Land and Environment Court

New South Wales

Case Name:	Graham Developers Pty Ltd v Blacktown City Council
Medium Neutral Citation:	[2021] NSWLEC 1142
Hearing Date(s):	9-10 March 2021
Decision Date:	23 March 2021
Jurisdiction:	Class 1
Before:	Horton C
Decision:	See directions at [88]
Catchwords:	DEVELOPMENT APPLICATION – subdivision – new road construction – residential apartment development – stormwater drainage – height of buildings development standard – minimum lot size development standard – clause 4.6 written request
Legislation Cited:	Architects Act 2003 Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 4.17, 8.7 Environmental Planning and Assessment Regulation 2000, cll 3, 50 National Parks and Wildlife Act 1974 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Sydney Region Growth Centres) 2006, cll 4.1AB, 4.3, 4.6 State Environmental Planning Policy No 55 – Remediation of Land State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development, cl 28
Cases Cited:	Ballina Shire Council v Palm Lake Works Pty Ltd [2020] NSWLEC 41 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118

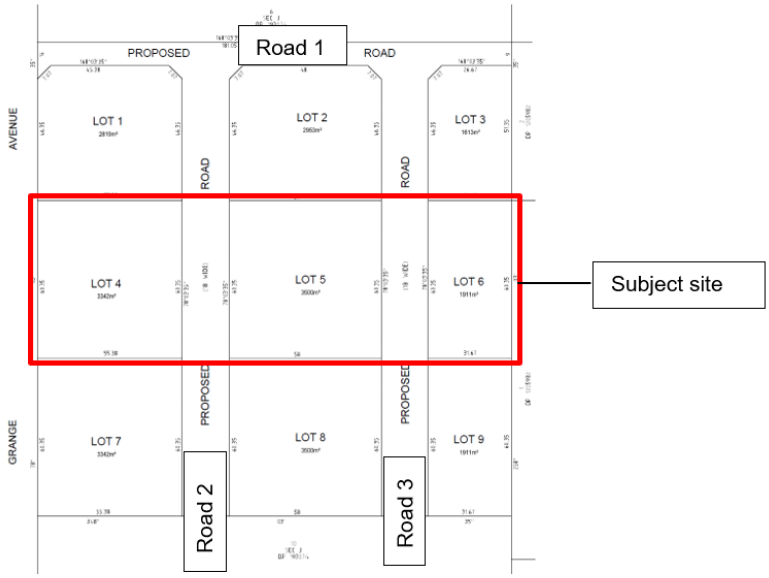
	Weal v Bathurst City Council (2000) 111 LGERA 181; [2000] NSWCA 88 Young v Gosford City Council (2001) 120 LGERA 243; [2001] NSWLEC 191
Texts Cited:	Apartment Design Guide
Category:	Principal judgment
Parties:	Graham Developers Pty Ltd (Applicant) Blacktown City Council (Respondent)
Representation:	Counsel: S Berveling (Applicant) D Loether (Solicitor) (Respondent) Solicitors: Conomos Legal (Applicant) Bartier Perry (Respondent)
File Number(s):	2020/101167
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER:** This Class 1 appeal is brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by the Sydney Planning Panel on behalf of Blacktown City Council (the Respondent) of Development Application SPP-17-00051 seeking consent for the demolition of existing structures, subdivision to create 3 development lots and 1 lot for roads, construction of new public roads, 3 residential flat buildings consisting of 148 apartments, 256 basement car parking spaces (as amended) and associated drainage works and landscaping at 217 Grange Avenue, Marsden Park (the site).

2 The application before the Court relies on subdivision works proposed in a separate and preceding application that is yet to be determined and that seeks consent for a 9 lot subdivision, demolition, tree removal and civil works consisting of the construction of roads and footpaths at 215-219 Grange Avenue, otherwise known as the ‘Parent subdivision’.

3 To understand the relationship between the development the subject of the development application, and the Parent subdivision, it is helpful to re-produce the layout plan prepared as part of the Parent subdivision, and as it appears behind Tab 5 of Exhibit 2, other than for annotations applied by the Court.



