



Land and Environment Court

New South Wales

Case Name: Lilac Pty Ltd v City of Ryde Council

Medium Neutral Citation: [2021] NSWLEC 1135

Hearing Date(s): 27-29 January and 1 February 2021

Date of Orders: 23 March 2021

Decision Date: 23 March 2021

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
In respect of the Concept Plan appeal (proceedings no. 2019/25398):
(1) The Applicant's written request to justify the contravention of cl 4.3 of the Ryde Local Environmental Plan 2014 pursuant to cl 4.6 of the Ryde Local Environmental Plan 2014 is upheld.
(2) The appeal is upheld.
(3) Concept Development approval is granted to Development Application LDA/2018/0223 for a concept development application pursuant to s 4.22 (Concept Development Applications) of the Environmental Planning and Assessment Act 1979 seeking Concept Plan approval for a mixed use development at 20 Waterview Street, Putney, subject to the conditions of consent at Annexure 'A'.
(4) All exhibits are returned, except for Exhibits A, C, D, E, F, G, H, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, AM, AN, AO, AP, AQ, AR, AS and BD.
In respect of the Demolition appeal (proceedings no. 2019/254350):
(1) The appeal is upheld.
(2) Development consent is granted to Development Application No. LDA/2019/0172 for the part demolition

of an existing boatshed and ancillary structures on the site, the removal of trees and remediation works at 20 Waterview Street, Putney, subject to the conditions of consent at Annexure 'B'.

(3) All exhibits are returned, except for Exhibits X, AB, AC, AD, AE, AF, AG and AH.

Catchwords:

DEVELOPMENT APPLICATION – s 4.22 Concept Development Applications – Stage 1 development application – Sydney Harbour Catchment Strategic Foreshore Site – height exceedance – clause 4.6 written request – Sydney Harbour foreshore walk – cultural heritage significance – impact on heritage significance of item – adaptive reuse

Legislation Cited:

Architects Act 2003
Biodiversity Conservation Act 2016
Environmental Protection Biodiversity Conservation Act 1999 (Cth)
Environmental Planning and Assessment Act 1979 ss 4.15, 4.22, 4.23
Environmental Planning and Assessment Regulation 2000 cl 50
Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 Sch 1 cl 95
Heritage Act 1977
Interpretation Act 1987
Land and Environment Court Act 1979 s 39
National Parks and Wildlife Act 1974 ss 84, 90J
Ryde Local Environmental Plan 2014 cll 2.5, 4.3, 4.6, 5.10, 6.1, 6.5, 6.6, Sch 1 cl 17
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Coastal Management) 2018
State Environmental Planning Policy (Infrastructure) 2007
State Environmental Planning Policy No 55 – Remediation of Land cl 7
State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development
State Environmental Planning Policy (State and Regional Development) 2011

	Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 cl 2, 6, 7, 12, 13, 14, 15, 20, 22, 23, 25, 26, 41, 44, 45, 46, 49, 52, 53, 54, 55, 57, 58, 59
Cases Cited:	Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118
Texts Cited:	Apartment Design Guide The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 2013 Ryde Development Control Plan 2014 Sydney Harbour Water Foreshore and Waterways Area Development Control Plan 2005
Category:	Principal judgment
Parties:	Lilac Pty Ltd (Applicant) City of Ryde Council (Respondent)
Representation:	Counsel: I Hemmings SC with J Reid (Applicant) H Irish (Respondent) Solicitors: Pikes & Verekers (Applicant) Hall & Wilcox (Respondent)
File Number(s):	2019/25398 and 2019/254350
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** In this matter, the Applicant, Lilac Pty Ltd, brings an appeal under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by the City of Ryde Council (the Respondent) of Development Application LDA/2018/0223 for a concept development application pursuant to s 4.22 (Concept Development Applications) of the EPA Act seeking Concept Plan approval for a mixed use development at 20 Waterview Street, Putney (the site).
- 2 The proposal for the site ('Concept Plan Appeal') comprises three development components, including:

- (1) The adaptive reuse of an existing boatshed for marine related businesses and services, a food and drink premises and 19 dwellings;
 - (2) 18 x three storey townhouses fronting Waterview Street;
 - (3) A three storey residential flat building containing 33 units with basement parking. It is proposed to establish building envelopes to accommodate up to 70 dwellings (inclusive of those within the boatshed).
- 3 The proceedings also seek to appeal the deemed refusal by the Respondent of a Stage 2 Development Application No. LDA/2019/0172 for part demolition of an existing boatshed and ancillary structures on the site, the removal of trees and remediation works ('Demolition appeal').
- 4 The parties agree to the joinder of issues in both the Concept Plan appeal and Demolition Appeal which are now heard together. Together I will refer to the appeals as the 'Concept development application'.

The site and its context

- 5 The site has some historical significance for the layers of history represented on and near the site including evidence of Aboriginal occupation, early convict enterprise and mid-to-late 20th century maritime operations.
- 6 The site is an irregularly shaped parcel of land located on the northern foreshore of the Parramatta River, roughly mid way between the Kissing Point ferry wharf, and the Ryde Bridge.
- 7 The site is legally known as Lot 1, DP 430647, Lot 1, DP 70489, Lot 2, DP 70488 and Lots 440–447, DP 15224, located at No. 20 Waterview Street, Putney and has a combined area of 15,870m².
- 8 The site is currently dominated by a large existing boatshed that is surrounded by a concrete hardstand area, jetties, ancillary buildings and a slipway.
- 9 Development in the local area is predominantly low density residential, comprising detached dwellings of 1 and 2 storeys in height.
- 10 Immediately adjoining the site to the south-east is Bennelong Park, beyond which is Kissing Point Park and, beyond that, the Kissing Point ferry wharf.

- 11 Immediately adjoining the site to the north-west is, firstly, a parcel of land identified as Crown land that is generally referred to as 'overgrown'. To the north-west of this parcel of land is land known as Settlers Park.
- 12 At the commencement of proceedings, I attended the site along with the legal representatives and those experts identified by the parties during earlier directions hearing with the exception of Dr Tim Owen who was unavailable and I granted leave to the Respondent for Mr Paul Bu to attend in Dr Owen's place.
- 13 In the company of the same, I was taken on site to view the interior and exterior of the existing boatshed, including various additions that are the subject of expert evidence, the existing seawall that is agreed to be degraded, the concrete hardstand, ancillary buildings and the like.
- 14 Following a view of the site itself, those attending the onsite view walked in a south-easterly direction to view the site from certain locations on Waterview Street, Bennelong Park and parts of Kissing Point Park as far as a sculpture I understand to be known as the Snapper fish wind sculptures.
- 15 After this, I was taken to Settlers Park to view the site, and most notably the existing boatshed, from a high point to the north-west of the site.

Expert evidence

- 16 The Court was assisted by experts in a number of disciplines who conferred prior to the commencement of the hearing.

Discipline	Applicant	Respondent
Town planning	Mr Ben Craig	Mr Jeff Mead
Urban Design	Mr Brian McDonald	Mr Paul Bu
Built Heritage	Mr Brian McDonald	Ms Lisa Trueman
Archaeological Heritage	Ms Natalie Vinton	Dr Tim Owen

Aboriginal Heritage	Ms Natalie Vinton	Dr Tim Owen
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- 17 While a number of joint expert reports were prepared, oral evidence was required only from the town planning, urban design and heritage experts during the hearing.

Public submissions

- 18 Public submissions are contained in Exhibit 17, behind tabs 36-52, and may be broadly summarised as follows:

- The capacity of local roads and the provision for on-street parking are currently inadequate, and will be worsened should the proposal proceed.
- The area will lose parkland and the landscape amenity currently enjoyed, particularly from properties in Waterview Street.
- Night time use of the foreshore is often a cause of nuisance, and will be worsened should the proposal proceed.
- The proposal for apartments and townhouses will result in built form that is incompatible with the existing character of the local area, and introduce residents unlikely to share the current sense of community.
- The extent of archaeological investigation is inadequate and the likelihood of discovering more artefacts is greater than suggested by the Applicant's expert.
- A total of 70 dwellings on the site will exceed the capacity of infrastructure in the local area.

Planning framework

Environmental Planning and Assessment Act 1979

- 19 The Applicant seeks concept development approval pursuant to s 4.22 of the EPA Act, which relevantly provides:

4.22 Concept development applications

...

(1) For the purposes of this Act, a *concept development application* is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for the site or for separate parts of the site are to be the subject of a subsequent development application or applications.

(2) In the case of a staged development, the application may set out detailed proposals for the first stage of development.

(3) A development application is not to be treated as a concept development application unless the applicant requests it to be treated as a concept development application.

(4) If consent is granted on the determination of a concept development application, the consent does not authorise the carrying out of development on any part of the site concerned unless—

(a) consent is subsequently granted to carry out development on that part of the site following a further development application in respect of that part of the site, or

(b) the concept development application also provided the requisite details of the development on that part of the site and consent is granted for that first stage of development without the need for further consent.

The terms of a consent granted on the determination of a concept development application are to reflect the operation of this subsection.

(5) The consent authority, when considering under section 4.15 the likely impact of the development the subject of a concept development application, need only consider the likely impact of the concept proposals (and any first stage of development included in the application) and does not need to consider the likely impact of the carrying out of development that may be the subject of subsequent development applications.

- 20 The Applicant seeks concept development approval in lieu of a site-specific development control plan as is permitted by subs 4.23(2) of the EPA Act which relevantly provides:

4.23 Concept development applications as alternative to DCP required by environmental planning instruments

...

(2) However, if an environmental planning instrument requires the preparation of a development control plan before any particular or kind of development is carried out on any land, that obligation may be satisfied by the making and approval of a concept development application in respect of that land.

Note—

Section 3.44(5) also authorises the making of a development application where the relevant planning authority refuses to make, or delays making, a development control plan.

(3) Any such concept development application is to contain the information required to be included in the development control plan by the environmental planning instrument or the regulations.

- 21 It is relevant to record here that provisions in Part 4 of the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Sydney Harbour SREP) require the preparation of a master plan.
- 22 It is agreed by the parties that the savings provision at cl 95 of Schedule 1 of the Environmental Planning and Assessment (Savings, Transitional and Other Provisions) Regulation 2017 (EPA Savings Regulation), provides that the

reference to a master plan at cl 95(3) may be treated as a 'DCP' for the purposes of the Act.

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

- 23 The site is identified as a Strategic Foreshore Site on the Strategic Foreshore Sites Map (Exhibit 18, tab 23, Sheet 16), which is incorporated into the Sydney Harbour SREP by operation of cl 6 which refers to those maps in Schedule 1.
- 24 The Sydney Harbour SREP applies, at cl 7(2), in the event of an inconsistency between it and any other environmental planning instrument.
- 25 The Sydney Harbour SREP contains, at Part 2, objectives (cl 12), and planning principles for land within the Sydney Harbour Catchment (at cl 13) which the Respondent identifies to include, relevantly:
- ...
- (f) development that is visible from the waterways or foreshores is to maintain, protect and enhance the unique visual qualities of Sydney Harbour,
- (g) the number of publicly accessible vantage points for viewing Sydney Harbour should be increased,
- ...
- (l) development is to avoid or minimise disturbance of acid sulfate soils in accordance with the Acid Sulfate Soil Manual, as published in 1988 by the Acid Sulfate Soils Management Advisory Committee.
- 26 The site is within the Foreshore and Waterways Areas Map (Exhibit 18, tab 23, Sheet 1 of 5).
- 27 Planning principles applicable to Foreshore and Waterway Areas, at cl 14 of the Sydney Harbour SREP, provide relevantly:
- (a) development should protect, maintain and enhance the natural assets and unique environmental qualities of Sydney Harbour and its islands and foreshores,
- (b) public access to and along the foreshore should be increased, maintained and improved, while minimising its impact on watercourses, wetlands, riparian lands and remnant vegetation,
- (c) access to and from the waterways should be increased, maintained and improved for public recreational purposes (such as swimming, fishing and boating), while minimising its impact on watercourses, wetlands, riparian lands and remnant vegetation,
- (d) development along the foreshore and waterways should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands and foreshores,

...

(f) public access along foreshore land should be provided on land used for industrial or commercial maritime purposes where such access does not interfere with the use of the land for those purposes,

...

