3 of LEP 2000.
- 71 I accept the council's position. The design of the development is focused on facilitating access for both pedestrians and cars to the supermarket and is likely to function as a stand-alone centre that can operate independently of the existing centre. The main entries to the development are on Victoria Street and Waterloo Street where the western courtyard, through site link and Victoria Road entry provide direct and easy access to the supermarket that bypasses the Plaza. This is contrary to the intent of the DCP, where the Plaza is a connecting element between the development and the existing streets.
- 72 Section D1.9 of DCP 2000 includes provisions for the public domain and the Plaza. The Planning Principles include the provision of a new publically accessible Plaza, upgrading the footpaths, provision of the pedestrian bridge and through site links that "provide unrestricted pedestrian access between Victoria Road, Darling Street and Waterloo Street to increase permeability and enhance the local pedestrian network". The proposal meets the numerical controls for the Plaza but in part does not reflect the Public Domain Plan in Figure 9.1, which shows the "extent of the new public plaza". In this plan, the main entry points to the plaza are shown to the eastern end of the site from Victoria Road and Darling Street, connecting to Waterloo Street and the Laneway. The other access proposed in Victoria Road, links the pedestrian bridge to the Plaza and is a secondary access. Similarly, the other access shown in Waterloo Street, where the western forecourt is now proposed, is a secondary minor access point.
- 73 The western forecourt provides access to the West Tower residential lobby, Specialty Retail 2 and the through site link to the supermarket and Specialty Retail 3 and 4. Even if the proposed larger forecourt were "superior" to that shown in the DCP and the design issues raised by Mr Thalys could be addressed by further detail, there is no visual or physical connection to the Plaza from the western forecourt and it serves as a principle entry point to the supermarket and retail specialty shops, which negates the need to enter the Plaza. While the proposed level of the Plaza restricts direct access this could be overcome, particularly if this larger western forecourt provided stairs and a lift to the Plaza or by lowering the level of the Plaza in this area. While the level of the Plaza may be fixed by the Darling Street entry, there may be scope for parts of the Plaza to better transition with the slope of the site.

While access to the West Tower residential lobby may be appropriate in this location, entry to the supermarket or a through site link is not, as this would increase non-residential use in a residential area. Although not explicitly raised as a contention by Council, this matter was considered by the experts and I accept Mr Harding's evidence that the western forecourt would be a convenient entry point to the supermarket and that this is likely to result in an increased intensity of non-residential use that would impact on existing residential amenity.

- 75 The entry off Victoria Road also provides direct access to the Supermarket, without the need to enter the Plaza. The supermarket is the main attractor to the centre, which will increase the number of people who visit the Rozelle Commercial Centre. If these people are to also be attracted to the existing shops in Darling Street the design of the development needs to facilitate the movement of users of the supermarket with the existing shops. The Plaza and the through site links are to "provide unrestricted pedestrian access between Victoria Road, Darling Street and Waterloo Street to increase permeability and enhance the local pedestrian network".
- 76 There are links between the Plaza and the existing centre, including the arcade to Darling Street. However, the connection to and from Darling Street to both the supermarket (the main attractor) and the retail parking is circuitous and does not facilitate or encourage the increased number of people that may visit the development to also use the existing shops. In particular, the provision of escalators (which cannot be used by trolleys) and only one small lift (Lift 8) with limited circulation space, that provides access between the Plaza and the supermarket is of concern, especially as it is located almost as far from Darling Street as possible. Similarly, the provision of only one small lift (Lift 10) from the retail parking to provide access to the Plaza and the retail arcade does not encourage access to Darling Street and the existing shops. The pedestrian bridge enters the site at a landing on Level 1; the same level as the club but has no access to it, and its connection to the Plaza and the supermarket is via Lift 8 or narrow stairs. While this can be redesigned it does not promote connection with Darling Street to the north of Victoria Road.
- 77 Consequently, the competitive effect of the proposed development is unlikely to be balanced with flow on benefits to the Rozelle Commercial Centre. The design of the development would not contribute to the vibrancy and prosperity of the Rozelle Commercial Centre with an active street life while maintaining residential amenity to the extent that it meets Objective 2(b) of Schedule 1, Part 3 of LEP 2000.

*Is the development well designed with articulated height and massing providing a high quality transition to the existing streetscape? (Objective 2(c))*

- 78 The urban design and planning experts accepted the height and the massing of the development reflected that envisaged by LEP 2000. This was based on the understanding that the FSR complied with cl 4 of Schedule, Part 3 of LEP 2000. However, Mr Thalys and Mr Harding noted that the controls resulted in a development,

which would be considerably larger than other development in the surrounding area and that, as the site is a landmark, it requires an iconic development that is well designed.

79 Mr Thalys raised a number of concerns about the level of design detail that had been provided. In his opinion, it was not sufficient to rely on the Design Review Report that accompanied the development application, to understand the resolution of the proposal and that this design intent should be incorporated into plans that would form part of any approval.

80 Mr Thalys was also concerned about aspects of the development and whether high quality transition to the existing streetscape would be achieved. Particularly, the western and eastern forecourts and their transition between Waterloo Street and the Plaza and the lack of deep soil to achieve mature landscaping consistent with the requirements of Part 3E-1 of the ADG.