4 The background facts of the matter are contained in the Amended Statement of Facts and Contentions, prepared by the Respondent and marked Exhibit 1.

5 The parties agree that a number of the contentions set out in Exhibit 1 have been resolved by joint conferencing between experts in a number of disciplines.

6 Amendments to the application arising from the joint conferencing are reflected in amended plans for which leave was sought by the Applicant, unopposed by the Respondent and which comprise architectural plans (Exhibit K), and civil engineering plans (Exhibit L).

7 However, the Respondent submits that, notwithstanding the agreement between the experts on certain contentions set out in Exhibit 1 and reflected in Exhibits K and L, there remains a risk in granting consent to the application before the Court whilever the Parent subdivision remains undetermined, and where the Parent subdivision is still subject to change.

8 A focus of the dispute between the parties are certain particulars set out under contention 6 in respect of drainage engineering.

The site and its context

9 The site is a large rectangular lot of land that is 11,120m2 in area, having a frontage to Grange Avenue of 60.35m and a depth of 181.05m.

10 The site is legally described as Lot 8 Section 7 DP 193074.

11 The site is located within the R3 Medium Density Residential zone according to Appendix 12 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Growth Centres SEPP), in which residential flat buildings are permitted with consent.

12 The objectives of the R3 zone are as follows:

> • To provide for the housing needs of the community within a medium density residential environment.
>
> • To provide a variety of housing types within a medium density residential environment.
>
> • To enable other land uses that provide facilities or services to meet the day to day needs of residents.
>
> • To support the well-being of the community by enabling educational, recreational, community, religious and other activities where compatible with the amenity of a medium density residential environment.

Background to the stormwater contention

13 In respect of contention 6, the Court was assisted by three experts. Mr Oliver Walsh for the Applicant, and Mr David Yee and Mr Tony Merrilees for the Respondent who jointly conferred in the preparation of the joint report marked Exhibit 5, and in which the remaining areas of disagreement are set out.

14 According to Mr Yee, since the Parent subdivision was lodged in early 2020, the proponent of the Parent subdivision and the Council have been discussing certain aspects of the civil engineering and stormwater design.

15 Recently, the proponent of the Parent subdivision elected to alter the path of flow for water upstream of the subject site. Related to this change was a reassessment of the area of the catchment which has, according to Mr Merrilees, ‘doubled or even tripled’.

16 Consequently, there is now a greater volume of water being received at the access road to the east of the site, which was referred to throughout the proceedings as ‘Road 1’.

17 To collect and carry this greater volume of water, Mr Yee believes the cross-sectional area of the pipe under Road 1 will need to be increased.

18 A larger pipe below Road 1 may have the effect of elevating the relative level of the road, however the exact change in relative levels could be expected to be anywhere between ‘zero and a lot’, according to Mr Yee.

19 An elevation of Road 1 would also necessitate the re-grading of a portion of Roads 2 and 3 which intersect with Road 1.

20 Also as a consequence of the change, the cross-sectional area of pipework below the roads that run perpendicular to Road 1, identified as Road 2 (on the northern side of the site), and Road 3 (on the southern side of the site) may reduce in size.

21 Should this occur, Mr Merrilees considers it possible that the Applicant would then choose to install the pipes higher in the ground, closer to the surface.

22 While this would save the Applicant costs, the consequences for both the Parent subdivision and the proposed development would be twofold. Firstly, higher invert levels in the pipework may adversely impact the operation of the onsite detention and secondly, higher invert levels may require a change in the gradient of Roads 2 and 3.

23 Mr Oliver Walsh is of the view that an increase in cross-sectional area of the pipe below Road 1 is only one option to cope with the larger catchment area. An alternative is to widen the box culvert currently shown below Road 1, or to introduce a second box culvert that would increase capacity of the system without impacting the level of Road 1 at all.

24 The Respondent Council does not favour either of Mr Walsh’s alternatives due to the limited flexibility in determining invert levels and increased maintenance.