- 28 The site is identified as Item No. 46 'Naval Refit Centre, Waterview Street Putney' in Schedule 4 Heritage Items of the Sydney Harbour SREP.
- 29 Planning principles applicable to heritage conservation, at cl 15 of the Sydney Harbour SREP are in the following terms:
 - (a) Sydney Harbour and its islands and foreshores should be recognised and protected as places of exceptional heritage significance,
 - (b) the heritage significance of particular heritage items in and around Sydney Harbour should be recognised and conserved,
 - (c) an appreciation of the role of Sydney Harbour in the history of Aboriginal and European settlement should be encouraged,
 - (d) the natural, scenic, environmental and cultural qualities of the Foreshores and Waterways Area should be protected,
 - (e) significant fabric, settings, relics and views associated with the heritage significance of heritage items should be conserved,
 - (f) archaeological sites and places of Aboriginal heritage significance should be conserved.
- 30 Division 2 of the Sydney Harbour SREP contains matters which are, by operation of cl 20, to be taken into consideration by consent authorities before granting consent to development under Part 4 of the EPA Act.
- 31 Clause 22 requires public access to, and use of, foreshores and waterways by consideration of the following:
 - (a) development should maintain and improve public access to and along the foreshore, without adversely impacting on watercourses, wetlands, riparian lands or remnant vegetation,
 - (b) development should maintain and improve public access to and from the waterways for recreational purposes (such as swimming, fishing and boating), without adversely impacting on watercourses, wetlands, riparian lands or remnant vegetation,
 - (c) if foreshore land made available for public access is not in public ownership, development should provide appropriate tenure and management mechanisms to safeguard public access to, and public use of, that land,
 - (d) the undesirability of boardwalks as a means of access across or along land below the mean high water mark if adequate alternative public access can otherwise be provided,

- (e) the need to minimise disturbance of contaminated sediments.
- 32 Clause 23 requires the 'working harbour' to be maintained, and the following matters are to be taken into consideration:
- (a) foreshore sites should be retained so as to preserve the character and functions of a working harbour, in relation to both current and future demand,
 - (b) consideration should be given to integrating facilities for maritime activities in any development,
 - (c) in the case of development on land that adjoins land used for industrial and commercial maritime purposes, development should be compatible with the use of the adjoining land for those purposes,
 - (d) in the case of development for industrial and commercial maritime purposes, development should provide and maintain public access to and along the foreshore where such access does not interfere with the use of the land for those purposes.
- 33 Clause 25 requires the scenic quality of the foreshore and waterways to be maintained, protected and enhanced by taking into consideration the following:
- (a) the scale, form, design and siting of any building should be based on an analysis of—
 - (i) the land on which it is to be erected, and
 - (ii) the adjoining land, and
 - (iii) the likely future character of the locality,
 - (b) development should maintain, protect and enhance the unique visual qualities of Sydney Harbour and its islands, foreshores and tributaries,
 - (c) the cumulative impact of water-based development should not detract from the character of the waterways and adjoining foreshores.
- 34 Clause 26 requires views to be maintained, protected and enhanced by taking into consideration the following:
- (a) development should maintain, protect and enhance views (including night views) to and from Sydney Harbour,
 - (b) development should minimise any adverse impacts on views and vistas to and from public places, landmarks and heritage items,
 - (c) the cumulative impact of development on views should be minimised.
- 35 Part 4 of the Sydney Harbour SREP deals with Strategic Foreshore sites. In particular, the requirement for, and preparation and nature of master plans.
- 36 Clause 41 sets out requirements for master plans, and relevantly provides:
- (1) Development consent must not be granted for the carrying out of development on a strategic foreshore site unless—

- (a) there is a master plan for the site, and
- (b) the consent authority has taken the master plan into consideration.

37 Clause 44 states that a masterplan is a document that firstly outlines provisions relating to development of land to which the master plan applies, and that explains how the principles in Part 2 and in any other relevant environmental planning instrument are addressed.

38 A master plan must be prepared for the whole of the site, according to subcl 45(2), where the site is a strategic foreshore site and for which the relevant council is the appropriate authority unless the Minister directs that the master plan should be prepared for only part of the site.

39 Clause 46 provides, at subcl (1), that a draft master plan may be prepared by or on behalf of the owner of the land and, at subcl (2) is to be prepare following consultation with the appropriate authority and is to illustrate and explain the following:

- (a) design principles drawn from an analysis of the site and its context,
- (b) phasing of development,
- (c) distribution of land uses including foreshore public access and open space,
- (d) pedestrian, cycle and motor vehicle access and circulation networks,
- (e) parking provision,
- ...
- (g) infrastructure provision,
- (h) building envelopes and built form controls,
- (i) heritage conservation (including the protection of archaeological relics and places, sites and objects of Aboriginal heritage significance), implementing the guidelines set out in any applicable conservation policy or conservation management plan,
- (j) remediation of the site,
- (k) provision of public facilities,
- (l) provision of open space, its function and landscaping,
- (m) the impact on any adjoining land that is reserved under the *National Parks and Wildlife Act 1974*,
- (n) protection and enhancement of the natural assets of the site and adjoining land,

(o) protection and enhancement of the waterway (including water quality) and any aquatic vegetation on or adjoining the site (such as seagrass, saltmarsh, mangroves and algal communities).

- 40 The Applicant has set out, in the Statement of Environmental Effects at Exhibit A, Tab 3, how the provisions at cl 46 of the Sydney Harbour SREP have been addressed.
- 41 Clause 52 provides that Part 5 of the Sydney Harbour SREP is to be taken into consideration before the grant of consent for the purposes of Part 4 of the EPA Act.
- 42 Part 5 of the Sydney Harbour SREP deals with Heritage provisions, including objectives that are in the following terms:

53 Objectives

(1) The objectives of this plan in relation to heritage are—

- (a) to conserve the environmental heritage of the land to which this Part applies, and
- (b) to conserve the heritage significance of existing significant fabric, relics, settings and views associated with the heritage significance of heritage items, and
- (c) to ensure that archaeological sites and places of Aboriginal heritage significance are conserved, and
- (d) to allow for the protection of places which have the potential to have heritage significance but are not identified as heritage items.

...

- 43 By virtue of the heritage status afforded at [28], cl 54 provides that Division 2, Protection of heritage items, applies to the site.
- 44 Clause 55 relevantly provides:

55 Protection of heritage items

(1) The following development may be carried out only with development consent—

- (a) demolishing or moving a heritage item,
- (b) altering a heritage item by making structural or non-structural changes to its exterior, including changes to its detail, fabric, finish or appearance,
- (c) altering a heritage item by making structural changes to its interior,
- (d) disturbing or damaging a place of Aboriginal heritage significance or an Aboriginal object,

(e) erecting a building on, or subdividing, land on which a heritage item is located.

...

(4) Before granting development consent as required by this clause, the consent authority must assess the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage item concerned.

(5) The assessment must include consideration of a heritage impact statement that addresses at least the following issues (but is not to be limited to assessment of those issues, if the heritage significance concerned involves other issues)—

(a) the heritage significance of the item as part of the environmental heritage of the land to which this Part applies, and

(b) the impact that the proposed development will have on the heritage significance of the item and its setting, including any landscape or horticultural features, and

(c) the measures proposed to conserve the heritage significance of the item and its setting, and

(d) whether any archaeological site or potential archaeological site would be adversely affected by the proposed development, and

(e) the extent to which the carrying out of the proposed development would affect the form of any historic subdivision.

(6) The consent authority may also decline to grant development consent until it has considered a conservation management plan, if it considers the development proposed should be assessed with regard to such a plan.

45 Division 3 of the Sydney Harbour SREP applies to give protection to places of potential heritage significance. While it is commonly held that an aboriginal object was found on the site, the site has not been declared an Aboriginal place as defined by s 84 of the *National Parks and Wildlife Act 1974*.

46 Clause 57 of the Sydney Harbour SREP sets out matters that must be considered, or of which the consent authority, or the Court on appeal, must be satisfied in respect of Aboriginal heritage.

47 As the site is identified as an archaeological site in the Ryde Local Environmental Plan 2014 (RLEP), cl 58 of the Sydney Harbour SREP relevantly provides:

(1) Before granting development consent for development that will be carried out on an archaeological site or a potential archaeological site of a relic that has non-Aboriginal heritage significance (whether or not it is, or has the potential to be, also the site of a relic of Aboriginal heritage significance), the consent authority—

- (a) must consider a heritage impact statement explaining how the proposed development will affect the conservation of the site and any relic known or reasonably likely to be located at the site, and
- (b) must be satisfied that any necessary excavation permit required by the *Heritage Act 1977* has been granted.

...

(3) This clause does not apply—

- (a) if the proposed development does not involve disturbance of below-ground deposits, and if the consent authority is of the opinion that the heritage significance of any above-ground relics would not be adversely affected by the proposed development, or
- (b) if the proposed development is integrated development by virtue of—
 - (i) the requirement for consent under section 90 of the *National Parks and Wildlife Act 1974*, or
 - (ii) the requirement for approval under section 57 of the *Heritage Act 1977*.

48 As the subject site is in the vicinity of Kissing Point Park, being an item of local heritage significance, cl 59 of the Sydney Harbour SREP applies, and relevantly provides:

59 Development in vicinity of heritage items

- (1) Before granting development consent to development in the vicinity of a heritage item, the consent authority must assess the impact of the proposed development on the heritage significance of the heritage item.
- (2) This clause extends to development—
 - (a) that may have an impact on the setting of a heritage item, for example, by affecting a significant view to or from the item or by overshadowing, or
 - (b) that may undermine or otherwise cause physical damage to a heritage item, or
 - (c) that will otherwise have any adverse impact on the heritage significance of a heritage item.
- (3) The consent authority may refuse to grant development consent unless it has considered a heritage impact statement that will help it assess the impact of the proposed development on the heritage significance, visual curtilage and setting of the heritage item.
- (4) The heritage impact statement should include details of the size, shape and scale of, setbacks for, and the materials to be used in, any proposed buildings or works and details of any modification that would reduce the impact of the proposed development on the heritage significance of the heritage item.

49 Clause 63 of the Sydney Harbour SREP requires that the Court consider wetland protection matters prior to the grant of development consent. Those

matters are addressed in the General Ecology Report prepared by Cardno dated 8 November 2018 (Exhibit A, Tab 17) and I record here that I am satisfied, based on the likelihood of occurrence and associated impact assessment for listed ecology, that no threatened species, population or community listed under the *Biodiversity Conservation Act 2016* or the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) would likely be significantly impacted by the project.

Ryde Local Environmental Plan 2014

- 50 The site is located within the IN4 Working Waterfront zone, according to the RLEP and adjoins land that is zoned RE1 Public Recreation.
- 51 For completeness, I record here that the Parramatta River is identified in the Sydney Harbour SREP as a W1 Maritime Waters zone.
- 52 While all forms of residential accommodation are prohibited according to the land use table in the IN4 zone, the Applicant relies on the additional uses that apply to the site by operation of cl 2.5 of the RLEP which calls up Schedule 1 of the RLEP, in which cl 17 provides for site-specific land use in the following terms:

17 Use of certain land at 20 Waterview Street, Putney

(1) This clause applies to land at 20 Waterview Street, Putney, being Lot 1, DP 430647, Lot 1, DP 70489, Lot 2, DP 70488 and Lots 440–447, DP 15224.

(2) Development for the purposes of attached dwellings, business premises, food and drink premises, kiosks, marinas, multi dwelling housing, residential flat buildings and shops is permitted with development consent if—

(a) no more than 70 dwellings will be erected on the land to which this clause applies, and

(b) no more than 19 dwellings will be erected on the land identified as “Area 1” on the Key Sites Map, and

(c) a site-specific development control plan is prepared and provides for the retention of trees on Waterview Street, the impact on, and improvements to, the public domain, including the foreshore, and appropriate building setbacks from the foreshore.

- 53 The objectives of the IN4 zone are in the following terms:

- To retain and encourage waterfront industrial and maritime activities.
- To identify sites for maritime purposes and for activities that require direct waterfront access.

- To ensure that development does not have an adverse impact on the environmental and visual qualities of the foreshore.
- To encourage employment opportunities.
- To minimise any adverse effect of development on land uses in other zones.

54 Clause 4.3 of the RLEP identifies three different maximum permissible heights for buildings on the site, as re-produced below. In general terms, the area marked 'N2' permits a height of 14m in the vicinity of the existing boatshed; the area marked 'L' applies a height of 11.5m to the portion of the site on which the residential flat building is proposed; and the area marked 'J' applies a height of 9.5m where townhouse development is proposed fronting Waterview Street.



Figure 1- Height of buildings Map re-produced from Ryde Local Environmental Plan 2014

- 55 The proposed residential flat building exceeds the height permitted in the area marked 'L', and the Applicant relies upon a written request prepared in accordance with cl 4.6 of the RLEP.
- 56 The site is identified in Schedule 5, Part 1 of the RLEP as an item of local heritage significance being identified as the 'Former Squire's Brewery and Halvorsen's Boat Yard' (item 327).
- 57 The site is also identified in Schedule 5, Part 3 of the RLEP as an archaeological site, being identified in an identical manner to the Part 1 entry.

- 58 Whether the site adjoins, or is in the vicinity of, an item of local heritage significance is disputed. However, it is commonly held that Kissing Point Park (former boat slips) and Bennelong Park is identified in Schedule 5, Part 1 of the RLEP.
- 59 By virtue of the listing in Schedule 5 of the RLEP, the provisions of cl 5.10 of the RLEP relevantly provide:

5.10 Heritage conservation

...

(1) **Objectives** The objectives of this clause are as follows—

- (a) to conserve the environmental heritage of Ryde,
- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,
- (c) to conserve archaeological sites,
- (d) to conserve Aboriginal objects and Aboriginal places of heritage significance.

(2) **Requirement for consent** Development consent is required for any of the following—

- (a) demolishing or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance)—
 - (i) a heritage item,
 - (ii) an Aboriginal object,
 - (iii) a building, work, relic or tree within a heritage conservation area,
- (b) altering a heritage item that is a building by making structural changes to its interior or by making changes to anything inside the item that is specified in Schedule 5 in relation to the item,
- (c) disturbing or excavating an archaeological site while knowing, or having reasonable cause to suspect, that the disturbance or excavation will or is likely to result in a relic being discovered, exposed, moved, damaged or destroyed,
- (d) disturbing or excavating an Aboriginal place of heritage significance,
- (e) erecting a building on land—
 - (i) on which a heritage item is located or that is within a heritage conservation area, or
 - (ii) on which an Aboriginal object is located or that is within an Aboriginal place of heritage significance,

...

(4) **Effect of proposed development on heritage significance** The consent authority must, before granting consent under this clause in respect of a heritage item or heritage conservation area, consider the effect of the proposed development on the heritage significance of the item or area concerned. This subclause applies regardless of whether a heritage management document is prepared under subclause (5) or a heritage conservation management plan is submitted under subclause (6).

...

(6) **Heritage conservation management plans** The consent authority may require, after considering the heritage significance of a heritage item and the extent of change proposed to it, the submission of a heritage conservation management plan before granting consent under this clause.

(7) **Archaeological sites** The consent authority must, before granting consent under this clause to the carrying out of development on an archaeological site (other than land listed on the State Heritage Register or to which an interim heritage order under the *Heritage Act 1977* applies)—

- (a) notify the Heritage Council of its intention to grant consent, and
- (b) take into consideration any response received from the Heritage Council within 28 days after the notice is sent.