81 In addition to the design issues in relation to the western forecourt discussed above, Mr Thalys considered that the entry to the residential lobby for the West Tower was set back too far from Waterloo Street and the forecourt provided opportunities for concealment, particularly the setback of the entry to Specialty Retail 2, as well as the blank walls that define the space. The design raises issues of safety, legibility and visibility with a lack of surveillance and active frontage as well as increased visual bulk. Mr Thalys raised similar concerns about the detailed design of the eastern forecourt and its integration with Waterloo Street and the Plaza.

82 Mr Koopman considered that the Design Review Report provides a clear statement of the architectural design intent of the proposal. If further design details were required these could be provided at a later stage.

83 In Mr Koopman's opinion, an appropriate transition to Waterloo Street would be achieved. He stated:

Context and street character of Waterloo Street is a residential street without an existing street wall character. Buildings are generally two storey terrace forms and single storey timber cottages with front garden zones, side setbacks and open parking areas. The proposal seeks to strike a scale and transitional balance between the existing street character and the 'block' forms recommended in the DCP. The garden courts are a means to integrate the address of the towers that are well setback but still require clearly legible address to further enhance street activation and surveillance. The garden courts reduce the street wall forms to a rhythm and scale which are appropriate to the Waterloo Street fine grain residential context.

84 Mr Koopman noted that the entry to Specialty Retail 2 could be brought forward. He acknowledged that this would increase the retail FSR but that other changes could be made to maintain compliance. In his opinion, there were adequate opportunities for surveillance of the forecourt and that it would provide an active street front.

85 Mr Koopman considered the constraints of the site made it difficult to provide deep soil and larger trees and that this is recognised in Part 3E-1 of the ADG. The development seeks to achieve an "urban solution and character" in which large trees would not be appropriate and consequently deep soil is not required.

## Findings

- 86 Mr Thalys raised a number of issues with the level of detail of the design that, if the application were to be approved, would need to be addressed by further design resolution. The issues in relation to the transition of the western forecourt to Waterloo Street have largely been discussed earlier and been found to be unsatisfactory due to the direct access it provides to the supermarket and the through site link and the lack of access, both visual and physical to the Plaza. Although the eastern forecourt provides physical access to the Plaza, this is not direct and there is limited visual connection between the Plaza and Waterloo Street. Access to the entry lobbies of the residential towers off Waterloo Street through forecourts could provide an appropriate transition to Waterloo Street, subject to satisfactory detailed design.
- 87 The absence of deep soil is a negative feature of the development. Although the Plaza may be urban in character, the interface and transition between the development and Waterloo Street could be assisted by deep soil and large planting.

*Does the traffic generated by the development have an unacceptable impact on pedestrian or motor vehicle traffic on Darling Street, Waterloo Street and Victoria Road, Rozelle? (Objective 2(d))*

- 88 The traffic experts agree that that the local traffic network is significantly constrained and, in particular, is at overcapacity during peak periods with the Victoria Road/Darling Street intersection operating at level of service "F".
- 89 The key disagreement between the experts is whether the additional traffic generated by the development would have an acceptable impact, in particular, whether a 10% increase in travel times is an appropriate measure.
- 90 Mr Milston noted that as part of the rezoning for the site and the assessment of the nearby Terry Street development, the traffic assessment prepared for council by ARUP (ARUP Report) reflected that vehicle travel times should not increase by more than 10% on 5 critical routes. That value was chosen to provide an appropriate balance between facilitating development without significantly impacting on existing road users. It has been a figure used by the industry in the assessment of other development sites and, in his opinion, it remains valid for the assessment of the proposed development in the absence of any policy document or guidelines, which specify what constitutes "acceptable" increases in traffic in the context of a constrained road network.
- 91 Mr Milston acknowledged that the ARUP Report also adopted a peak traffic generation for the site of 316 v/hr (65% of the original traffic generation proposed prior to the Report). Whereas, the traffic generation of the proposal is a maximum of 253 v/hr. However, the traffic generation in the Arup Report was based on 2007 traffic surveys and predicated on traffic management measures being undertaken in the vicinity of the site to expedite traffic flow, including an upgrade of Waterloo Street to provide for two approach lanes to the intersection with Darling Street, which has not occurred nor is it proposed as part of this development application. He acknowledged that there would

be operational benefits to the road network from the removal of the on-street parking in Darling Street (both sides) south of Victoria Road, but that council's preferred position is to retain the on-street parking due to concerns about impacts on the existing shops.