25 Regardless, in a scenario where the relative level of Road 1 is elevated, the Applicant submits that there is sufficient ‘wiggle room’, or ‘tolerance’ to accommodate the change without significantly or fundamentally changing the application before the Court.

26 As I understand it, the relative levels of Road 1 are around 2m below those of Road 2, and around 1m below those of Road 3. It is for this reason that Mr Walsh believes an elevation in the relative levels of Road 1 of 500-600mm, should that be required, would be easily absorbed in the transition to Roads 2 and 3.

27 However, a longitudinal section of Road 3 on drawing C302 (Exhibit L) shows a ‘sag point’ around 40m west of the intersection between Roads 1 and 3 that is of particular concern to Mr Yee as it suggests the gradient of Road 3 would be more steep between the sag point and Road 1 should Road 1 be further elevated.

28 Resolving these levels to ensure a gradient of no more than 3% in Road 3 has the potential to impact on the levels at the frontage of the site which throws into question the height plane assumed by the Applicant, and which underlies the preparation of the written request to vary the height standard pursuant to cl 4.6 of Appendix 12 of the Growth Centres SEPP.

29 According to the Respondent, these issues impose a degree of uncertainty on the final application that should preclude the grant of consent and, in the alternative, to rely upon deferred commencement conditions contained in the without prejudice draft conditions of consent (Exhibit 6) defers an essential matter for later consideration.

30 The drainage systems cannot operate independently, and the drainage system the subject of the Parent subdivision is yet to be fully resolved.

31 The Applicant submits that the absence of certainty is limited to precisely how two drainage systems interact. In the case of the drainage system documented in the Parent subdivision, it is sufficiently well developed that the final outcome is sufficiently certain.

32 In the case of the application before the Court, the proposed drainage system is the subject of expert evidence in Exhibit 5 and of oral evidence. As such, the issues have been properly considered and to the extent there remains an absence of certainty, it is not so great as would prevent the grant of consent.

33 Furthermore, the scope of Condition 2 and Condition 4 as proposed in Exhibit 6 are, in the words of the Respondent's experts, a 'failsafe' means of ensuring consistency between the two drainage systems.

34 The conditions are of a kind permitted by s 4.16(3) of the EPA Act which provides for development consent to be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority as to any matter specified in the condition.

35 Such conditions are also consistent with s 4.17 of the EPA Act which relevantly provides:

> (1) **Conditions—generally** A condition of development consent may be imposed if—
>
> > (a) it relates to any matter referred to in section 4.15(1) of relevance to the development the subject of the consent, or
> >
> > …
> >
> > (f) it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 4.15(1) applicable to the development the subject of the consent, or
> >
> > (g) it modifies details of the development the subject of the development application, or
> >
> > …

36 The wording of Condition 2 requires the final issue of architectural and civil engineering plans to be consistent with the Parent subdivision.

37 The wording of Condition 4 sets out forty-one requirements for the stormwater drainage system that are 'failsafe'.

38 Both Conditions 2 and 4 are, in their scope and wording, final and certain as understood in *Young v Gosford City Council* (2001) 120 LGERA 243; [2001] NSWLEC 191 ('*Young v Gosford*') and do not represent a risk that the development as built would be significantly or fundamentally different to that for which consent is sought.

Consideration

39 In the circumstances of this case, the application before the Court has a clear nexus with the Parent subdivision. To the extent that the works proposed in the

Parent subdivision are beyond the subject site, but are likely to be impacted by the proposed development, they may be characterised as off-site impacts.

40 The Applicant submits that this inter-relationship between the subject site, and off-site works is two-way. Firstly, s 4.15(1)(b) of the EPA Act requires the Court to take into consideration the impacts of the proposed development on the locality.

41 Similarly, s 4.17(1)(f) of the EPA Act permits the imposition of a condition of consent requiring the "carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 4.15(1) applicable to the development the subject of the consent".