(8) **Aboriginal places of heritage significance** The consent authority must, before granting consent under this clause to the carrying out of development in an Aboriginal place of heritage significance—

- (a) consider the effect of the proposed development on the heritage significance of the place and any Aboriginal object known or reasonably likely to be located at the place by means of an adequate investigation and assessment (which may involve consideration of a heritage impact statement), and
- (b) notify the local Aboriginal communities, in writing or in such other manner as may be appropriate, about the application and take into consideration any response received within 28 days after the notice is sent.

60 Clause 6.1 of the RLEP deals with Acid Sulfate Soils, however as the Concept development application does not seek consent for works, which is the subject of a future Stage 2 development application, the provision does not apply. That said, the site contains Class 4 Acid Sulfate Soil pursuant to the relevant map and an Acid Sulfate Soil Management Plan is in evidence.

61 Clause 6.5 of the RLEP applies limits on development on foreshore area, in the following terms:

(1) The objective of this clause is to ensure that development in the foreshore area will not impact on natural foreshore processes or affect the significance and amenity of the area.

(2) Development consent must not be granted for development on land in the foreshore area except for the following purposes—

- (a) the extension, alteration or rebuilding of an existing building wholly or partly in the foreshore area,
- (b) the erection of a building in the foreshore area, if the levels, depth or other exceptional features of the site make it appropriate to do so,
- (c) boat sheds, sea retaining walls, wharves, slipways, jetties, waterway access stairs, swimming pools, fences, cycleways, walking trails, picnic facilities or other recreation facilities (outdoors).

(3) Development consent must not be granted under this clause unless the consent authority is satisfied that—

- (a) the development will contribute to achieving the objectives for the zone in which the land is located, and
- (b) the appearance of any proposed structure, from both the waterway and adjacent foreshore areas, will be compatible with the surrounding area, and
- (c) the development will not cause environmental harm such as—
 - (i) pollution or siltation of the waterway, or
 - (ii) an adverse effect on surrounding uses, marine habitat, wetland areas, fauna and flora habitats, or
 - (iii) an adverse effect on drainage patterns, and
- (d) the development will not cause congestion or generate conflict between people using open space areas or the waterway, and
- (e) opportunities to provide continuous public access along the foreshore and to the waterway will not be compromised, and
- (f) any historic, scientific, cultural, social, archaeological, architectural, natural or aesthetic significance of the land on which the development is to be carried out and of surrounding land will be maintained, and
- (g) in the case of development for the alteration or rebuilding of an existing building wholly or partly in the foreshore area, the alteration or rebuilding will not have an adverse impact on the amenity or aesthetic appearance of the foreshore, and
- (h) sea level rise or change of flooding patterns as a result of climate change has been considered.

62 Clause 6.6 of the RLEP relevantly provides:

6.6 Environmental sustainability

- (1) The objective of this clause is to ensure that development on land in a business or industrial zone embraces principles of quality urban design and is consistent with principles of best practice environmentally sensitive design.
- (2) Development consent must not be granted to development on land in a business or industrial zone if the development is 1,500 square metres in gross floor area or greater unless the consent authority is satisfied that the development has regard to the following—

- (a) water demand reduction, including water efficiency, water recycling and minimisation of potable water usage,
- (b) energy demand reduction, including energy generation, use of renewable energy and reduced reliance on mains power,
- (c) indoor environmental quality, including daylight provision, glare control, increased outside air rates, thermal comfort,
- (d) a reduction in new materials consumption and use of sustainable materials, including recycled content in concrete, sustainable timber and PVC minimisation,
- (e) emissions reduction, including reduced flow to sewer and light pollution,
- (f) transport initiatives to reduce car dependence such as providing cycle facilities, car share and small vehicle parking spaces,
- (g) land use and ecology, including reduced topsoil removal and contaminated land reclamation.

The height standard is exceeded

- 63 As the residential flat building exceeds the height of building development standard at cl 4.3 of the RLEP, the Applicant relies upon a written request pursuant to cl 4.6 of the RLEP, authored by Mr Chris Forrester of Ethos Urban dated 24 September 2020 (written request) (Exhibit Q).
- 64 I note here that the town planning and urban design experts record their agreement that, from a planning and urban design perspective, the exceedance of the height standard is acceptable (Exhibit 23, par 11).
- 65 However, it is also the agreed position of the same experts in par 12, that there are, or may be, matters of interest to the heritage experts arising from the exceedance of the height standard.
- 66 I record here that Ms Irish, counsel for the Respondent, sought leave to cross examine the town planning and urban design experts on the nature of their agreement in respect of the written request, on the grounds that the Court is not bound by agreement between experts and that it is for the Court to reach an opinion of satisfaction.
- 67 I also record the objection of the Applicant to the Respondent's application for leave on the grounds that efficient disposal of proceedings by the Court is facilitated by 'ruling a line under' what is the subject of agreement.

- 68 I declined the Respondent's application to cross examine the town planning and urban design experts on two grounds:
- (1) Firstly, on the basis of the clear and unambiguous language at par 11 that records agreement between the experts was formed on the basis of particular amendments described by the experts as a "reduction in height of the residential flat building as shown in the updated Architectural Plans".
 - (2) Secondly, I do not understand the reference to heritage issues in par 12 of the joint report to disturb the agreement of the town planning and urban design experts. Instead, I understand the statement to record that there is a "heritage aspect" to the contention in respect of height exceedance. For this reason, I consider the matter discrete to the heritage experts to whom questions could be appropriately put, and not to the town planning or urban design experts who have identified the particular aspect as being outside their expertise.
- 69 That said, I also directed that the Respondent is not prevented from making any and all relevant submissions as to the written request.
- 70 While I accept the agreement of the planning and urban design experts, cl 4.6 of the RLEP requires that a consent authority, or the Court on appeal, first consider a written request and secondly, be satisfied in respect of those matters set out at cl 4.6(4)(a) of the RLEP.
- 71 In doing do, cl 4.6 of the RLEP provides the Court with the power to grant development consent to the development even though the development would contravene the height standard, but that power is subject to conditions.
- 72 As shown by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 (*Initial Action*), for the Court to have the power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that:
- (1) The proposed development will be consistent with the objectives of the particular standard in question (cl 4.6(4)(a)(ii)), and
 - (2) The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)),
 - (3) The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)), and

- (4) The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b))

73 The Court must form two positive opinions of satisfaction under cl 4.6(4)(a) to enliven the power of the Court to grant development consent (*Initial Action* at [14]). I must be satisfied that:

- (1) the Applicant's written request has adequately addressed the matters required to be demonstrated by subcl (3) and;
- (2) that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objective of the zone in which the development is proposed to be carried out.

74 In summary, the exceedance occurs at five locations, being two lift overruns, two pergola structures and a portion of a parapet. More specifically, the written request identifies the extent of the exceedance in Table 1 as follows:

Building envelope	LEP Max height	Height proposed	Variation (m)
RFB West lift overrun	11.5m	RL 19.35	2.259m to 2.435m
RFB West pergola shade structure		RL 18.36	1.575m
RFB West parapet		RL 16.15	0.2m
RFB East lift overrun		RL 19.35	1.160m to 1.385m
RFB East pergola shade structure		RL 18.36	2.078m to 2.400m

75 The written request asserts that compliance with the height standard is unreasonable or unnecessary as the objectives of the height standard are achieved, notwithstanding the non-compliance.

- 76 The objectives of the height standard, at cl 4.3 of the RLEP, are in the following terms:
- (a) to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,
 - (b) to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,
 - (c) to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,
 - (d) to minimise the impact of development on the amenity of surrounding properties,
 - (e) to emphasise road frontages along road corridors.
- 77 In respect of objective (a), the written request identifies the row of townhouses fronting Waterview Street that are within the height standard and which reflect the scale of surrounding development. To the extent the exceedance may be perceived from Waterview Street, the proposed townhouse development is in the foreground, is set back 14m from the street frontage, is screened by existing mature trees, and is assisted by the site's natural fall towards the shoreline.
- 78 In respect of objective (b), the elements causing the exceedance are centrally located on the rooftop of the residential flat building such that overshadowing is contained within the building footprint or, in the case of the 200mm exceedance at the parapet corner, the exceedance is so minor as to be imperceptible and avoids additional overshadowing.
- 79 In respect of objective (c), the site is subject to a site-specific planning proposal that identifies the scale and type of development proposed, which is not intensified or enlarged by the effect of the exceedance of the height standard.
- 80 In respect of objective (d), overshadowing diagrams demonstrate that recreational land adjoining the site is not adversely impacted as a result of the exceedance, notwithstanding overshadowing to Bennelong Park from development that is within the complying envelope. Additionally, the 14m setback from Waterview Street to townhouse development is described as a tree protection zone that will function to retain the existing character of the street.

- 81 In respect of objective (e), mature landscaping and natural topography will assist in visually screening the proposed development from Waterview Street and the townhouse development that is visible, will contribute to the character of the road corridor.
- 82 Next, the written request sets out four environmental planning grounds that are said to be sufficient to justify the contravention of the height standard in accordance with cl 4.6(3)(b) of the RLEP. These grounds may be summarised as follows:
- (1) The first ground is the site's uneven topography which results in an irregular height plane which causes the proposed building envelope of the residential flat building to breach the height limit.
 - (2) The second ground is that the exceedance occurs as a result of communal open space being located on the rooftop which allows more of the ground plane to be publicly accessible for the purposes of through-site links.
 - (3) The third ground is that the proposed development, in its general arrangement, respects the site-specific provisions in cl 17 of the RLEP while offering interfaces and amenity that are appropriate to a waterfront location.
 - (4) The fourth ground is that the height exceedance will not result in unacceptable shadow, visual or view impacts.
- 83 On the basis of the reasons set out in the written request, and summarised above at [77]-[82], I am satisfied that the Applicant has adequately addressed the matters required of it by cl 4.6(3) of the RLEP. In arriving at this state of satisfaction, I accept that the Court on appeal does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3)(a) and (b) of the RLEP, but only indirectly form such an opinion and on the basis that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3)(a) and (b) of the RLEP (*Initial Action* at [25]).
- 84 Accordingly, I also consider cl 4.6(4)(a)(i) of the RLEP to be satisfied.
- 85 Clause 4.6(4)(a)(ii) requires that the Court also be satisfied that the proposed development is in the public interest as it is consistent with the objectives of the height standard, and of the IN4 zone.
- 86 As stated earlier, I consider the objectives of the height standard to have been achieved, notwithstanding the non-compliance with the numerical control of the

height standard. In considering whether or not the proposed development is consistent with the objectives of the IN4 zone at [53], the written request relies upon the following:

- (1) While the height exceedance will have no impact on the maritime activities on the site, the proposal will retain and encourage maritime activities by providing equitable access to the foreshore for such activities.
- (2) The residential flat building that is the object of exceedance provides communal open space at the rooftop so as to allow more publicly accessible open space to the waterfront.
- (3) The setback of the residential flat building from the shoreline allows communal open space and vegetation that will act to provide a natural screen to the foreshore, will reduce the visual protrusion and reflectivity of the proposal along the foreshore by reducing the contrast between natural and built elements.
- (4) The exceedance does not impact on the site's capacity to provide employment, however new opportunities are enabled by the additional uses in the RLEP, such as boat chandlery and marine surveys which will be attracted to the business tenancies due to the site's location on the waterfront and a wet-berth marina that is foreshadowed.
- (5) The setbacks and scale of the residential flat building when considered from Waterview Street or Bennelong Park will not impose unreasonable or adverse view or visual impacts.

87 I am satisfied that the proposed development is consistent with the first, second and fourth objective of the IN4 zone.

88 However, unlike the state of satisfaction reached at [83] in respect of the matters at cl 4.6(4)(a)(i), I must directly form an opinion of satisfaction about the matters in cl 4.6(4)(a)(ii) of the RLEP (*Initial Action*, at [26]).

89 In order to finally and completely form an opinion of satisfaction in respect of the matters as cl 4.6(4)(a)(ii), I consider the evidence of Ms Trueman relevant in two ways to the question of whether the Concept Plan appeal would impose an adverse impact on the environmental and visual qualities of the foreshore, which is the subject of the third objective of the IN4 zone, or of development on land uses in other zones, which is the subject of the fifth objective.

90 Firstly, Ms Trueman considers the visual impact of the residential apartment building to adversely impact on views of the site and its setting when viewed from the water and beyond, and on the heritage values of the heritage item at

Kissing Point Park and Bennelong Park. Secondly, Ms Trueman considers the rooftop landscaping to be inappropriate when viewed from beyond the site.

- 91 While the scope of Ms Trueman's evidence is responsive to a more comprehensive inventory of matters in contention, I consider her evidence in respect of these two aspects to be most applicable to considering the environmental and visual qualities of the foreshore and adjoining land.
- 92 To be clear, while the objectives of the IN4 zone do not directly engage considerations of heritage, I consider the environmental qualities of the foreshore to encompass the qualities of environmental heritage which, at cl 5.10(1)(b) of the RLEP include associated fabric, settings and views.
- 93 At the onsite view, Ms Trueman stated that the height of the lift overrun, being the cause of the greatest exceedance, should be lowered and, preferably, be relocated closer to Waterview Street.
- 94 As I understand Ms Trueman's concern, it is that the height of the building elements that are the subject of the exceedance extend higher than the ridgeline of the existing boatshed, and the resulting visual prominence of the residential flat building will permanently alter the landmark qualities of the existing boatshed (Ex 21, par 13(dd)) when viewed from beyond the site.
- 95 Reference to the existing boatshed as a 'landmark' is found in the CMP. In particular, Ms Trueman cites Policy 3.2 which states "to fully retain the identified cultural significance of the place, the form and scale should continue to be read as a landmark in its waterside setting". This excerpt from the CMP was engaged by both the heritage experts in their written and oral evidence.
- 96 According to Ms Trueman, the aspects or viewpoints from which the visual prominence will be most acutely understood are from the water, and from the heritage item known as Kissing Point Park (former boat slips) including Bennelong Park.