- 92 The modelling undertaken for the proposal (Bitzios Modelling) and the summary of travel times prepared by Mr Pindar (Exhibit H), indicate that the additional traffic generated by the proposal will result in increased traffic congestion and delay in the local Rozelle road network, greater than the 10/% threshold which Mr Milston considers to be reasonable.
- 93 Further, Mr Milston raised concerns about the modelling, as at times where the network is at saturation point it is not possible for the model to accurately determine incremental impacts of the development. The summary prepared by Mr Pindar was not presented as a weighted average and did not take into account impact on particular routes and the base travel times are not the current levels but include the future Terry Street generation.
- 94 Mr Milston also noted that the 2007 surveys found that the Balmain Leagues Club site generated 143 vehicle trips in the PM peak, which represents less than 60% of the traffic forecast under the proposal. The reference in a traffic report prepared for the applicant in 2010 (Halcrow Report) that "some time ago" surveys found that the site generated 264 vt/hr should not be relied upon. The source of the information was the Traffic Authority of NSW and it is therefore likely to be more than 25 years old. He also questioned the traffic generation rate of 0.19 vt/unit used to forecast the traffic generation by the residential component of the development during the Saturday peak. This rate is below the rate of 0.29 vt/unit used by previous studies and confirmed by ARUP through surveys of other high density developments fronting Victoria Road.
- 95 Mr Pindar considers the measure of a 10% increase in travel times has no foundation as it is not an adopted policy or guideline and conformity with a 10% measure has not been required by the RMS or TfNSW. He acknowledged that "there was a fairly significant impact on local intersections" but that the measure applies to travel times for certain routes within a small traffic area and is unrepresentative of the impact on the network overall. It also needs to be considered in absolute terms; the actual delay rather than the percentage increase, and that a red light at a traffic intersection may have a greater impact upon travel times.
- 96 Mr Pindar notes that the peak generation of 253 vt/hr is less than the historic peak of 264 vt/hr which demonstrates that the road network has accommodated similar volumes of traffic generated by the site. Furthermore, the proposed peak generation is below the 316 vt/hr stated to be acceptable in the ARUP Report, which he considers to be still relevant despite that some of the traffic measures have not been implemented.
- 97 Mr Pindar considers that the planning controls envisage the traffic generation and number of parking spaces proposed and that the "increases in travel times during all time periods considered are not unacceptable, being the unavoidable consequence of a

compliant development and representing generally only a slight overall increase across all routes assessed". Furthermore, he noted that the ARUP report would have also resulted in increased delays that are not dissimilar to those resulting from the proposal.

- 98 Mr Pindar did not accept Mr Milston's concerns about the modelling or the generation rate of 0.19 vt/unit as this is a higher rate than the RMS trip rate for high density residential development and is therefore conservative.
- 99 The applicant submits that the previous application had traffic and transport impacts that TfNSW and RMS identified as being a 'fundamental impediment to achieving the proposed development outcome for the site'. Whereas, both the RMS and TfNSW have provided conditions for the approval of the application and raised no concern with traffic impacts. The applicant submits:

the 'fundamental impediment' with the previous development arose where the number of car parking spaces proposed was 488... whereas the proposed development has some 369 car parking spaces. PAC's assessment.... demonstrates that traffic and transport was the subject of critical assessment by TfNSW and RMS.... focused on (a) Impacts on the surrounding road networks (b) Impacts of bus travel times (c) Vehicular access arrangements and concluded ....'As a result of the significant traffic and transport impacts resulting from the development, TfNSW and the RMS do not support the proposal in its current form.'.... TfNSW and RMS expressed fundamentally adverse views in relation to 'Impacts on the surrounding road networks' and 'Impacts on bus travel times' in relation to the penultimate application but have expressed no such concerns about unacceptable impacts on the surrounding road networks nor on impacts on bus travel times. Any contrary views expressed by a Government agency in relation to impacts on bus travel times must be taken to have been considered and subsumed in the positive conclusion arrived at by TfNSW and the RMS. In that regard it is important to note that whilst an objector sought the views of a Government agency about bus travel times, neither the Council nor the PAC sought the views of that agency. In such circumstances the Court would, give determinative weight to the positive assessment by TfNSW and RMS that arises necessarily from the approval of the application by TfNSW and RMS.

## Findings

- 100 Objective 2(d) of Schedule 1, Part 3 to LEP 2000 provides:

... consent may be granted for mixed use development on the site, but only if, in the opinion of the Council, the following objectives are met:

(d) the traffic generated by the development does not have an unacceptable impact on pedestrian or motor vehicle traffic on Darling Street, Waterloo Street and Victoria Road, Rozelle.

- 101 The site specific provisions in DCP 2000 deal with Traffic Management in D1.11, which relevantly include:

### Objective

To ensure traffic generated by the development is within environmental limits and is well managed throughout the local network.'

### Controls

'The final mix of uses within the development must ensure traffic does not significantly impact the road network in the area.'

- 102 Section D1.6 of DCP 2000 includes Planning and Design Principles, which provide that the range of uses on the site shall include commercial, retail including a supermarket, a leagues club, residential and a plaza. The development application includes these uses

and states that it complies with the maximum FSR for each use permitted under the site specific control in LEP 2000. However, this does not of itself mean, as submitted by the applicant, that the "level of traffic generation for the site is consistent with the inevitable consequence and reasonable expectations arising from compliance with the applicable planning controls". As the achievement of these limits is dependent upon the satisfaction of the objectives for the site in Schedule 1, Part 3 of LEP 2000. This is of relevance, given the matters discussed below in relation to the maximum FSR of the club use on the site.