42 The Respondent submits that, as was the case in *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41 ("*Palm Lake Works*"), the matters that remain uncertain are in the nature of off-site impacts that are matters of mandatory consideration under s 4.15(1)(b) of the EPA Act and in respect of which conditions are not final and certain in the manner set out by McEwen AJ, at [46], in *Young v Gosford*:

> "To answer the question as to whether Condition 1 is final and certain, one asks, whether the condition allows the consent to be fundamentally or significantly altered by the subsequent determination of the matter which has been deferred. If it is possible that, consequent upon the matter which has been left open, the consent as ultimately implemented may be significantly different from that which the consent purportedly approved, then the condition falls foul of the requirement that it be final and certain…"

43 I agree with the Applicant that there is a distinction between the circumstances of this case and *Palm Lake Works* in that the off-site impacts in this matter are documented in the form of the drainage system proposed in the Parent subdivision.

44 As such, the impact of the drainage system has been the subject of evaluation, resulting in discussion as to the nature of impacts that are possible on the application before the Court, should the amendment to the Parent subdivision which was the subject of evidence before the Court, eventuate.

45 In the event that the relative levels of Road 1 are elevated, which I accept is not certain, I consider there to be sufficient tolerance in the relative levels of

Road 2 and 3 to absorb the change in level with no impact identified on the drainage the subject of the application before the Court.

46 While there would be an impact on the levels of Roads 2 and 3, there was no evidence that the preferred gradient of the roads cannot be achieved. Furthermore, even if Roads 2 and 3 are re-graded as a result of the possible elevation of Road 1, no evidence was given as to particular aspects that would require alteration on the subject site beyond a general reference to levels.

47 Likewise, the drainage system the subject of the application before the Court has also been documented and I consider the concerns expressed by Mr Merrilees as to the potential for the drainage under Roads 2 and 3 to be lifted to be adequately addressed in Mr Walsh's oral evidence. In particular I accept Mr Walsh's evidence that the order of savings likely to come from installing pipework at a more shallow level to be negligible in the scale of the development, and is unlikely to be pursued if it would have the consequence of compromising the operation of the onsite detention of water.

48 For these reasons, I do not believe that the proposed conditions of consent at Conditions 2 and 4 would allow the consent to be fundamentally or significantly altered by the subsequent determination of the matter which has been deferred.

49 Next, in considering whether the proposed deferred commencement conditions results in the deferral of essential matters (*Weal v Bathurst City Council* (2000) 111 LGERA 181; [2000] NSWCA 88), I am of the view that the proposed conditions of consent do not defer consideration of an essential matter.

50 Rather, in their content, they appropriately prescribe actions that are commonplace, such as compliance with the requirements of Council's WSUD developer handbook (Condition 4(i)) the inclusion of the lot numbers on the drawings (Condition 4(ii)), specification of the date and revision number of the plans referred to in notes on any revised plans (Condition 4(xvi)), and the clear marking of RL's (Condition 4 (xxvi)).

51 The particulars of the proposed Condition 4 also provide for co-ordination between the subject application and the Parent subdivision such as ensuring