View impacts from the water and beyond

- 97 In the joint report, Ms Trueman expresses her opinion that the residential flat building is "over-scaled in relation to the site, the boatshed and surrounding

parkland” (Exhibit 21, par 13 (ff)). Elsewhere, Ms Trueman considers the height to be ‘unnecessarily high’ (Exhibit 24, p5, par 1(c)).

- 98 In particular, it is the height of the residential flat building that fails to render the proposed new built form subordinate to the existing boatshed (par (gg)), as well as the mass and scale which responds inappropriately to the setting of the boatshed and the site (par (ii)).
- 99 According to Mr McDonald, the residential flat building was originally a single form that was, during the design process, separated into two separate tower forms with a 12m gap between. The result of this amendment is that each of the tower forms has a footprint less than one-third of the footprint of the boatshed (Ex 21, p13, par 3(r)).
- 100 Furthermore, two-thirds of the existing boatshed footprint stands further to the south west than the south western alignment of the residential flat building. By this, I understand that two-thirds of the existing boatshed is positioned closer to the shoreline than the elevation of the residential flat building fronting the shoreline.
- 101 Next, Mr McDonald describes a hierarchy of open space which ranges from private open space in the form of balconies, to communal open space on the roof and between the tower forms, and finally to publicly accessible open space along the foreshore and through the site (p13, par (t)).
- 102 I prefer Mr McDonald’s evidence as it directly addresses aspects of mass and scale by reference to the particular arrangement of built form on the site, including the space between buildings, when considered in the context of the existing boatshed.
- 103 In contrast, while Ms Trueman refers to mass and scale, I find her evidence is more directly addressed to the height of elements such as the lift overrun and rooftop communal open space.
- 104 The Applicant relies on a number of reports, prepared by Clouston Associates, to assess the visual impact of the proposed development. A particular focus of the assessments is the visual impact of the residential flat building from which the exceedance arises.

105 The relevant assessment reports are as follows:

- Visual Impact Assessment Addendum Report prepared by Clouston Associates (Exhibit D), dated 13 September 2019;
- Additional views also prepared by Clouston Associates (Exhibit E), dated 6 November 2019;
- Landscape Character and Visual Impact Assessment prepared by Clouston Associates (Exhibit T), dated 10 June 2020;
- Landscape Character and Visual Impact Assessment Addendum Impact on Bennelong Park and Kissing Point Park, dated 2 October 2020.

106 Exhibit T is the most comprehensive of the assessment reports, in which an assessment of eleven viewpoints is undertaken in accordance with a methodology set out at section 3.1.2 of Exhibit T that is in the following terms:

“ensuring all receptors (viewers) have been adequately identified, even at distance, with emphasis on public domain views

comprehensive evaluation of context to determine visual catchment of site from these areas

being clear on and separately defining quantitative impacts (distance, magnitude, duration etc) as against qualitative impacts (viewer type and context of view)

providing a clear rationale for how impacts are compared and contrasted

ensuring photomontages include views from highest potential impact locations, identified from analysis above

being clear on the differing forms of mitigation options, namely avoidance, amelioration (eg design), mitigation (eg screening) and compensation (on or offsite).”

107 A summary of the assessment appears on p99 and states:

“Eleven views for public receptors have been selected and assessed.

One viewpoint received an impact rating of Negligible

One viewpoint received an impact rating of Low

Six viewpoints received an impact rating of Moderate/ Low

Three viewpoints received an impact rating of Moderate”

108 All eleven viewpoints are identified in Fig 7.2 of Exhibit T which is re-produced in its relevant part below (emphasis added to viewpoints 1, 3 and 4):



109 The summary of visual impact on p101 of Exhibit T identifies viewpoints 1, 3 and 4 as those resulting in the greatest visual impact, rated as 'moderate'. A 'moderate' impact is described on p26 of Exhibit T in the following terms:

“The Project may form a visible and recognisable new element within the overall scene that affects and changes its overall character.”

A 'moderate' impact is described at p28 as a:

“Moderately adverse visual impact”

110 As I understand the methodology described at Appendix E of Exhibit T, each viewpoint is a photomontage of the Concept Plan appeal as executed, composed using the following four datasets:

- 3D models of proposed building envelope;
- Camera location and alignment point surveyed data;

- Site Survey;
- Site photography.

111 Exhibit U is an addendum to Exhibit T, prepared with additional information in the form of a dashed red line indicating the outline of the residential flat building. View point 3 and 4 are two of the viewpoints included in the addendum. I note here that Exhibit U also appears in evidence as Appendix 1 of the joint heritage report at Exhibit 24.

112 Viewpoint 1 is not included in addendum at Exhibit U. I re-produce it below as it appears in Exhibit T:



113 'Viewpoint 3 – magnified', as it appears in Exhibit U, is re-produced below:



114 'Viewpoint 4 – magnified', as it appears in Exhibit U, is re-produced below:



115 Mr McDonald's view of the visual impact assessment is that the proposed new built form will not be visible from viewpoints 1, 2, 5, 7 and 8. Where it is visible

from viewpoint 3, a corner of the residential flat building and lift overruns would be seen above existing fig trees at a distance from the existing boatshed with only minimal impact. No visual impact will result from viewpoint 4 (Exhibit 21, p14, par x) and (Exhibit 24, p5, par e).

116 Finally, Mr McDonald concludes that the existing boatshed will continue to be the dominant landmark on the shoreline.

117 I cannot identify where, if at all, Ms Trueman engaged in consideration of the visual assessment described above, other than to state, at par 13 (jj) of the joint report (Exhibit 21) that “the building will be highly visible from the foreshore, the boatshed and its wharf and the adjacent heritage listed park”.

118 On the basis of the visual assessment set out above, I prefer Mr McDonald's evidence due to the careful and repeated engagement with the viewpoints that support the qualitative analysis in the reports listed at [105]. Furthermore, on the basis of the photomontage images that appear to have been prepared in accordance with the Court's practice note on the matter, I do not accept that viewpoint 1 or 4 depict new built form that is 'highly visible' from the foreshore. On the basis of the photomontage at viewpoint 3, I do not accept that the proposed new built form is 'highly visible' from Kissing Point Park or Bennelong Park.

Impact on Kissing Point Park and Bennelong Park

119 Ms Trueman's view is that the setback, orientation and form of the residential flat building closest to Bennelong Park do not respond to the intersection of the two sites. In particular the eastern elevation is excessively high, and without articulation (Ex 21, par 13(kk) and at Exhibit 24, par 2(b)). The result is an adverse impact on the heritage values of Kissing Point Park.

120 Setting the building back further would increase the landscape buffer at this location, and stepping its form would reduce its impact on Bennelong Park.

121 For the reasons set out at Exhibit 24, par 2(c), Mr McDonald considers amendments to the architectural drawings, shown best on DA-201 Rev 6, to have reduced the extent of basement car parking visible above ground.

- 122 It is important to record here that the parties do not agree as to whether the land immediately adjoining the site to the south east is properly considered to be subsumed within the heritage item identified in Schedule 5 of the RLEP as 'Kissing Point Park (former boat slips) and Bennelong Park'.
- 123 The Applicant submits that as the property description contained in Schedule 5 does not include the Lot number of the land immediately adjoining, being Lot 448 in DP 15224 (Lot 448), then regardless of reference in the item name, the land does not answer to the description in the definition of a heritage item which is (emphasis added):
- heritage item means a building, work, place, relic, tree, object or archaeological site the location and nature of *which is described in Schedule 5*.
- 124 In the alternative, the Respondent tendered a title search and maps (Exhibit 30) that it says identifies the land as public land that is consistent with being identified as Bennelong Park, which is within the description in Schedule 5.
- 125 However in written submissions, the Respondent accepts that neither the address or property description properly include the whole of the land known as Bennelong Park.
- 126 While I am inclined to find that the land immediately adjoining the subject site on its south eastern boundary is not described in Schedule 5, Part 1, I agree with the parties that it does not preclude consideration of the potential impact on the heritage significance of the proposal on the heritage item that is unquestionable Kissing Point Park, and a portion of Bennelong Park.
- 127 Whether or not the land at Lot 448 is properly identified as a heritage item or not, I note here that Lot 448 is agreed to be 35m in width and the contention at the centre of the dispute is whether the proposed development adversely impacts the heritage significance of the heritage item properly identified in Schedule 5.
- 128 As the heritage item that is agreed to be described in Schedule 5 is, at worst, 35m from the south eastern boundary of the site, and the position from which the site was viewed during the onsite view was in a similar order of distance from the south eastern boundary, I am satisfied that the consideration is

required in accordance with cl 59 of the Sydney Harbour SREP as it is development in the vicinity of a heritage item.

129 In her oral evidence, Ms Trueman cited the heritage inventory sheet, at Exhibit 18, tab 20. It is Ms Trueman's view that it should be read expansively and beyond the statement of significance itself. In describing her approach to this task Ms Trueman noted the heritage inventory sheet dates from 2012, is deserving of an update and fails, in the statement of significance, to give appropriate weight to past Aboriginal occupation, and to the operation of the James Squires brewery.

130 Mr Hemmings draws my attention to the section titled Recommended Management, which includes a note that "the detailed requirements for each property will be determined on a case-by-case basis...As a largely archaeological resource, excavation or landscaping in the location of the former boatslips may require an archaeological report and permission under the NSW Heritage Act." (Ex 18, tab 20, p5/7)

131 I understand that it is the Applicant's submission that the heritage values of the Kissing Point Park (former boat slips) including Bennelong Park are vested in the boat slips and the history surrounding their origins and use. In my view this position is supported by a reading of the physical description and item history contained in the inventory sheet.

132 In their oral evidence, the experts referred to Article 8 of the Burra Charter (Exhibit 18, tab 10) which, along with Article 1.12, provides guidance on the use of the term 'Setting' in heritage conservation.

133 Article 1.12 of the Burra Charter defines Setting in the following terms:

"Setting means the immediate and extended environment of a place that is part of or contributes to its cultural significance and distinctive character."

134 Whatever Ms Trueman's own views on the heritage values of heritage item may be, the Applicant submits that the heritage values of Kissing Point Park (former boat slips) including Bennelong Park are documented in the heritage inventory sheet and are primarily related to the former boat slipways which are located around 900m from the site.

135 While I accept Ms Trueman's observations as to the wider history underlying the northern foreshore of the Parramatta River in the immediate area, I consider that even an expanded reading of the heritage inventory sheet supports the Applicant's argument that the heritage values as currently identified are vested in the vicinity of, and past use associated with, the Kissing Point boat slips.

136 After reading the heritage inventory sheet in its totality, I conclude that the 'setting' as defined in the Burra Charter, when applied to the heritage item as described in the heritage inventory sheet, is not adversely affected by the proposed three storey residential flat building when viewed from either Kissing Point Park or Bennelong Park.

Rooftop landscaping

137 Drawing A-105 (Exhibit F), re-produced below, shows the general arrangement of the residential flat building, comprising two three-story tower forms with landscape planting to the perimeter of communal open space.



138 While the Landscape concept plans (Exhibit V), are a useful aid, they were not relied upon in submissions and so a detailed assessment of the plant schedule indicating the height and quantity of proposed species was not undertaken.

- 139 However, I understand that some species currently proposed may achieve heights of 5m when mature.
- 140 According to Ms Trueman's oral evidence, trees at the level of the rooftop terrace would be domineering, would likely exacerbate the perception of the height exceedance and a more simple roof form with lower planting is preferable.
- 141 At the root of Ms Trueman's interest is the continued ability to read the existing boatshed as a landmark building in its waterside setting (Exhibit AO, Policy 3.2).
- 142 Mr McDonald holds the view that rooftop landscape would visually merge with the profusion of mature planting currently in the vicinity, as is evident, in his view, in the assessment of views and visual impact prepared in support of the Concept Plan appeal.
- 143 For reasons similar to those set out at [118], I do not understand the visual impact assessment to support the concern held by Ms Trueman that the landmark form and scale of the existing boatshed would be compromised.
- 144 Instead, even where the proposed residential flat buildings are crudely rendered absent materials, finishes, shadows and the like, I am unable to form the view that where visible, the lift overrun structures dominate, or serve to compromise the form and scale of the existing boatshed. The elements that exceed the height are limited in the area of their footprint and, in the case of the shade structures, likely to read as transparent.
- 145 I accept Mr McDonald's view that landscape planting at the rooftop level is likely, when viewed in the context of the site, to visually merge with existing landscape that is, from many viewpoints, both in the foreground and the background.
- 146 I also consider the effect to be consistent with the cumulative visual impact sought in Section 5.4 of the Sydney Harbour Water Foreshore and Waterways Area Development Control Plan 2005 (Sydney Harbour DCP) for the built elements on a lot to be mitigated through bands of vegetation and by having

regard to preserving views of special natural features, landmarks or heritage items.

- 147 Having considered the evidence of the heritage experts above, I am satisfied that the proposed development does not have an adverse impact on the environmental and visual qualities of the foreshore, which is the focus of objective (c) of the IN4 zone, nor on the land uses of other zones which is the focus of objective (e) of the IN4 zone.
- 148 Furthermore, I consider this to be evidence that the scale, form, design and siting of the residential flat building as described by Mr McDonald is based on analysis of a kind required by cl 25(a) of the Sydney Harbour SEPP and that the landscape treatment on the rooftop is likely to maintain, protect and enhance the unique visual qualities of the Harbour in accordance with cl 25(b) of the Sydney Harbour SEPP.
- 149 I am therefore satisfied, together with the reasons at [87], that the proposed development is in the public interest because it is consistent with the objectives of the height standard, and of the IN4 zone.
- 150 In arriving at this opinion of satisfaction, I particularly note the locating of the communal open space at the rooftop has, in this circumstances of this case, some merit for the manner in which it provides for private open space for residents of the residential flat building, while effectively allocating ground level open space for public use.
- 151 Finally, cl 4.6(4)(b) of the RLEP requires that the concurrence of the Planning Secretary be obtained for development consent to be granted to development that contravenes a development standard.
- 152 The Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 that the Secretary's concurrence may be assumed for exceptions to development standards, subject to certain conditions contained in the notice.
- 153 That said, s 39(6) of the *Land and Environment Court Act 1979* (LEC Act) gives the Court the power to grant development consent without obtaining the concurrence of the Secretary, although consideration ought be given to the

matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.