- 103 The evidence before the Court raises sufficient doubt such that I am unable to conclude that the proposal would meet Objective 2(d) of Schedule 1, Part 3 to the LEP 2000. It is necessary that there be some measure as to whether the traffic generated by the development will have an acceptable impact on pedestrian or motor vehicle traffic on Darling Street, Waterloo Street and Victoria Road, Rozelle. While not explicitly stated, vehicular traffic would include public transport. In circumstances, where the existing road network is already congested and at overcapacity during peak periods there appears to be no relevant standard to apply. In particular, the intersection of Victoria Road/Darling Street already operates at level of service "F", which indicates that it is failing during peak periods. Furthermore, the modelling results are indicative of a saturated network where there are "volatile results". Given, that the measure of 10% was relevant in the Arup Report for the preparation of the planning controls, and in the absence of any adopted standard, I accept that it is also a relevant measure in the assessment of a development application that flows from the planning controls to determine whether the traffic generation would have an acceptable impact.
- 104 Similarly, given that Objective 2(d) refers specifically to Darling Street, Waterloo Street and Victoria Road, Rozelle, and that the preparation of the Arup Report also referred to the impact on five specific routes in this local area, it is relevant to assess the impact of the development on these five routes rather than on the wider network. If the 10% measure is applied the development results in "fairly significant impact on local intersections".
- 105 While the maximum traffic generation is below that in the Arup Report, this was based on 2007 traffic surveys and predicated on traffic management measures. Some of which have not been undertaken or are not proposed. Consequently, this would not be sufficient justification for the proposal. Operational benefits to the road network could be achieved through the removal of on street parking on Darling Street south of Victoria Road but these need to be balanced against the impacts to the existing shops and the vibrancy of the Rozelle Commercial Centre, discussed above.
- 106 Similarly, the proposition that the site will generate less traffic than was generated by the previous users of the Balmain Leagues Club does not justify that the impacts of the proposal are acceptable. Even, if the historical figure of 264 vt/hr is accepted, this occurred about 25 years ago in different traffic conditions.

107

TfNSW and RMS have not raised concerns about the traffic impacts of the proposal and the experts agree that matters such as egress and entry to the development off Victoria Road are acceptable as well as the impacts on the wider road network. However, for the reasons outlined above, there are concerns about the current application, which remain unresolved and therefore I am not satisfied that the proposal meets Objective 2(b) of Schedule 1, Part 3 to LEP 2000.

#### **Other matters**

- 108 For the reasons above, the development does not meet Objectives (b), (c) and (d) in cl 2 of Schedule 1, Part 3 in LEP 2000 and there is no power to grant consent and the appeal must fail. Given these findings and those below, it would not be appropriate to permit further amended plans due to the extent and uncertainty of changes that would be required. The Contentions included other matters that, although they are related the question of whether the objectives are met, are merit issues that are addressed separately below.

#### *Solar access and ventilation*

- 109 The urban design expert disagree on the proposal's compliance with the ADG requirements for solar access and cross ventilation.
- 110 Mr Thalys questioned whether a maximum of 15% of units would receive no direct sunlight between 9am-3pm in midwinter, as required under Objective 4A-1 and 4U-1 of the ADG (units E209, E309, E409, E509 and W606). Mr Koopman stated that in the current proposal E509 and E209 do comply but that E409, E509 and W606 do not comply but that with minor amendments to provide larger windows these three units would receive a "sliver" of sunlight and comply with the 15%. Mr Thalys supported the changes but, without details, he was not sure if it would comply and considers that there may be other changes that could increase solar access to the units. Particularly, as the footprint of the apartment towers occupies a small amount of a large unconstrained site, the development should therefore establish best practice.
- 111 Mr Thalys was also concerned about the lack of solar access to the plaza after midday in midwinter and its compliance with Objective 3D-4 of the ADG requirement for public open spaces that "solar access should be provided year round along with protection from strong winds". In Mr Thalys' opinion, if the West Tower was rotated slightly more solar access could be achieved in the residential apartments in the East Tower and the Plaza. Mr Koopman considered the site to be constrained and that the available solar access is a result of compliance with the height and setback controls in DCP 2000. Solar access is provided to at least 50% of the central plaza during the peak 9am-11am breakfast/morning coffee period. Solar access during mid-winter is also available to lesser extents between 11am and 1pm and after 3pm.
- 112 Mr Thalys considered that the proposal did not comply with the requirements for natural ventilation in Part 4B of the AGD. Whereas, Mr Koopman maintains that the development complies. The difference of opinion centred on compliance with Objective



4B-3 and the Design Criteria that “at least 60% of apartments are naturally cross ventilated in the first nine storeys of a building”. To address the traffic noise on Victoria Road, the units on the northern side of both residential towers need to be sealed to achieve the required acoustic performance and consequently there would be no cross ventilation to these units. Mr Koopman considers that these units should not have to comply with cross ventilation and that the window would not be fixed so the occupants could choose whether to open the windows to these units. Whereas, Mr Thalís considers that there would be a conflict between achieving acoustic privacy and cross ventilation that could be better addressed by other mechanisms such as a further setback of the towers from Victoria Road. Mr Thalís also considered that a number of units in the middle and south of the residential towers would not achieve cross ventilation.