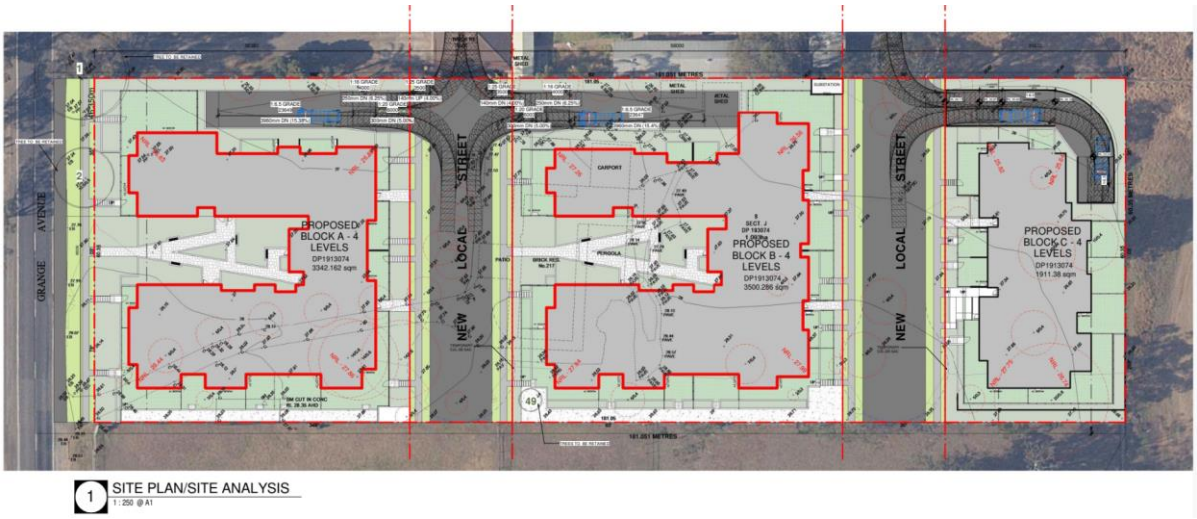
that all the pit level and pipe sizes in the street system match the approved subdivision plans (Condition 4 (xxiii)); or the revision, if required, to the staging plan resulting from a change in the infrastructure constructed in the Parent subdivision (Condition 4(iii)).

52 Finally, the particulars of Condition 4 also prescribe requirements that appear unrelated to the Parent subdivision in the form of amendments to drawings to ensure the use of non-return flaps in pipes (Condition 4 (xi)), the length of Stormfilter weirs (Condition 4 (xii)), and the basement driveway entry width that is sufficient to accommodate pipework in that location (Condition 4(xx)).

53 While I have sympathy for the Respondent's argument that an application for subdivision should be resolved in advance of an application that relies upon the grant of consent for that subdivision, there is no suggestion in this case that the drainage system currently proposed in the application is not sufficient for its purpose and function. Instead, the conditions provide, appropriately in my view, for certain prescribed amendments to the drainage documentation subject to the final form, if varied from that currently proposed, in the Parent Subdivision.

The proposed development exceeds the height of buildings development standard

54 The application before the Court seeks consent for the construction of three residential flat buildings, identified in the architectural plans (Exhibit K) as Block A, B and C, as indicated in the site analysis plan re-produced below.



55 Each of the proposed Blocks exceed the height of 14m that is permitted by cl 4.3 of Appendix 12 of the Growth Centres SEPP. The extent of the exceedance is indicated in Drawing Z002 (Exhibit K), re-produced below, and is the subject of a written request prepared in accordance with cl 4.6 of Appendix 12 of the Growth Centres SEPP by Mr Michael Georghiu of Tudor Planning and Design dated 13 November 2020 (Exhibit D).

56 I note here that the parties agree that the contravention of the height standard is justified. However, cl 4.6 of Appendix 12 of the Growth Centres SEPP requires that a consent authority, or the Court on appeal, consider a written request and secondly, be satisfied in respect of those matters set out at cl 4.6(4)(a) of Appendix 12 of the Growth Centres SEPP.

57 In doing so, cl 4.6 of Appendix 12 of the Growth Centres SEPP 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.

58 As shown by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [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))

59 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.

60 The exceedance is described in Table 2 of the written request as being attributable to the lift overrun and fire staircase on buildings A, B and C, and attributable to a parapet in building B, and ranging from 0.081m to 3.1m in excess of the permitted height.

61 Notwithstanding the non-compliance with the height of buildings development standard, the written request asserts that the proposed development is consistent with the objectives of the standard.

62 Clause 4.3 of Appendix 12 of the Growth Centres SEPP sets the maximum permissible height of buildings at 14m. The objectives of the height standard are as follows:

> (a) to establish the maximum height of buildings,
>
> (b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,
>
> (c) to facilitate higher density development in and around commercial centres and major transport routes.

63 In summary, the written request identifies that the proposed development, while not compliant with the height of buildings standard, provides the required

common open space at ground and rooftop level to which the lift overrun and fire stairs provide access. The central location of the elements imposes no adverse visual impact on adjoining properties, and does not prevent adjoining properties from achieving solar access requirements. Furthermore, the proposed development is within a local area in which consent has been granted for buildings with similar exceedance.