- 154 I have considered those matters at cl 4.6(5) and I do not consider the proper exercise of cl 4.6 of the RLEP in the circumstances of this case raises any matter of significance for State or regional environmental planning, and for the reasons set out earlier, I consider it to be in the public interest for the cl 4.6 request to be upheld.

Public access to the foreshore

- 155 The Respondent contends that the Concept Plan appeal is inconsistent with the aims and objectives of the Harbour SREP due to the use of the north western side of the existing boatshed for private open space which has the effect of privatising part of the foreshore.

- 156 The Respondent seeks the public access to continue along the north-western side of the existing boatshed.

- 157 Mr Hemmings SC, counsel for the Applicant, submits that the Respondent seeks to impermissibly impose a public obligation on private land in a manner that is unsupported by the provisions of the Sydney Harbour SREP.

- 158 The Applicant asserts that it proposes to provide access to and along the foreshore, which is defined in the dictionary of the Sydney Harbour SREP as the whole of the land comprising the site.

- 159 The aims of the Sydney Harbour SREP at cl 2, includes relevantly:

...

(f) to ensure accessibility to and along Sydney Harbour and its foreshores,

...

- 160 Planning principles set out at cl 22 of the Sydney Harbour SREP relevantly provides:

(a) development should maintain and improve public access to and along the foreshore, without adversely impacting on watercourses, wetlands, riparian lands or remnant vegetation,

- 161 Clause 6.5(3)(e) of the RLEP provides that a consent authority, or the Court on appeal, must not granted consent unless satisfied that:

...

(e) opportunities to provide continuous public access along the foreshore and to the waterway will not be compromised, and

...

- 162 The Sydney Harbour DCP, at Section 5.2, similarly places importance on such public access in the following terms:

“The Harbour, Parramatta River and their tributaries, are for everyone’s enjoyment and public access to the foreshores is fundamentally important. Foreshore access is to be encouraged and wherever possible, public access to and along the foreshore including the inter-tidal zone should be secured or improved.

Most desirable are foreshore links joining public open spaces or access points. They can be obtained by right of way or dedicated or acquired strips of land and may link with tracks across beaches and rock platforms. Where foreshore access cannot be achieved, a linkage through adjacent streets is usually possible.”

- 163 Section 4.3 of the Sydney Harbour DCP states that “foreshore access is to be encouraged and promoted. Wherever possible, public access to and along the foreshore including the inter-tidal zone should be secured or improved.”

- 164 ‘Foreshore’ is defined in the Sydney Harbour SREP in the following terms:

foreshore includes land with a water frontage and land that is separated from the waterfront by a public reserve, road or open space.

- 165 This definition of foreshore is given further weight by reference to Sydney Harbour DCP which chooses to adjunct the term ‘immediate’ to the term ‘foreshore’ so as to define ‘foreshore (immediate)’ in the following terms:

“**foreshore (immediate)** means the section of land extending from low water mark to the property boundary most distant from the waterway of the first line of properties as viewed from the waterway.”

- 166 So understood, the foreshore is distinct from the shoreline, which is defined in the Sydney Harbour DCP in the following terms:

“**shoreline** means the intertidal zone and the land immediately adjoining it.”

- 167 The foreshore to, and along which access is required, is not the water’s edge as the Respondent chooses to apply it in contending that access is required to the north west of the existing boatshed.

168 Instead, the Foreshore and Waterways Areas Map at Exhibit 18, tab 23 marks the area defined as foreshore in heavy line to include all of the land between the water and Waterview Street.

169 Accordingly, the Applicant submits that access to and along the site, as shown by the dashed orange lines in Dwg DA-006 Rev 6, re-produced in part below, also fulfils the requirement to provide access to and along the foreshore.



170 Achieving such access to and along the site is also consistent with the planning principle at subcl 14(b) of the Sydney Harbour SREP for land within the Foreshore and Waterways Area in which:

(b) public access to and along the foreshore should be increased, maintained and improved, while minimising its impact on watercourses, wetlands, riparian lands and remnant vegetation,

...

171 According to the Respondent, a better understanding of the type of public access desired in the Ryde local government area is set out in the Ryde River Walk Masterplan Report (Exhibit 18, Tab 6) (River Walk Masterplan).

172 Background to the River Walk Masterplan is summarised in the following terms at pii:

“The River Walk project undertaken by the City of Ryde, is to provide a vision and working plan for a recreation trail focused along the Parramatta River within the Ryde Local Government Area (LGA). The trail proposes to connect existing foreshore parks and provide an important link in a regional systems of recreation trails. The study develops a strategy for the staged implementation and enhancement of the recreation trail over time. A public art strategy that animates and reveals the landscape and stories of the places of the local area, is also proposed in conjunction with the trail.”

173 In describing the study area, the River Walk Masterplan provides:

“The study area includes the parks and connecting streets along the northern foreshore of the Parramatta River in the Ryde LGA, from Wharf Road in the west to Punt Road in the east. The River Walk seeks to connect to adjacent recreation trails, public parks, urban centres and public transport hubs.

Wherever possible, the trail is directly along the foreshore edge, with a direct physical and visual connection to the water. In other areas, the trail is set back behind residential properties or steep bushland parks due to topography or limited physical access. These areas seek to enhance the visual connection to the water overlooking the river, adding diversity to the River Walk experience.”

174 The subject site is within Precinct 4 of the River Walk Masterplan. The site is depicted on p14, re-produced below, and a path through the site is shown dotted.



175 Path typologies are described at Section 3.0 of the River Walk Masterplan. I am advised by the parties that the path shown through the site is a ‘Type 1, Main Shared Path – in Parks’ (Type 1 path).

- 176 The characteristics of a Type 1 path are set out in Section 5.0, indicating new paths should have a width of 3.5m, with additional width to allow for clearances either side of path for passing of cycles and pedestrians in peak usage. If side clearances are not achievable, the Section advises that additional width may be required.
- 177 According to the Applicant, the description of the Type 1 Path being 'in parks' can only be understood if the subject site was identified for acquisition by the Council for public land, and identified the land as 'Open Space' when the area was last re-zoned. Alternatively, the Respondent could have imposed conditions to the same effect on development on the land as is permitted by cl 2.5 (1)(b) of the RLEP.
- 178 A sketch, prepared by Mr Bu marked Exhibit 29 shows a path width of 2m, which is described by Ms Irish, counsel for the Respondent, as demonstrating Council's flexibility in the circumstances of the case. Additionally, Mr Bu foresees opportunity to increase the width of the path in detailed development of the Concept Plan in a Stage 2 development application to permit both pedestrian and bicycle access.
- 179 That said, Mr Bu acknowledges the sketch at Exhibit 29 is prepared without regard to the Applicant's flood report (Exhibit A, Tab 18) that requires a public walkway to be at RL 1.46 AHD, or to the Sydney Harbour DCP that requires a height difference of 1m between public and private interfaces to ensure privacy.
- 180 According to Mr Mead, this is because Exhibit 29 is only a concept for a pathway that could be further assisted by the setting back of ground floor glazing by 1900mm as shown in the sketch section to achieve a separation distance of 6m consistent with design objective 3C-1 or 4E-1 of the Apartment Design Guide.
- 181 Absent a public pathway on the north west side of the existing boatshed, Mr Mead considers access through the atrium of the existing boatshed to be an inappropriate alternative as it does not read as a public thoroughfare and, given security considerations, cannot be assured in perpetuity.

182 It is helpful at this point to describe the proposed access through the existing boatshed is in the manner of a large atrium, serviced by some ground floor commercial and retail operations.

183 As it is described by Mr McDonald, the atrium is the subject of the Heritage Interpretation Strategy that will celebrate the history of the Halvorsen boat making enterprise on the site.

Findings on public access

184 The definition of 'foreshore' makes clear that the term refers to an area of land that extends well beyond the interface between land and water, whether at low or high tide.

185 The site clearly falls within this area, and so the entirety of the site answers the description of foreshore.

186 The plan illustrated at [169] depicts two pathways traversing the site in a roughly parallel manner to the shoreline. The path closest to the shoreline (the shoreline path) connects to an existing path in Bennelong Park in order to provide access to the concrete hardstand. Two alternate routes lead away from the concrete hardstand in the direction of Waterview Street. The first route is along the south east of the existing boatshed to a forecourt, with a further choice in path being either directly onwards in a north eastern direction to Waterview Street, or a north-western direction towards Settlers Park. The second route leading from the concrete hardstand towards Waterview Street is through the existing boatshed to the forecourt.

187 The second path shown at [169] traverses the site between the residential flat building and the townhouse development fronting Waterview Street (the Mid path). Also arriving at the forecourt, the Mid path connects to the first and second routes described at [180], providing access to paths connecting to the concrete hardstand, the forecourt, settlers Park or Waterview Street.

188 There is also a third path shown on the drawing at [169]. I understand this to be the existing shared pedestrian, bicycle path outside the boundary of the site, along Waterview Street.

- 189 I accept the Applicant's argument that both the Shoreline path, and the Mid path are paths that provide access to, and along, the foreshore within the subject site. As stated by Mr Ben Craig at par 32 of the joint report (Ex 23), these paths are new, and provide public access to the site for the first time since the 1800's.
- 190 By virtue of providing this new access to and along the site, where no public access is provided at present, the proposed paths increase and improve public access to the foreshore, which are principles contained in cl 14 of the Sydney Harbour SREP.
- 191 The paths, as I have sought to describe at [180]-[181], interconnect, providing a network of paths that present choices to anyone using the path. This interconnection is, in my view, consistent with the requirement of cl 6.5(3)(e) of the RLEP for "opportunities to provide continuous public access along the foreshore and to the waterway..." which is in similar terms to the desire in Section 5.11 of the Sydney Harbour DCP for redevelopment proposals to ensure continuous public access to the foreshore: both in the connection evident to adjoining sites, and within the site itself.
- 192 In arriving at this conclusion, I also consider the aims of the Sydney Harbour SREP, to ensure accessibility to and along Sydney Harbour and its foreshores, to be achieved.
- 193 I note here that while the term 'accessibility' is not defined in either the Sydney Harbour SREP or the Sydney Harbour DCP, I consider it reasonable to assume that the term infers universal access that would not exclude access by a person or persons in a wheelchair or other mobility aid, or with a pram or the like. Drawing DA-504 Rev 5 shows the gradient of ramps to be no greater than 1:14 and so, to my understanding, ensures accessibility.
- 194 Having achieved the aims and planning principles of the Sydney Harbour SREP, and being consistent with the particular provision of the RLEP at cl 6.5(3)(e), my preliminary view is that the Applicant has discharged its obligations under the relevant environmental planning instruments.
- 195 However, the Respondent asks of the Court two questions:

- Has the Applicant satisfactorily improved public access to and along the foreshore?
- Should the Applicant provide public access to the north western side of the existing boatshed?

196 For the reasons set out at [184]-[194], I find the answer to the Respondent's first question is yes.

197 As to whether the Applicant should provide public access to the north western side of the existing boatshed, I note the preference of the Respondent, supported by its experts, is for access to be continuous along the shoreline.

198 I have some sympathy for the desire for full pedestrian circumnavigation of the existing boatshed so as to provide users of the Ryde River Walk with a complete understanding of the historic fabric of the existing boatshed.

199 Whether or not it is desirable, the provisions of the relevant environmental planning instruments do not require it.

200 Guidance contained in the Sydney Harbour DCP acknowledges that the extent of access to both the foreshore and shoreline is subject to the particular circumstances of foreshore sites.

201 Section 4.3 of the Sydney Harbour DCP provides that "*wherever possible*, public access to and along the foreshore including the inter-tidal zone should be secured or improved...*where foreshore links are not available*, a link through adjacent streets is usually possible" (emphasis added).

202 Section 5.3 of the Sydney Harbour DCP is in similar terms, providing that "Where foreshore access cannot be achieved, a linkage through adjacent streets is usually possible."

203 While I accept that the sketch at Exhibit 29 is a concept that could be further developed, I consider the proposed path width of 2m to be unreasonably narrow in such a public setting, and where immediately adjoining water. As such, I consider it likely that such a path could cause congestion or generate conflict between people using open space areas or the waterway, which is to be avoided in accordance with cl 6.5(3)(d) of the RLEP.

- 204 While not assisted by submissions or expert evidence on the matter, it would also seem axiomatic that the obtaining of greater privacy between public and private open space to and from such a path would preclude the level of natural surveillance expected for a public ‘passage’ that would appear to measure just 2m wide x 64m long and with no means of escape should that be needed, with obvious implications for public safety.
- 205 While my preliminary view is that the public access proposed by the Applicant is consistent with the requirements of the Sydney Harbour SREP, I note that cl 22(c) requires development, where not in public ownership, should provide appropriate tenure and management mechanisms to safeguard public access to, and public use of, that land.
- 206 A condition of consent is proposed by the Respondent in respect of such a mechanism that I consider in more detail at [326]-[329].

Heritage significance of the site and its surrounds

- 207 In general terms, the parties dispute the impact of the proposed development for two reasons:
- (1) Firstly, whether the concept development application adversely impacts the heritage significance of heritage items that immediately adjoin, and are located in the vicinity.
 - (2) Secondly, on the ground that the heritage significance of the site itself is adversely impacted by the concept development application.
- 208 For reasons set out earlier in this judgment, I consider the question at [207(1)] to be resolved in the negative.
- 209 In relation to the question at [207(2)], I note that the parties are agreed that, resulting from the conferring of experts in respect of heritage, certain particulars are resolved, or are capable of being resolved by conditions of consent. Those matters that primarily underlie consideration of the heritage significance of the site itself were put, broadly, as follows:
- The adequacy of the heritage management documents;
 - The impact of residential on the ground floor of the existing boatshed;
 - The forecourt design.