## Findings

- 113 The two residential towers occupy only a small area of the podium and consequently are relatively unconstrained, except for the proximity to Victoria Road and potential acoustic impacts. There is conflict in the current design between compliance with acoustic criteria and cross ventilation as well minimal compliance with solar access to units and the Plaza. While the DCP proposes envelopes and setbacks, there is flexibility under s79C(3A) of the EPA Act for adjustments, particularly to the West Tower, to better achieve solar access objectives and the residential apartments should be able to achieve compliance with the cross ventilation requirements of the AGD.

## *Pedestrian Bridge*

- 114 The lift, lift landing and stairs for the pedestrian bridge on the northern side of Victoria Road are within land owned by council where owner’s consent has not been granted. The Council raised issues as to the operation of s39(2) of the LEC Act in relation to a class one appeal where the person or body whose decision is the subject of the appeal [JRPP] is not the owner of the land [council]. The parties agreed that the merits of the bridge should be addressed first. If the proposed development were found to be acceptable, but for the bridge, it could be deleted from the application. Alternatively, if the proposed development, including the bridge, were found to be acceptable, owner’s consent could be obtained, prior to consent being granted.
- 115 Council submits that regardless of the issue of owner’s consent, the pedestrian bridge should be refused on its merits.
- 116 Mr Thalís does not support a pedestrian bridge over Victoria Street for the reasons expressed by the DRP that “the easy connectivity and pedestrian amenity of an at grade crossing at Darling Street is essential for the shopping precincts on both sides of the intersection.” If there is to be a bridge, he considered it should be direct and perpendicular to Victoria Road and preferably connect to the Laneway to better facilitate access through the plaza and to Darling Street south. He was critical of the current curved design and splayed alignment, which he considered resulted in greater length and structure and would therefore be more visually prominent.

- 117 Mr Harding considered that DCP 2000 envisages a bridge with a ramp entering the site at grade to facilitate access to the site across Victoria Road. The proposed bridge is designed with steps and an elevator on the northern side of Victoria Street and results in the loss of the toilet block. It accesses the development on level 1 with only a narrow stair and lift access to the Plaza.
- 118 Mr Koopman considers that the single span and design of the bridge makes a "dynamic" contribution to the streetscape that will provide an appropriate connection to all the activities on the site. Although, he acknowledged that the stairs between Level 1 and the plaza could be widened to be a single rise "grand stair" The location of the bridge is consistent with the DCP and it would be inappropriate for it to connect with the Laneway as this would then compete with the Plaza. Mr Blythe acknowledged that the bridge involved the demolition of the toilet block and that its location was different to that in the DCP.

### Findings

- 119 The pedestrian bridge is an obligation not only under a VPA but also under DCP 2000. Therefore, if it is not required this should be addressed strategically by council through amendments to these documents. The proposed pedestrian bridge does not correspond exactly to the location shown in the DCP and there are issues with its design and the manner in which it arrives in the development that would require further consideration if consent were to be granted.

*Does the development promote the long term viability of the Balmain Leagues Club on the site, for the benefit of the local community?*

- 120 Section D1.4 of DCP 2000 includes a General Objective "To promote the long term viability of the Balmain Leagues Club on the site, for the benefit of the local community."
- 121 The planners relied on the contractual arrangements between the Balmain Leagues Club and the owner to demonstrate that the Objective in s D1.4 is met. In the Joint Report Mr Blythe states:

..he has viewed agreement for lease between the owners of the land and the Balmain Leagues Club. The agreement is understood to provide a lease on agreed commercial terms for 3x15 year terms at the option of the club. The agreement for lease is also understood to also contain a loan to the club for fitout purposes.

- 122 Mr Harding agreed that:

Subject to a review of this document that this would provide sufficient evidence to demonstrate that the DCP objective of 'promoting the long term viability of the Balmain Leagues Club' is achieved by the development.

- 123 In oral evidence, Mr Harding clarified that he had not viewed the Agreement to Lease. Mr Blythe said that he had read parts of the Agreement to Lease relating to the general arrangements between the Club and the owner. He was aware of the Settlement Deed but not of the details. He assumed that the Club would be able to lease the premises in the development and that this was an integral part of the design. He accepted that if this were not the case, the LEP would not be met. Even though the LEP permits a generic club use, the intent is that the club is specifically the Balmain Leagues Club.

- 124 The applicant's submissions referred to a press release from the Balmain Leagues Club dated 16 March 2016 to demonstrate the long term viability of the Club and made the following written submissions in relation to the contractual arrangement between the Club and the owner:

Exhibit M demonstrates that following completion of the construction of club premises, the Balmain Leagues Club has contractual rights for a lease pursuant to an executed Deed of Agreement for Lease dated 14 May 2010. The Lease is set out as Annexure B of the Deed of Agreement for Lease (page 25) with the Reference schedule identifying a term of 15 years with three further terms of 15 years (60 years in total).

Part 2 of Exhibit M includes a Deed of Settlement and Release dated 21 August 2014 where clause 3.2 provides that an Amended Agreement for Lease be adopted in place of the previous Agreement for Lease. The Amended Agreement for Lease (page 25 Deed of Settlement) is Annexure A to the Deed of Settlement. The Amended Agreement for lease has as its Annexure A, an Amended Lease which confirms a term of 15 years with three further terms of 15 years (60 years in total) (see page 7 of the Lease being Annexure A to the Agreement for Lease which is Annexure A to the Deed of Settlement and Release - August 2014 Amended lease).