64 The written request sets out the following environmental planning grounds that it considers sufficient to demonstrate that the contravention of the standard is justified:

(1) Firstly, overshadowing as a consequence of the exceedance occurs on the proposed development itself and the proposed development as a whole generates a similar or identical shadow profile as the proposed or approved developments on adjoining properties in a manner that does not prevent those adjoining properties from achieving the required solar access.

(2) Secondly, the elements of the building that generate the exceedance are largely not visible from the public domain, and replicate similar elements producing a similar exceedance on the adjoining property for which consent has been granted.

(3) Thirdly, and for the reasons above, the similarity in built form with developments that are proposed, or for which consent has already been granted, can be taken as an indication that the proposed development, including its exceedance, is consistent with the future character of the area.

65 Further in support of its justification of the contravention, the written request identifies certain objects of the EPA Act with which the proposed development is said to conform.

66 Finally, the written request considers the proposed development to be consistent with the objectives of the R3 zone set out at [12] for the reasons that follow:

(1) The proposed development is medium density residential development which the first objective of the zone seeks to achieve;

(2) The mix of dwelling types is consistent with the variety sought by the second objective of the zone; and

(3) While the proposed development is for a residential purpose, it is in close proximity to shops and other facilities that are the focus of the third objective of the zone.

67 I am satisfied that the written request adequately addresses those matters required of it by cl 4.6(4)(a)(i) of Appendix 12 of the Growth Centre SEPP, and I am also satisfied that the proposed development is in the public interest because it is consistent with the objectives of the standard and the zone. In arriving at this opinion of satisfaction, I note that the 3D shadow diagrams at Figures 10 and 11 indicate solar access is achieved to buildings of similar form and scale as those proposed, as desired by objective b) of the height standard.

68 I have also considered the matters in subcll 4.6(5)(a), (b) and (c) of Appendix 12 of the Growth Centre SEPP as to whether any matter of significance for State or regional environmental planning is raised, and the public benefit of maintaining the standard. I conclude that in the circumstances of this case, and for the reasons outlined above, that the standard can be contravened as there is no apparent public benefit maintaining strict compliance with the standard in the circumstances of this case.

69 For the reasons set out above, I am satisfied that the written request prepared in relation to cl 4.3 of Appendix 12 of the Growth Centre SEPP and in accordance with cl 4.6 of Appendix 12 of the Growth Centre SEPP is well founded and should be upheld.

The minimum lot size development standard is exceeded

70 The application before the Court is also supported by a written request prepared in accordance with cl 4.6 of Appendix 12 of the Growth Centre SEPP by Mr Michael Georghiu of Tudor Planning and Design dated November 2020 in respect of the Minimum Lot size provision at cl 4.1AB of Appendix 12 of the Growth Centre SEPP (Exhibit E).

71 Clause 4.1AB(9)(a) of Appendix 12 of the Growth Centre SEPP establishes a development standard in respect of the minimum lot size for residential flat buildings of 2000m2.

72 As the lot proposed to accommodate Block C has an area of 1,911.38m2, the development standard is contravened and the written request at Exhibit E seeks to justify the contravention.

73 I note here that the parties agree that the written request at Exhibit E is well-founded and should be upheld. However as stated at [56], it is for the Court to be satisfied in the circumstances of the case.

74 I accept that the objectives of the minimum lot size standard are achieved, notwithstanding the non-compliance for the reasons set out in the written request at Exhibit E and as summarised below:

(1) Firstly, as the subdivision pattern and road layout that generates the non-compliance originates in the Marsden Park Indicative Layout Plan, and is replicated in adjoining lots that are not the subject of the application before the Court.

(2) Secondly, despite the non-compliance, adequate open space is provided in the form of landscaped area on ground level, and in the extent of deep soil planting.