Adequacy of heritage management documents

- 210 Underlying the heritage contentions are concerns held by the Applicant at the approach and thoroughness of the Conservation Management Plan, and the two Statements of Heritage Impact.
- 211 In support of the application, a Conservation Management Plan (the CMP) has been prepared by NBRS Architecture and Heritage, dated December 2020 (Exhibit AO).
- 212 Two identical Statements of Heritage Impact have been prepared by dfp planning, both dated May 2019 (and amended December 2019):
- Exhibit J is a Statement of Heritage Impact in respect of the Concept Plan appeal.
 - Exhibit AC is a Statement of Heritage Impact in respect of the Demolition appeal.
- 213 Ms Trueman believes the purpose of a CMP is to establish an understanding of the heritage significance of a place through investigation of its history, physical fabric, and research potential based on documentary and physical evidence and develop conservation policies in order to guide the conservation of the heritage significance of the place, with consideration of any potential future re-use or development.
- 214 In the joint expert report, Ms Trueman considers the policies contained in the CMP to have been prepared in support of the Concept development application, rather than as a document intended to guide the conservation of the heritage values of the site as is the proper purpose of a CMP (Exhibit 21, par 13 (f) pp3-4).
- 215 In particular, it lacks guidance of appropriate siting, scale, height, and character of new buildings on the site (Exhibit 21, par 13(m)) and places too great a focus, in Ms Trueman's view, on the existing boatshed at the expense of the site as a whole (Exhibit 21, par 12(p)).
- 216 Mr McDonald accepts the CMP omits information such as the height of buildings imposed on the site by amendment to the RLEP, and the addition of the site to Schedule 5, Part 3 of the RLEP as an archaeological site.

- 217 Similarly, in his oral evidence, Mr McDonald acknowledges the Statements of Heritage Impact give no consideration to the policies contained in the CMP relating to demolition and remediation on the site.
- 218 However, the Applicant submits that omissions in the CMP are not fatal to the concept development application as the application must be understood in its entirety, comprising as it does plans and reports that, when considered as whole, fix the nature of uses, location of buildings, the proposed footprint and envelope, extent of demolition and the like.
- 219 According to the Respondent, guidelines contained within a CMP should anticipate an application being prepared on the basis of any of the uses permitted in the IN4 zone, while protecting the heritage values of the site and it's setting.
- 220 I have carefully reviewed the CMP in light of Ms Trueman's concerns summarised at [213] and [214] and I do not accept that the CMP is written in a manner that is wholly responsive to the Concept development application. Nor do I accept that the CMP is overly focused on the existing boatshed at the expense of the site.
- 221 Firstly, I accept Mr McDonald's evidence in the original joint expert report that in the circumstances of this case, the CMP was prepared in the context of an approved planning proposal that had broadly defined the possible future uses on the site (Exhibit 21, pars (f)-(j), p9). In other words, it is the planning proposal that set broad parameters for the site that the CMP was cognisant of, and not the Concept development application.
- 222 Secondly, and relatedly, it is Ms Trueman's written evidence, in pars (y)-(z) of Exhibit 21, that the Concept development application is contrary to, not consistent with, Policy 4.4 of the CMP. Presumably such a contradiction could not be contended if the CMP was written in support of the Concept development application, but is conceivable if the CMP was informed by the broader brush approach of the planning proposal.
- 223 Next, I consider Section 7 of the CMP to encompass policies addressing the site as a whole, and are not limited to the existing boatshed:

- Policy 4.1 and Policy 6.2 directly address the remnant James Squires wharf.
- Policy 6.1 addresses the site, not just the existing boatshed, in the context of the southern foreshore of the Parramatta River, the suburb of Concord and the like.
- Policy 6.2 addresses the archaeological investigation associated with the use by James Squire in 2018.
- Policies 7.1 – 7.6 deal with Aboriginal archaeology on the site.

224 While I note the Applicant's submission that the Concept development application must be read as a whole, I consider the function and purpose of a CMP to be somewhat 'stand alone' of any single proposal for redevelopment of a site. Instead, a CMP is generally prepared in advance of a proposal so that the assessment of cultural significance, and management strategies are not biased by the specific features or elements of a proposal, but the inverse; a proposal should be informed by the assessment of the cultural significance and management strategies in respect of extant fabric.

225 That said, I accept the Applicant's submission that the omission of a reference to the addition of the site to Schedule 5, Part 3 flows from the contemporaneity of the listing of the site as an archaeological site, on 27 November 2020, with the date of amendment of the CMP on 7 December 2020.

226 Furthermore, I accept Mr McDonald's evidence that an omission of the listing does not derogate the consideration given to the historical associations identified in respect of James Squires operations. I note a word search of the CMP for the term 'Squire' produces 256 references.

227 A review of the documentary evidence listed in the CMP's table of contents, and again contained in Appendix A of the Statements of Heritage Impact does not support the assertion that the application is overly, or primarily focused on the existing boatshed. Both documents list the inventory of documentary evidence relevant to the whole of the site in the following terms:

- Pre-European History of the Area;
- Early Settlement and Kissing Point Farm;
- Early Ownership and Development of the Subject Site;
- James Squire's Brewery;
- Cleves Estate;

- Mary Ann Watson's Portion;
- Development by Lars Halvorsen Sons Pty Ltd;
- Lars Halvorsen Sons Pty Ltd;
- Acquisition of the Subject Site by Lars Halvorsen Sons Pty Ltd;
- Construction of Halvorsen's Boatshed (1941-42);
- World War II Boat Production (1940-1946);
- Post-World War II Boat Production (1946-1979);
- R.A.N. Small Craft Repair Facility (1980-1998);
- Putney Marina (from 1999).

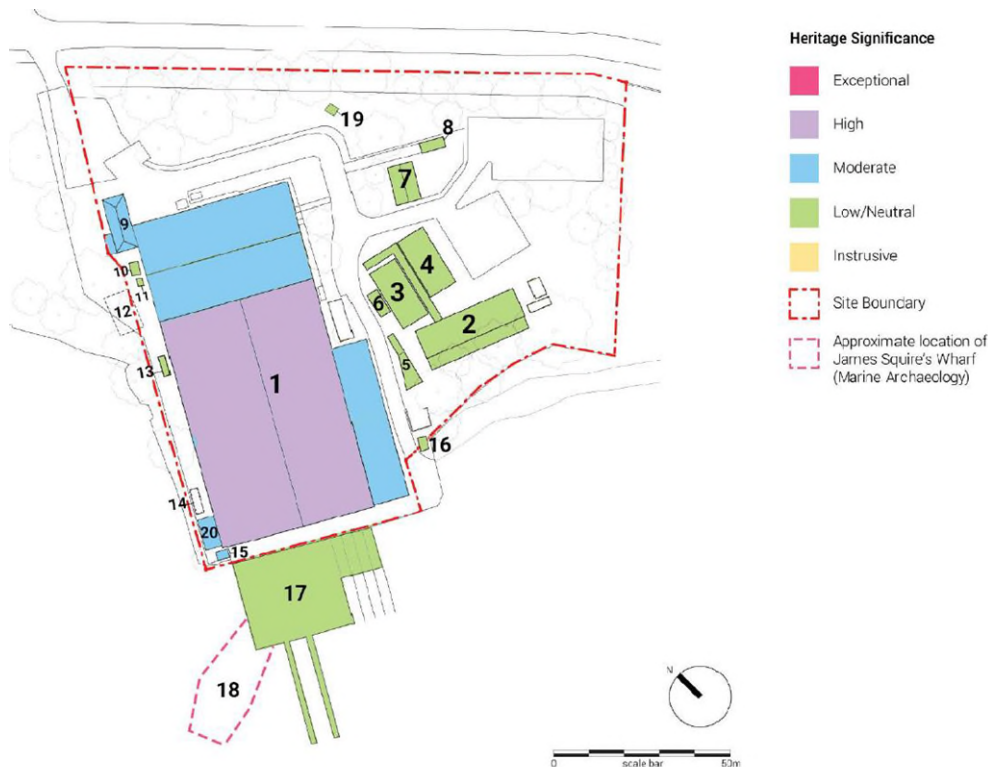
228 Where the CMP omits policies in respect of the height of buildings, I accept that the site-specific nature of the amendment to the RLEP dealt with this issue.

229 I also understand from Mr McDonald's oral evidence that the Statements of Heritage Impact fail to consider the impact of the Demolition appeal against the policies contained in the CMP. However, I note that the removal of significant fabric is the subject of Section 7.4.4 of the Statements of Heritage Impact.

230 In summary, I do not understand omissions from the CMP, while admitted, to be of such consequence as to undermine the integrity of the document as a whole, or the application the subject of the appeals on this ground.

Demolition of the fabric and ground floor residential

231 It is helpful at this point to re-produce below the site grading diagram at p23 of Exhibit AC (identical to Exhibit J) to describe the general arrangement of buildings on the site, including the former Halvorsen boatshed as it exists today.



- 232 What may be described as the primary boatshed structure (marked in purple) stands around 13m tall. Two skillion-roofed additions abut the primary boatshed addressing Waterview Street to the north east. Additionally, a small single storey addition is located to the north west of the primary boatshed form. Finally, a single storey form runs virtually the full length of the primary boatshed form to the south-east, only a portion of which is agreed to be original as identified in the original drawings at Figures 36 and 37 of Exhibit AO.
- 233 The Concept Plan proposes the removal of the two skillion-roofed additions, and all other single storey forms (marked in blue) so that the primary boatshed structure is retained, but without those additional forms currently evident on site.
- 234 The heritage experts are divided as to the impact of demolition proposed by the Applicant.
- 235 In summary, Mr Trueman's concern is that structures dating from the 1940's and 1950's and which are identified in the CMP as being of 'moderate' significance, are proposed to be removed.
- 236 However, according to the CMP, such action may only be considered where there is no appropriate alternative or where the changes are essentially

reversible (Policy 4.4). According to Ms Trueman, the Applicant has not demonstrated there to be no appropriate alternative, and the experts agree that demolition is not reversible.

- 237 At p15 of the joint expert report (Exhibit 21), Mr McDonald relies upon an excerpt taken from the statement of significance at Section 3.2 of the CMP to the effect that the primary significance is vested in the larger boatshed form, and not in the additions now proposed to be removed:

“While the interior therefore has some aesthetic values expressed in the retained timber elements and double height workspace, it is the scale, form and waterside location of the main larger element of the former Boatshed which is considered to form the core aesthetic significance of the building on a local level. The location of the structure on the river and its high visibility and prominence in views from the water has long made the Boatshed a local landmark. The lean-to engineers’ shed on the eastern side dates from the original construction period. This component does not demonstrate the former uses and distinctive structural design of the main boatshed space and does not contribute to its landmark presence. Similarly, the two stages of the early northern additions represent conventional industrial construction of the time and lack the ability to interpret the Halvorsen boat building activities. The secondary buildings on the site, with one exception, post-date the initial occupation by Halvorsen; most date from the use of the site by the Royal Australian Navy. These items do not demonstrate any important aspects of the activities carried out on the site or any intrinsic qualities that are significant.”

- 238 Relatedly, the Respondent considers use of the ground floor area of the existing boatshed for residential accommodation inappropriate as such a use fails to meaningfully interpret the former of the site for boat building and repair, and as the planning proposal that informed the insertion of the additional uses on the site under cl 17 of Sch 1 of the RLEP initially stated that residential uses should be limited to the upper level (Ex 21, Fig 1).
- 239 In support of which, the Respondent relies on two documents prepared by JBA Planning to which the Applicant objects on the grounds that the Court should not seek to ‘go behind’ the planning proposal to which the JBA reports related.
- 240 The documents are in the form of reports prepared for Council in considering the Planning Proposal that resulted in RLEP Amendment No.7 (Exhibit 18, tab 13) which inserted the additional uses permissible for the site at cl 17 of Schedule 1 of the RLEP.

- 241 The report prepared by JBA Planning at Tab 9 (Exhibit 18) is dated September 2013, and the report prepared by JBA Planning at Tab 12 (Exhibit 18) is dated April 2015.
- 242 I determined to accept the two JBA documents into evidence, subject to weight.
- 243 The JBA Planning report of April 2015 states that the Planning Proposal will facilitate development of certain uses, including residential apartments on the upper level or upper floor of the existing boatshed, and dry boat storage for approximately 100 boats.
- 244 It is the reference to the upper level, or upper floor that the Respondent identifies as intrinsic to the Council's adoption of the Planning Proposal for the site from which the Applicant now seeks to depart with the addition of residential apartments on the ground floor.
- 245 The omission of dry boat storage is also identified by the Respondent as a departure from the planning proposal as originally described.
- 246 However Mr Hemmings counsels that, consistent with s 34 of the *Interpretation Act 1987*, reference to either of the JBA Planning Reports would be to rely impermissibly on extrinsic material as the additional uses at cl 17 of the Schedule 1 of the RLEP is not a provision of an Act or statutory rule to which the provision applies, and as there is no ambiguity for which extrinsic material would assist the ascertainment of meaning.
- 247 Whether or not reference to residential accommodation being limited to the upper level or floor was intrinsic to the Council's adoption of the Planning Proposal is unknown, other than what is suggested by its omission from the terms of cl 17, Schedule 1 of the RLEP which I take, by their adoption, to be in a form that satisfied the Council at the time of their adoption.
- 248 I consider the terms of cl 17, Schedule 1 of the RLEP to be clear, and to contain no limitation on the use of the ground floor that would preclude the residential now proposed.
- 249 I also note the arrangement of uses on the ground floor as currently shown on Drawing DA-100 Issue 8 (Exhibit P) provides for a two-storey restaurant at the

south-western elevation fronting the concrete hardstand area. As a consequence of this arrangement, it is my view that a portion of the volume of the existing boatshed will be understood internally at this important corner of the building.