It needs to be pointed out that the Deed of Settlement and Release at clause 10(a) and the Agreement of Lease at clause 2.2(b) each provide that if a satisfactory development consent has not been granted by the Development Consent Sunset date (29 November 2015), then the Landlord can terminate the deed. Importantly this provision was extinguished by the letter dated 23rd December 2015 (see Part 3 of Exhibit M) which provides that Rozelle Village Pty Ltd waives its entitlements to terminate the Amended Agreement for Lease as set out above. The outcome being that pursuant to clause 3.1 of the Agreement for Lease (as amended) the landlord must grant to Balmain Leagues Club Limited a lease which has a term of 15 years commencing 20 days after practical completion after the construction of the club premises with three further terms of 15 years (60 years in total). The Applicant remains committed to providing registered club floor space for the return of the Balmain Leagues Club and there is no evidence of any contrary position.

- 125 There was no disagreement that a lease with a term of up to 60 years is available to Balmain Leagues Club. Council, subject to certain reservations, accepted that based on the letter of 23 December 2015 (the letter) the owner has waived its rights of termination of the Amended Agreement for Lease. However, council raised concerns about the ability of the Balmain Leagues Club to enter into the lease given its financial position. Council referred to a newspaper article dated 14 November 2015, which refers to the Club's sale of the site for \$1 in 2009....and it still owes \$11m to the owner. The Recitals in the Deed of Release, which settles litigation between the owner and the Balmain Leagues Club and includes reference to a charge against the assets of the Club for money lent to it for the fit-out of the Club's alternate premises. Council also referred to the deficits in the financial accounts of the Club that have been filed with Australian Securities and Investment Commission (ASIC). Council recognised "that the Club may be able to trade out of its difficulties" but these "non-planning exigencies" may mean that despite the best intentions of the Club to return to the site, it may not be able to.
- 126 Council submits that the circumstances in which LEP 2000 and DCP were prepared are relevant, as the controls for the site are premised on the history of the use of the site by the Balmain Leagues Club and provide incentives to facilitate that continued use. Planning is not usually concerned about the user but rather the use (see *Jonah Pty Limited v Pittwater Council* (2006) 144 LGERA 408) and the zoning in LEP 2000 refers

to a generic "club" use. However, the genesis of the controls and the requirements of the DCP relate not just to a generic club but specifically to the Balmain Leagues Club and extend the principles in *Jonah*.

- 127 The applicant generally accepted the proposition that, while the Court would not normally concern itself with the user of a development, because of the way LEP 2000 was prepared and the requirement in DCP 2000 to promote the long term viability of the Balmain Leagues Club on the site, it is a valid planning consideration. Furthermore, to be satisfied that this development will be promoting the long term viability of the Club, the Court should be satisfied that the GFA provided for club use will be occupied by the Balmain Leagues Club for its long term viable usage.
- 128 Following questions from the Court, the parties commented on the Settlement Deed and Amended Agreement to Lease, which replaces the Agreement to Lease. Particularly, the changes between cl 3.2 in the Agreement to Lease and cl 3.2 in the Amended Agreement to Lease, whereby the owner can reduce the lettable area available to the club from 3650sqm to a minimum of 2000sqm.
- 129 The applicant submits that the obligation on the owner, in the Amended Agreement to Lease, is to provide sufficient floor space for the Balmain Leagues Club, which is shown in Exhibit A under the heading "Balmain Leagues Club August 2015 Altus Club Concept" (Club Concept) and this is what is on offer to the Club. In relation to the Club Concept, the applicant states:
- ...there has been quite a sophisticated attending to the manner in which the floor space that is to be offered to the Tigers will be utilised and the position is that the documents before the Court in exhibit M...demonstrate that the Tigers have available or will have available if the consent's granted the potential to occupy what we see here in Exhibit A for 60 years, and there is an obligation on whoever is the owner of the site to provide such floor space to the Tigers.
- 130 The submissions of the applicant were that what is shown in the Club Concept represents the 0.5:1 FSR permissible under LEP 2000 for the club component of the development. The applicant agreed that if the Balmain Leagues Club could not use the space allocated it would be "highly unlikely and illogical that the landlord would be able to find another club to occupy any space not taken up by the Balmain Leagues Club given that there is an obligation to have a club occupying the space". Any additional space not used for a club purpose would require a development application to change the use that may affect compliance with the permissible FSR under cl 4 of Schedule 1, Part 3 in LEP 2000 for other uses.

## Findings

- 131 The agreed position of the parties is that consideration of the Objective in sD1.4 of DCP 2000 "To promote the long term viability of the Balmain Leagues Club on the site, for the benefit of the local community" serves a "proper planning purpose". The applicant refers to the documents in Exhibit M, in particular the Amended Agreement to Lease and the Club Concept, as demonstrating that this objective of DCP 2000 is met. I do not accept this submission.
- 132 Section 3 of the Deed of Agreement for Lease dated 14 May 2010 relevantly includes:

### 3.1 Grant of Lease

Subject to satisfaction of the condition in clause 2 and provided there has been no termination under clause 14, the Landlord must grant the Lease to the Tenant on the Commencing Date and the Tenant must immediately accept the grant of the Lease.