75 Next I am satisfied that there are sufficient environmental planning grounds as required by cl 4.6(3)(b) of Appendix 12 of the Growth Centre SEPP because, despite the non-compliance with the minimum lot size standard, the proposed development demonstrates that medium density development is achieved with adequate area for landscaping, deep soil planting, common open space and building separation without generating adverse impacts on future adjoining properties.

76 I also accept that the proposed development is consistent with the objectives of the zone for the same reasons as are set out in [67] and, for the reasons set out at [68], I consider the matters at subcll 4.6(5)(a), (b) and (c) of Appendix 12 of the Growth Centre SEPP to support a conclusion that the written request at Exhibit E should be upheld.

Other considerations

77 The parties agree that the owners consent accompanying the development application was in error. Following the identification of the same by the Respondent, the Applicant submits the owners consent for development of the land marked Exhibit J.

78 The application is also accompanied by a BASIX certificate (Certificate No. 791151M_03, dated 24 November 2020) prepared in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and

the Environmental Planning and Assessment Regulation 2000 (EPA Regulation).

79 An Aboriginal Due Diligence Assessment is contained in Exhibit A, prepared by Comber Consultants dated September 2016 in accordance with Part 6 of the *National Parks and Wildlife Act 1974*. I note that the site is within an area of archaeological sensitivity with high potential to contain Aboriginal objects which is the object of Condition 2.8 of the proposed conditions of consent.

80 The Applicant relies upon a Soil Report prepared by DTM Geocivil Consulting dated 15 February 2018, which concludes, on the basis of 47 samples taken from the site, that no contamination or asbestos was identified and so the site is free of contamination. Additionally, a Preliminary Site Investigation prepared by Aargus dated 21 September 2016 forms part of the original Class 1 application and states that the site will be suitable, subject to a Detailed site investigation which forms part of the recommendation reflected in the conditions of consent. On this basis, I am satisfied in respect of those matters at cl 7 of State Environmental Planning Policy No 55 – Remediation of Land.

81 While conformity with design objective 4P of the Apartment Design Guide (ADG) was originally contended in Exhibit 1, the town planning experts reached agreement on the particular in the joint expert report at Exhibit 3.

82 The ADG is a companion document to the State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65).

83 Where an application relates to residential apartment development, cl 50(1A) of the EPA Regulation requires that the application must be accompanied by a statement by a qualified designer (‘designers statement’), defined at cl 3 of the EPA Regulation 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), and include attestations in relation to subcll 28(2)(b) and (c) of the SEPP 65.

84 Clause 50(1AB)(b)(ii) requires the designers statement to:

> (b) provide an explanation that verifies how the development—
>
> …

(ii) demonstrates, in terms of the Apartment Design Guide, how the objectives in Parts 3 and 4 of that guide have been achieved.

85 The designers statement included in the Class 1 application and dated 10 December 2017 does not include an explanation that verifies how the development demonstrates conformity to Parts 3 and 4 of the ADG. While a form of explanation is contained in Table 4 at p13 of the amended Statement of Environmental Effects (Exhibit C), it appears selective in its scope. For example, Part 4P of the ADG is not addressed. Neither is Exhibit C authored by the designer, as required by cl 50(1AB) of the EPA Regulation.

86 Finally, I note there are two references in the designers statement prepared by the architect, Mr Simon Ochudzawa that indicates the designers statement to be incorrectly founded. Firstly, the design quality principles are found in Schedule 1 of SEPP 65, and not Part 2 (which is repealed) as stated. Secondly, reference is made on p2 of the designers statement to the Residential Flat Design Code which was replaced by the ADG sometime in 2015.

87 As compliance with the ADG is not now a principally contested matter between the parties, I do not consider the deficiencies of the designers statement to be grounds for refusal of the application. However, as the application lacks a designers statement in a complying form, I consider it necessary for the Applicant to provide a complying designers statement.

Directions

88 For the reasons set out at [81]-[87], the Applicant is to provide a designers statement that fully complies with the requirements of cl 50(1AB) of the EPA Regulation within 7 days of the date of this direction.

……

T Horton

Commissioner of the Court

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