- 250 Furthermore, reference to 'Shed Section 4' on Drawing DA-200 Issue 6 (Exhibit P) shows the residential accommodation at Level 2 is setback from the south-western façade along which the Statement of Heritage Impact (Exhibit J, p31) identifies the retention of the full height doors in this location. What I understand from these references in the concept development application is that the scale and form of the existing boatshed will continue to be legible when viewed externally.
- 251 The CMP identifies the external appearance of the existing boatshed when viewed from the Parramatta River to be a primary constraint in any proposal for adaptive re-use, which is to be guided by the Policies contained in the CMP (Exhibit AO, Section 6.2).
- 252 Policy 4.4 provides that fabric of moderate heritage significance may be considered for removal or alteration under certain circumstances.
- 253 Policy 10.1 states that "the building is to retain its overall form, scale and industrial character. Proposed changes to the place should be designed to retain the exterior form and interpret the industrial character and qualities of the original building."

Forecourt design

- 254 In the joint heritage expert report (Exhibit 21, par 11), the experts agree that redesign of the forecourt to the north of the existing boatshed should expose more of the form and fabric of the façade with a more distinctive maritime character and incorporating meaningful interpretation to reflect historic themes of the site.
- 255 According to the Applicant's initial submissions, the redesign is evident in Exhibit AY which was said to include a rendered image of the sketch plan contained at Fig 3 of the supplementary built heritage joint report (Exhibit 24).

256 However, in his oral evidence, Mr McDonald acknowledged that the rendered image shown at Exhibit AY actually depicts an earlier version of the forecourt design.

257 The heritage experts agree that a detailed design for the forecourt is not yet before the Court, however the sketch plan contained at Figure 3 is accompanied by notation describing the elements of the redesign in the following terms:

“Modular pergola structure to align and compliment original elevation of Boatbuilding yard

Paving banding aligned with existing sliding door opening Opportunity for heritage interpretation as paving inscription of James Squire, early settlers

Tree set in paving within tree pit

Potential Food/Beverage outlet

Planting buffer to provide heritage curtilage to Forecourt”

258 According to Ms Trueman, it is conceivable that a detailed design could be acceptable, but until one is produced, her concerns are, broadly, that the basement carpark requires the removal of heritage fabric, alters the relationship of the boatshed to its site and the maritime character of the boatshed is yet to be adequately expressed.

259 However, as the application is for concept development approval, Mr McDonald considers it premature to require detailed resolution of the maritime industrial character and integration of heritage interpretation, which could be the subject of a condition of consent.

The impact on heritage significance is acceptable

260 The heritage experts agree that “carefully managed change for adaptive re-use is an appropriate means of securing the preservation of its most significant elements, being the primary timber structure, internal spatial characteristics and its landmark presence.” (Exhibit 21, p2)

261 The Respondent’s position is that, as the removal of existing built fabric of moderate heritage significance is not reversible, it must be demonstrated that no appropriate alternative is available to conform to Policy 4.4 of the CMP.

262 Mr McDonald is of the opinion that emphasis should fall on the term 'appropriate' as the elements otherwise agreed at [249] are preserved, including and most relevantly, the landmark presence of the existing boatshed that does not rely upon the additional forms that are now proposed to be removed.

263 Clause 55 of the Sydney Harbour SEPP requires that a consent authority, or the Court on appeal, must assess the extent to which the carrying out of the proposed development would affect the heritage significance of the heritage item concerned (subcl (4)).

264 Such an assessment must include, at subcl (5), consideration of a heritage impact statement that addresses at least the following issues:

- (a) the heritage significance of the item as part of the environmental heritage of the land to which this Part applies, and
- (b) the impact that the proposed development will have on the heritage significance of the item and its setting, including any landscape or horticultural features, and
- (c) the measures proposed to conserve the heritage significance of the item and its setting, and
- (d) whether any archaeological site or potential archaeological site would be adversely affected by the proposed development, and
- (e) the extent to which the carrying out of the proposed development would affect the form of any historic subdivision.

265 The Statements of Heritage Impact address cl 55 of the Sydney Harbour SEPP at pp39-41 and identify the heritage significance of the site.

266 In addressing the impact of the proposed development on the heritage significance of the site, and its setting, I note the primary interest of the CMP is to retain the visual appearance of the existing boatshed from the Parramatta River. For the reasons set out at [118], [136] and [148] I consider the form and siting of the proposed residential flat building to be acceptable.

267 For the reasons that follow, I also consider the removal of the heritage fabric identified to be of moderate heritage significance to be acceptable in the context of the proposal as a whole:

- (1) Firstly, the original drawings (Exhibit AO, Figures 36 and 37) identify the single storey 'Engineer Shop' located on the south-eastern corner of the primary boatshed structure as the only structure that is secondary or

minor in scale when compared with the scale of the primary boatshed form. While the experts agree that one of the two skillion-roofed structures was erected at, or shortly after the primary boatshed structure, as neither of the skillion-roofed structures are visible from the Parramatta River, the Applicant is less constrained in its proposal to remove structures that are not visible from the Parramatta River.

- (2) Secondly, a description of the Boatshed Fabric and Spatial Characteristics is found at pp29-34 of the Statement of Heritage Impact (Exhibit AC). In summary, the built form proposed for demolition is identified as either not original, or being of “conventional and less technical interest”. The timber structure identified to be retained is described as follows:

“The components of the primary timber structure, comprising round cross section posts, trusses, roof purlins, knee braces and cross braces at the upper parts of the elevations, are the most significant parts of the building fabric and are to be retained in situ. Steel rails used for hoists running under the roof trusses will also be retained for interpretive purposes.”
- (3) I accept that there is a clear visual and technical distinction between the timber structure within the primary boatshed form, and what is evident in the structural arrangement of forms proposed to be removed. The structure within the primary boatshed volume is to be retained.
- (4) Thirdly, as I understand it, Ms Trueman’s first preference is to retain the two skillion-roofed structures located to the north-east in particular. In the alternative, and in the event of their removal, a greater degree of the north-east elevation of the existing boatshed form should be exposed.
- (5) Drawing DA1-003 (Exhibit AB) shows the volume of the skillion-roofed forms attached to the north-eastern elevation of the existing boatshed.
- (6) A comparison between this drawing and Dwg DA-202 (Exhibit P) suggests, to my reading, that a greater proportion of the north-eastern elevation of the primary boatshed form is revealed by the removal of the skillion-roofed forms, which I accept demonstrate a lesser degree of technical interest than the structure described at [267(2)], and witnessed at the onsite view.
- (7) Where the proposed basement carpark will undoubtedly obscure a portion of the north-eastern elevation of the existing primary boatshed form, an assessment of the drawings noted above indicate to me that the skillion-roofed forms currently obscure a greater proportion of this elevation and so the proposed basement carpark does not detract from, but is likely to improve, an understanding of the scale of the primary boatshed form, which is commonly held to be a feature or element of its landmark form.
- (8) Fourthly, I note that the removal of limited built form that is secondary and subordinate to the primary boatshed structure facilitates a public pathway located to the south-east of the existing boatshed within a wide landscaped avenue that steps down to the Parramatta River immediately adjacent to the large form of the existing boatshed. In my

view the immediacy of this path to the existing primary boatshed form is likely to afford a greater appreciation of the landmark form which is, in large part, facilitated by the removal of the single-storey form in this location.

- (9) The landscaped avenue is 12m in width which, in my view, provides appropriate separation from the residential flat buildings proposed for the site, is consistent with the area identified on Figure 107 of the CMP as an appropriate curtilage for the existing boatshed in this location, and has a direct pedestrian connection to Waterview Street. All of these elements combine to provide a view corridor from the shared pedestrian/bicycle path on Waterview Street.
- (10) I accept that the removal of the single-storey forms falls within what may be considered the adaptive re-use of the existing boatshed, where the primary focus is on the scale and form of the primary boatshed that is the object of such landmark presence when viewed from the Parramatta River.

268 The Concept development application is supported by a heritage interpretation strategy (Exhibit R) and public art strategy (Exhibit S) which, when read together with pp29-35 of the Statements of Heritage Impact and the proposed conditions of consent, set out measures that I am satisfied will conserve the heritage significance of the site.

269 In summary, these measures include:

- (1) Identification of the site's historic thematic layers such as:
 - Indigenous occupation and use - Aboriginal life on the River;
 - Bennelong's connection with the locality;
 - James Squire – convict, master brewer, land holder - his house and Brewery;
 - Early colonial life along the Parramatta River;
 - The interim period – occupation and use 1840s to 1940;
 - Halvorsen and Sons – Boat builders;
 - War time Boat Building – contribution to the defence of the nation; and
 - Royal Australian Navy and Australian Defence industries – small boats.
- (2) Identification in the public art strategy of the site as a place of Aboriginal occupation, and that of James Squire, and the Halvorsen family.
- (3) The retention of the central internal volume of the existing boatshed at its highest point, in the form of a publicly accessible atrium in which heritage interpretation is outlined, including the installation of a restored Halvorsen boat, interpretation panels.

- (4) The retention of and, in the case of the north-eastern elevation, the reinstatement of original openings behind which new balconies, screening and other elements will remain
- (5) The choice of structure, materials and finishes that reflect the industrial aesthetic of the original boatshed presentation, and the retention or interpretation of significant elements such as the full-height doors on the south-west elevation.
- (6) Where new building components are proposed internally, these are to follow the structural grid so that the timber structure is evident, and where the principle of reversibility is to be adopted in both detailed design and construction.

270 Clause 55(5)(d) of the Sydney Harbour SREP requires consideration be given to whether the site, as an archaeological site within Schedule 5, Part 3 of the RLEP would be adversely affected by the proposed development.

271 Oral evidence from the archaeological experts was not required as it is commonly held by the parties that proposed conditions of consent sufficiently address the procedures necessary to appropriately manage further archaeological investigations.

272 In particular I note the conclusions of the Archaeological Impact Statement (AIS) (Exhibit A, Tab 14, p25) are, relevantly:

The results from test trenches T2, T3, T4 and T6 provide definitive evidence of:

- a high level of cutting down to bedrock across most areas tested;
- the introduction of modern fill across many areas of the site; and
- widespread disturbances, generally, across the whole of site during the twentieth century which has resulted in the removal of any potential archaeological resource across the majority of the site.

273 I also note as a result of excavation in Trench 1 is a conclusion that the majority of the complex known as the James Squire Brewery is within the footprint of the existing boatshed which is an area “of no archaeological potential due to the cutting down of the site for the construction of the boatshed, and quarrying of the sandstone for the seawall”.

274 On the basis of the agreed position of the archaeological experts, and the proposed condition of consent as to further archaeological investigations, I consider there to be sufficient management strategies in place to address the risk of impact on the site.

- 275 I also note here that I found no reason to doubt the integrity of the archaeological investigations as suggested in public submissions at [18].
- 276 I have also considered the Aboriginal Cultural Heritage Assessment Report (Exhibit 19, Annexure 9, p12) which states that an Aboriginal object was found on the site and which was subsequently reported to the Office of Environment and Heritage.
- 277 An Aboriginal Heritage Impact Permit (AHIP) has been issued (Permit ID: 4643) (Exhibit AN) under s 90J of the *National Parks and Wildlife Act 1974*, and provision is made at Condition 12 of the consolidated conditions of consent for an application for an additional AHIP as recommended in the Addendum joint report of the Aboriginal heritage experts (Exhibit AS).
- 278 On the basis of the above, I consider the provisions set out at cl 55 of the Sydney Harbour SREP to be met by the Concept development application.
- 279 I have also considered the effect on the heritage significance of the site in accordance with cl 5.10 of the RLEP and, for reasons identical to those set out above, I consider the impact of the concept development application to be acceptable.

Conclusion

- 280 In this matter, the Applicant seeks the Concept Plan appeal and the Demolition appeal to be treated as a concept development application in accordance with s 4.22(3) of the EPA Act.
- 281 Section 4.23(2) of the EPA Act makes clear that a concept development application, such as the Concept Plan Appeal satisfies the requirement for a site-specific development control plan, and cl 95 of Schedule 1 of the EPA Savings Regulation provides that a master plan is an acceptable substitute for a site-specific DCP.
- 282 I am satisfied that the concept development application before the Court is founded on a master plan that addresses those matters required of it by cl 49 of the Sydney Harbour SREP.

283 I am also satisfied that the concept development application has demonstrated consistency with the planning principles set out at cl 14, 15, 22, 23, 25 and 26 of the Sydney Harbour SREP.

284 I have also considered the Statements of Heritage Impact in relation to development affecting matters of non-Aboriginal heritage significance as I am required to do by cl 58 of the Sydney Harbour SREP and I am satisfied that any excavation permits required by the *Heritage Act 1977* are properly the subject of subsequent development applications.

State Environmental Planning Policy No 55 – Remediation of Land

285 Clause 7(1) of State Environmental Planning Policy No 55 – Remediation of Land ('SEPP 55') prohibits the grant of development unless the consent authority, or the Court on appeal, has considered certain matters.

286 It is commonly held by the parties that the Land is contaminated. Clause 7(2) of SEPP 55 requires that the Court consider a preliminary investigation of the land concerned carried out in accordance with the contaminated land planning guidelines.

287 The Applicant has prepared a Remediation Action Plan (Exhibit AE) and Data Gap Closure Report (Exhibit AF) which is the subject of a site audit report (Exhibit AH) and site audit statement (Exhibit AG). On that basis, and on the basis of the proposed conditions of consent, I am satisfied that the Land will be remediated so that it will be suitable for its intended purpose.