### 3.2 Premises

(a) As at the date of this deed, the parties are incapable of determining the exact size of the Premises.

(b) The Tenant must advise the Landlord in writing as soon as practicable after the date of this deed (or prior to this deed if possible), the required Tenant's Business Area

(c) On and from the Commencing Date, the Tenant must:

(i) lease the Premises; and

(ii) sublease to the Landlord for \$1,00 per annum plus GST the Sublease Area on terms consistent with this Lease, excepting for rent which will be \$1.00 per annum.

(d) The Landlord will construct the Landlord's Works so that the Premises are as close as practicable to 3,650 square metres but in any event have not less an area than the area required by the Tenant under clause 3.2(b)

- 133 The Amended Agreement to Lease, which is Attachment A to the Deed of Settlement and Release dated 21 August 2014, replaced the Agreement to Lease and includes an amended cl 3. The changes between the Agreement to Lease and the Amended Agreement to Lease are shown below as strikeout for removed and underline for new. The amended cl 3 provides:

### 3.1 Grant of Lease

Subject to satisfaction of the condition in clause 2 and provided there has been no termination under clause 14, the Landlord or the Successor In Title must grant the Lease to the Tenant on the Commencing Date and the Tenant must immediately accept the grant of the Lease.

### 3.2 Premises

(a) As at the date of this deed, the parties are incapable of determining the exact size of the Premises and the number of car spaces.

(b) The Tenant must advise the Landlord in writing as soon as practicable after the date of this deed (or prior to this deed if possible), the required Tenant's Business Area.

(c) Notwithstanding clause 3.2(b), at any time up to the commencement of the Club Fit-Out under clause 5.3, the Landlord or the Successor In Title:

(i) may, by written notice to the Tenant, nominate a reduced Lettable Area for the Premises, provided that the Lettable Area nominated is not less than 2,000 square metres; and

(ii) must nominate the number of car spaces to be leased by the Tenant, being not less than the number required to be allocated to the Premises under any relevant planning instrument which relates to the Premises.

~~(b)(d)~~ If the Landlord or the Successor In Title make a nomination under clause 3.2(c), the Tenant agrees to promptly enter into a deed of variation of this deed under which the definition of Premises is amended to have the approximate Lettable Area nominated by the Landlord under clause 3.2(c).

~~(e)~~(e) On and from the Commencing Date, the Tenant must:

(i) lease the Premises; and

(ii) sublease to the Landlord for \$1.00 per annum plus GST the Sublease Area on terms consistent with this Lease, excepting for rent which will be \$1,00 per annum.

(f) The Landlord will construct the Landlord's Works so that the Premises are as close as practicable to 3,650 square metres, provided that if the Landlord or the Successor In Title make a nomination under clause 3.2(c), the Landlord will construct the Landlord's Works so that the Premises are as close as practicable to the nominated Lettable Area but in any event have a Lettable Area of not less an area than 2000 square metres the area required by the Tenant under clause 3.2(b).

134 The definitions in the Amended Agreement to Lease relevantly include:

**Lettable Area** means, in respect of the Premises, the Building or any part of them, the lettable area of the relevant area measured in accordance with the method of measurement then adopted by the Property Council of Australia for buildings or premises which are similar to the Premises.

**Premises** means a stratum lot or part thereof premises the subject of the Lease to be constructed on the Land or part thereof.

(a) comprising having a Lettable Area of between 2,000 square metres and approximately 3,650 square metres (subject to the terms of this deed;

(b) which is appropriate to use as club premises;

(c) meets the requirements, if any, of the Registered Clubs Act 1976 (NSW) with respect to size, access, location in a development and configuration;

(d) which includes a reasonably sized outside area for smoking purposes;

(e) which includes a separate entrance from any residential development constructed on the Land; and

(f) ~~the subject of the Landlord's Works and the subject of the Lease~~, which for the purpose of ~~the~~ calculation of the area Lettable Area of the Premises will exclude the existing area of approximately 500 square metres that is not taken into account in calculated FSR or such other area that is not taken into account in calculated FSR as the Parties agree.

**Sublease Area** means the difference between the area of the Premises and the Tenant's Business Area and must have direct access to the piazza area of Rozelle Village.

**Tenant's Business Area** means ~~the area that part of the Premises~~ required by the Tenant for the operation of the Tenant's Business on the ground floor of the Building.

135 Clause 3.2 in the Amended Agreement to Lease places an obligation on the owner to lease a minimum of 2000sqm of lettable area (this may not be the same amount as GFA), while the owner may lease up to 3,650sqm lettable area to the Balmain Leagues Club, there is no obligation to do so.

136 The Club Concept, which the applicant referred to as being the area that it was obliged to provide to the Balmain Leagues Club includes a Floor Area Schedule, which indicates the internal and external areas of the Club on Ground Level and First Floor. The internal areas (GFA) total about 2,700sqm. The plans lodged with the development application include GFA diagrams for the club, commercial, residential and retail uses. An additional use "ANC" is referenced in the diagrams but it is unclear what this relates to. Presumably it is "ancillary" uses, such as plant, that are common but how this is apportioned to each use is also unclear. No schedule of GFA accompanied the diagrams. Amended GFA diagrams were not provided with the amended plans but, as I understand, the GFA for each use and, consequently the FSR for each use and overall, did not change and remained at the maximum permissible.

137

It is unclear how the areas shown in the GFA diagrams relate to the following definition of GFA in LEP 2000. No submissions was made that an alternative definition, such as that in LEP 2013, would apply:

**Gross floor area** means the total area of a building's floorplates, measured between the outer edges of the outside walls or the centre line of any party wall, and includes mezzanines, attics, internal car parking spaces, garages, lofts and studios. It does not include projections outside the external walls of the building, paved areas, voids or basements used for car parking, where the car parking area does not protrude more than 1 metre above ground level.

- 138 The GFA diagrams do not include things such as lifts and ducts that are not excluded under the definition of GFA in LEP 2000, and it would appear should be included as GFA in the calculation of FSR.
- 139 GFA for each of the uses is also shown in the GFA diagrams for the basements, but again it is unclear how these areas relate to the definition of GFA. There also appears to be inconsistency between how similar areas are identified for different uses such as "water plant" on Basement 3 being shown as GFA for the club whereas the "water plant" on Basement 2 is shown as ANC, the CP exhaust on Level 1 is shown as club GFA, but presumably is for the whole car park, the retail and club loading area on Basement 1 are both shown as club GFA, as is part of the entry ramp to the car park off Waterloo Street and other unidentified areas, which appear to be circulation or left over space.
- 140 While GFA and the resultant FSR compliance were not raised as a contention in the proceedings, if the application were to be approved, the GFA and how the FSR is calculated for each use and overall would need to be clarified. However, the areas identified for the purpose of club use on ground level and first floor and those areas in the basement that can reasonably be included as club GFA in the basement, would appear to be less than the GFA and FSR attributed to the club ie 3658.5sqm in the development application and the FSR figures, which equate to the maximum 0.5:1 permissible under cl 4(d) of Schedule 1, Part 3 of LEP 2000. The LEP does not permit that, if the club utilises less than its permitted maximum, the excess can be used for another use.
- 141 The Amended Agreement to Lease and the Club Concept may demonstrate an obligation that at least 2000sqm of lettable area will be available for lease to the Club. Even if this is sufficient to promote the long term viability of the Balmain Leagues Club on the site, the proposal is based on 3658.5sqm of GFA being provided for use by the Balmain Leagues Club and this is the basis upon which the proceedings were held. Clearly if a lesser amount is required by Balmain Leagues Club or proposed to be offered to the Club, this does not justify the provision of more GFA in the development, which may be used for purposes other than to meet the requirements of the Balmain Leagues Club. Furthermore, if the Club requires a lesser amount of GFA, this could address some of the issues discussed above. In particular, a reduction in Club GFA/FSR may enable more flexibility in achieving ventilation and solar access to the units and solar access to the plaza and would require less parking that may better address the traffic impacts.

- 142 Conversely, if the full amount of permissible GFA is required by the Balmain Leagues Club, this should be clearly shown in the plans and specified in an Agreement to Lease, which links the amount of GFA (not lettable area for consistency), to be leased by the Balmain Leagues Club to that approved in any development consent. To do otherwise, may result in the need for a further development application, at a later stage, to change the approved club use to another use, which may consequently not comply with the FSR requirements for each use in the site specific LEP, particularly if the development was already built.

## Conclusion

- 143 The site specific controls in LEP 2000 require that consent may be granted to a mixed use development on the site but only if, in the opinion of the Court, certain objectives are met. Based on the evidence, the submissions of the parties and for the reasons set out in this Judgment, I have found that certain of these objectives are not met. In particular, the design of the proposal does not demonstrate that it will contribute to the vibrancy and prosperity of the Rozelle Commercial Centre or provide a high quality transition to the existing streetscape, nor does the evidence demonstrate that the proposal will have an acceptable impact on traffic around the site. For these reasons, consent must not be granted and the application must fail. Furthermore, there are matters of detail design, adequacy of solar access and cross ventilation, the design of the pedestrian bridge, questions in relation to the calculation of FSR for the club and the development overall and doubts about the area to be provided for use by the Balmain Leagues Club to promote its long term viability that would need to be addressed before any consent could be granted.

## ORDERS

- 144 The Court orders that:

- (1) The appeal is dismissed;
- (2) The development application (D/2015/438) for the demolition of existing buildings, remediation of the site and construction of a mixed use development including retail, commercial, club and residential uses at 138-152 and 154-156 Victoria Road, 697 and 699 Darling Street, and 1, 3, 5 and 7 Waterloo Street, Rozelle, is refused;
- (3) The exhibits, except Exhibit 6, are returned.

**Annelise Tuor**

**Commissioner of the Court**

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## Amendments

04 October 2016 - Amendment to date in paragraph 21.

28 September 2016 - Amendment to representation



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Decision last updated: 04 October 2016