State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development

288 While the Concept Plan appeal before the Court is for concept development application for the purposes of s 4.22 of the EPA Act, and contingent upon the preparation of subsequent development application(s), a residential flat building is proposed.

289 Where an application relates to residential apartment development, cl 50(1A) of the Environmental Planning and Assessment Regulation 2000 requires that the application must be accompanied by a statement by a qualified designer, defined at cl 3 as a person registered as an architect in accordance with the

Architects Act 2003. The statement must conform to the provisions of cl 50(1AB), which include attestations in relation to cl 28(2)(b) and (c) of State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development. I am satisfied that the statement provided by Connie Argyrou (Reg No.7031), dated 25 October 2019 (Exhibit C) is in a complying form.

Limited development on foreshore

290 In respect of those matters at cl 6.5(3) of the RLEP:

- (1) I am satisfied that the objectives of the IN4 zone are achieved, with reference to cl 17 of Schedule 1 of the RLEP in accordance with cl 6.5(3)(a) of the RLEP.
- (2) For the reasons set out at [118] and [148] I am satisfied that the appearance of the proposed structures identified in the concept development application are compatible with the surrounding area (subcl 6.5(3)(b)).
- (3) On the basis of the Ecology Report (Exhibit A, Tab 17), the Concept Stormwater Management Plan (Exhibit AK), and the Construction Management Plan (Exhibit X, Tab 15) I am satisfied that the development will not result in environmental harm (subcl 6.5(3)(c)).
- (4) On the basis of the Landscape Concept Plans (Exhibit V), and for the reasons set out at [191], I am satisfied that continuous access along the foreshore is not compromised, congested or likely to result in conflict (subcl(6.5)(3)(d)(e)).
- (5) As stated at [265]-[267], I am satisfied that the historic, cultural, and archaeological significance of the site will be maintained (subcl 6.5(3)(f)), and for the reason stated at [118], [136] and [148], I am also satisfied that the development will not will not have an adverse impact on the amenity or aesthetic appearance of the foreshore (subcl 6.5(3)(g)).
- (6) I note that the Harbour Flooding Report (Exhibit A, Tab 18) identifies, at p19, that the existing and proposed land levels on the site are above the extreme water level estimated as a result of sea level rise at Table 3 and so I am satisfied that subcl (3)(h) has been considered.

291 I am satisfied that the grant of consent is warranted.

292 In arriving at my determination I have taken into consideration such of the matters under s 4.15 of the EPA Act that are the subject of the concept development application, and I have not considered the likely impact of carrying out development that is likely to be the subject of subsequent development applications, in accordance with subs 4.22(5) of the EPA Act.

293 In finding that the grant of consent is warranted, I note that consent being granted to the concept development application is contingent upon consent being subsequently granted to a further development application in accordance s 4.22(4)(a) of the EPA Act.

The conditions are disputed

294 While the parties were unable to settle an agreed set of conditions of consent during the proceedings, some level of agreement was achieved and the Court heard submissions on those conditions that were the subject of dispute.

295 On the final day of the hearing, conditions of consent were tendered with annotations describing the competing position of the parties in respect of those conditions that were disputed.

296 Proposed conditions of consent in respect of the Concept Plan appeal were marked Exhibit 15, and proposed conditions of consent in respect of the Demolition Appeal were marked Exhibit 16.

Concept Plan Appeal conditions

297 In respect of the Concept Plan appeal, those matters agreed to be capable of being resolved by consent include:

- The final design of the new internal stair within the existing boatshed which I understand to be described as 'Core 2' is the subject of Condition 8.
- The Applicant is to demonstrate that the height of the lift overruns that service the two residential flat buildings are designed to the lowest possible head height in accordance with Condition 11.

Condition 3

298 The Respondent proposes wording at Condition 3 to limit the number of residential dwellings located within the existing boatshed to 'no more than 19 dwellings' on the grounds that the redesign sought of the Applicant prior to a Stage 2 development application should result in the vacating of residential accommodation from the ground floor. Such a redesign should not, the Respondent argues, be grounds for the Applicant to seek additional residential accommodation beyond that stipulated in cl 17 of Schedule 1 of the RLEP.

299 The Applicant's position is that, firstly, a use other than residential on the ground floor may render the development impermissible and secondly, that the

terms of cl 17 of Schedule 1 of the RLEP are clear and do not need to be further augmented.

300 As it is my finding, and the Applicant's position, that redesign is neither warranted nor intended for another use on the ground floor of the existing boatshed, the Respondent's preferred wording is consistent with the terms of cl 17 of Schedule 1 of the RLEP and is adopted.

301 Relatedly, Condition 10(B) as proposed by the Respondent states that consent is not granted to residential use on the ground floor of the existing boatshed. For the reasons set out at [242]-[244], Condition 10(B) is struck from the conditions of consent.

Condition 7

302 The Respondent seeks to impose conditions, at Condition 7, in respect of the detailed design for the forecourt to the north east of the existing boatshed in the following terms:

“... ”

Note: [if demolition of the rear sections of the Boatshed is approved, the location of the demolished structures North of the boatshed should be interpreted in the forecourt design to enable an ongoing understanding of the original and early layout and form of the building].

The design of the forecourt should incorporate the requirements for any Aboriginal heritage and historical archaeological protection and interpretation resulting from the further investigations required by Conditions 12 and 13”

303 The Applicant submits that such a condition is more appropriately imposed upon a future Stage 2 development application as heritage interpretation is a particular matter of further development.

304 I accept the Respondent's position that the location of the proposed forecourt is proximate to the area of archaeological interest. I also agree that the proposed forecourt design in Exhibit AY is limited in detail. For these two reasons, I accept that conditions in the terms sought by the Respondent are warranted, and on the basis of my finding that the removal of the skillion-roofed additions is acceptable.

Condition 9

305 For the reasons set out at [184]-[206], I find a public pathway as preferred by the Respondent is not a requirement of the concept development application. As a result, Condition 9 as proposed by the Respondent is struck from the conditions of consent.

Condition 15

306 At the heart of the dispute is an area of land fronting Waterview Street that is currently used by the Applicant, despite it being located outside the land of the subject site, and which is identified by the parties as Crown land.

307 The Respondent seeks the removal of the layback and restoration of the kerb and gutter currently being used for vehicular access from Waterview Street, and for the bitumen and all structures within this area are to be removed and the area restored with turf and returned as parkland.

308 The Applicant seeks to insert the phrase 'use all reasonable endeavours to obtain Owner's Consent' to effect the works set out by the Respondent in the condition.

309 The scope of the works are not disputed, but as the land the subject of the condition is not within the ownership of the Applicant, I consider it reasonable that the Applicant's preferred wording of Condition 15 be adopted.

Condition 18 and 19

310 According to the Respondent, Conditions 18 and 19 arise from an enquiry by the Applicant to the 'Dial before you dig' service and whether applicable to the concept development application or subsequent development applications, the conditions are common and reasonable.

311 The Applicant asserts that the owner of the relevant infrastructure is incorrectly identified, and the works are a requirement of statutory authorities in any event, fall due in future stages and is premature to presume should occur at no cost to the correct utility owner.

312 As the conditions seek to identify a mechanism for undertaking works, in the form of a works agreement, and prescribe the work standards by reference to

Australian Standards, and relevant legislation, the Respondent's conditions are adopted.

Condition 27

313 Condition 27, as proposed by the Respondent, seeks to ensure that the development's stormwater management system integrates the principles of water sustainable urban design as required by Ryde Development Control Plan 2014 (RDCP) in the preparation of a Water Sustainable Urban Design Strategic Plan (WSUDSP).

314 The Applicant submits that, in essence, the provisions as worded are not conjunctive. Instead, the condition is qualified by BASIX-affected development that is not identified in the text of the condition, and an election must be made by the Applicant in preparing a WSUDSP at a future development application.

315 The condition cites accordance with Part 8.2 (Stormwater and Floodplain Management) of the RDCP. Referring to the relevant provision suggests that Condition 27(a) be worded in greater accordance with the controls at Section 3.3.2 of the RDCP to identify the requirements for preparation of a WSUDSP:

"All development applicable under this section that does not require a BASIX certificate, must provide a rainwater tank to meet greater than the 50% of non-potable water demand.

Water use within open space areas of the development (for uses such as irrigation, ponds and water features, etc) must be supplied from sources other than potable water. This may include rainwater storage tanks or treated grey-water, to meet 80% of the water use demand."

316 So inserted, Condition 27 would read:

"To ensure that the development's stormwater management system integrates the principles of water sustainable urban design (WSUD) as required by Council's DCP and policies, as well as best practise design approach to urban stormwater management, a Water Sustainable Urban Design Strategic Plan (WSUDSP) must be prepared detailing WSUD components to be implemented throughout each stage of the development.

The WSUDSP must be prepared by a suitably qualified drainage engineer, in collaboration with a landscape architect, to implement WSUD components in the stormwater management system for the development. The plan must generally be in accordance Councils DCP Part 8.2 (Stormwater and Floodplain Management) and comply with the following:

- (a) Development that does not require a BASIX certificate, must provide a rainwater tank to meet greater than the 50% of non-potable water demand.
- (b) Water use within open space areas of the development (for uses such as irrigation, ponds and water features, etc) must be supplied from sources other than potable water. This may include rainwater storage tanks or treated grey-water, to meet 80% of the water use demand.
- (c) To demonstrate this, the WSUDSP will be required to present a water balance model analysing such uses respective of rainfall statistics.
- (d) Satisfy the requirements of a WSUD management plan as specified in the DCP Part 8.2 (Stormwater and Floodplain Management)

The WSUDSP must be submitted with any subsequent development application/s for any above ground development works. The approved WSUDSP is to be implemented for every following development application."

Condition 32 and Condition 34

- 317 The parties dispute the need for, and the precise wording of, a condition requiring the upgrade of public domain improvements along Waterview Street.
- 318 The Respondent considers the upgrades to have a direct nexus to the proposed development the subject of the concept development application and, at the very least, to telegraph the need for, and scope of, public works likely to be required in future development applications.
- 319 The Applicant disputes a nexus between the proposed development and the public domain upgrades, and contests that the works are within the scope of s 7.11 of the EPA Act for local infrastructure contributions and are a kind allowed by a contributions plan.
- 320 The parties agree the issue is primarily a matter for future development applications.
- 321 During the hearing, the Respondent was directed to particularise the scope of works and standards expected of the public domain upgrades by reference to codes, standards or other published guidelines. This was done, and the references are identical in the wording provided by the parties.
- 322 While not assisted by detailed submissions on the matter, I consider a nexus likely between the development on the site and the Waterview Street frontage.

Drawing DA-102 shows eighteen pathways to the proposed townhouse development intersecting with the Waterview Street pedestrian path. Additionally, at least two other pedestrian pathways intersect, as do two driveway crossings which provide access to and from the site.

323 That said, the Applicant's preferred wording requires a Public Domain and Landscape Plan that would appear an appropriate means to establish a proposed scope of works that is otherwise largely, if not wholly, agreed by the parties, and to serve as the basis for agreement on costs arising.

324 For this reason I adopt the wording proposed by the Applicant.

325 Condition 34 is proposed by the Respondent and requires the preparation of a staging plan for public domain works. As the public domain includes a shared path along Waterview Street that is evidently well-used, it is appropriate that a future development application identify the staging of such works, and the Respondent's proposed condition signals such a requirement.

Condition 38

326 The Respondent seeks to impose a condition requiring the creation of a Right of Way (RoW) over the publicly accessible paths. The Applicant does not contest the principle of the requirement, and accepts responsibility for the paths and links on the site, but is uncertain as to whether a public liability insurance facility is available in the circumstances of the development.

327 Equally, the Applicant accepts that final resolution is not required prior to the issue of an occupation certificate and prefers the withholding of the condition pending further discussions between the parties on the nature of the liability.

328 The RoW proposed by the Respondent, and the related liability of the Applicant in respect of the insured risk is, in my view, a means of satisfying the requirement of cl 22(c) of the Sydney Harbour SREP for an appropriate tenure and management mechanism to safeguard public access to land made available that is not in public ownership.

329 Absent an alternative proposed by the Applicant, I consider the terms of Condition 38 to be reasonable.

Demolition Appeal conditions

330 The Respondent proposes a deferred commencement condition that seeks to stay the operation of any consent until the CMP is amended and updated to include certain matters to the satisfaction of the Council's heritage adviser.

331 As stated at [230], I am satisfied that the CMP has adequately addressed the matters required of it, and the condition is struck from the conditions of consent in respect of the Demolition Appeal.

Orders

332 The Court orders that:

In respect of the Concept Plan appeal (proceedings no. 2019/25398):

- (1) The Applicant's written request to justify the contravention of cl 4.3 of the Ryde Local Environmental Plan 2014 pursuant to cl 4.6 of the Ryde Local Environmental Plan 2014 is upheld.
- (2) The appeal is upheld.
- (3) Concept Development approval is granted to Development Application LDA/2018/0223 for a concept development application pursuant to s 4.22 (Concept Development Applications) of the *Environmental Planning and Assessment Act 1979* seeking Concept Plan approval for a mixed use development at 20 Waterview Street, Putney, subject to the conditions of consent at Annexure 'A'.
- (4) All exhibits are returned, except for Exhibits A, C, D, E, F, G, H, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, AM, AN, AO, AP, AQ, AR, AS and BD.

In respect of the Demolition appeal (proceedings no. 2019/254350):

- (1) The appeal is upheld.
- (2) Development consent is granted to Development Application No. LDA/2019/0172 for the part demolition of an existing boatshed and ancillary structures on the site, the removal of trees and remediation works at 20 Waterview Street, Putney, subject to the conditions of consent at Annexure 'B'.
- (3) All exhibits are returned, except for Exhibits X, AB, AC, AD, AE, AF, AG and AH.

.....

T Horton

Commissioner of the Court

Annexure A (292099, pdf)

Annexure B (208857, pdf)

Plans (9553487, pdf)

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