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| Case Name:  | Eastern Suburbs Leagues Club Ltd v Waverley Council |
| Medium Neutral Citation:  | [2019] NSWLEC 130 |
| Hearing Date(s):  | 29, 30 August and 2 September 2019 |
| Date of Orders: | 13 September 2019 |
| Decision Date:  | 13 September 2019 |
| Jurisdiction:  | Class 1 |
| Before:  | Moore J |
| Decision:  | See directions at [158] |
| Catchwords:  | DEVELOPMENT APPLICATION - seniors living development - development proposed for the site of Waverley Bowling Club - site compatibility certificate issued rendering development permissible - most merit issues resolved by agreement between the experts resulting in significant amendments to the proposal - amended proposal not compliant with development standards for height and floor space ratio in Waverley Local Environmental Plan 2012 (the LEP) - issue of whether or not State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, renders it unnecessary for there to be a request pursuant to cl 4.6 of the LEP to dispense with compliance with those development standards - request pursuant to cl 4.6 not required - remaining merit issue concerned the proposed height of a seven storey building in the northwest corner of the site - merit consideration of the contextual appropriateness of this building - building as proposed not acceptable - building to be rendered acceptable by removal of one residential level and reduction of the footprint of the penultimate residential level - appropriate to grant development consent when agreed revised plans and conditions provided - directions to permit this to occur |
| Legislation Cited:  | Environmental Planning and Assessment Act 1979, s 8.15State Environmental Planning Policy (Affordable Rental Housing) 2009, cl 29State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004Waverley Local Environmental Plan 2012 |
| Cases Cited:  | Hastings Point Progress Association Inc v Tweed Shire Council [2009] NSWCA 285Ku-ring-gai Council v Bunnings Properties Pty Ltd [2019] NSWCA 28RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130 |
| Category:  | Principal judgment |
| Parties:  | Eastern Suburbs Leagues Club Ltd (Applicant)Waverley Council (Respondent) |
| Representation:  | Counsel:Mr A Galasso SC (Applicant)Mr C McEwen SC/Dr J Smith, barrister (Respondent) Solicitors:Landerer & Co (Applicant)Wilshire Webb Staunton Beattie (Respondent) |
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JUDGMENT

Introduction

1. On 18 December 2018, Eastern Suburbs Leagues Club Ltd (the Club) applied to Waverley Council (the Council) for development consent to redevelop the precinct occupied by Waverley Bowling Club (the Bowling Club). The Bowling Club is located on the southern side of Birrell Street, Waverley and is bounded by Henrietta Street, to the west, and Langlee Avenue, to the east.
2. The site is a little irregular in shape, with its frontage to Langlee Avenue being shorter than its frontage to Henrietta Street. As a consequence, on its Langlee Avenue side, the southern boundary of the site abuts 38 Langlee Avenue and turns to abut the rear boundaries of 38 and 36 Langlee Avenue. From this point, the boundary running west is against the northern fence of a residential flat building whose address is 10 Henrietta Street, a development that is located on a battle-axe block. This flat building has three residential levels. The southern boundary of the site then turns a short distance to the north before proceeding in a westerly direction along the northern boundary of 2 Henrietta Street.
3. The land occupied by the Bowling Club (the site) currently has on it the Bowling Club premises; an area of at-ground parking accessible from both Langlee Avenue and Henrietta Street (but with the primary entrance being from Langlee Avenue); and three standard size bowling greens, with those greens being set some metres back from the Birrell Street frontage and, effectively, occupying the whole of that frontage.
4. It is also to be noted that portion of the fabric of the existing clubhouse is a heritage building to which additions have been made over the years. It is also to be noted that, along the elbow of the site at its Henrietta/Birrell Street corner, there is also a heritage-listed stone retaining wall.

The proposed development

1. The development for which the Club now seeks approval from the Court comprises a number of elements.
2. The first is the development of a major seniors’ living residential development, the apartments of which would be in four new buildings of various heights across the site. The largest of them (Building A) is proposed for the north‑western corner in the vicinity of the intersection of Henrietta and Birrell Streets, and is to accommodate, at ground level, a new clubhouse for the Bowling Club. Construction of this building will necessitate the number of bowling greens on the site being reduced from three to two. The existing clubhouse is proposed to have its non-heritage-related external elements removed and be converted into a communal facility for use by the residents of the seniors’ living apartments.
3. The development proposes two levels of underground parking, with the major entry to be by ramp from Langlee Avenue, with this ramp having a clearance of 4.5 metres to permit the entry of vehicles servicing the site. The access ramp from Langlee Avenue is proposed to be two-way, whilst a separate access from Henrietta Street is proposed to be one-way-in only, with this access point reached by travelling down a short length of Henrietta Street (Henrietta Street being one-way to the south from its intersection with Birrell Street).
4. One of the options in the original proposal lodged with the Council included a childcare centre in the south-western corner of the site. This proposed childcare centre has been removed from the proposal for which consent is now sought. It has been replaced with a fourth seniors’ living apartment building (Building D). This change has had the effect of removing what would otherwise have been significant potential traffic impacts along Henrietta Street.

The relevant planning regime

Introduction

1. For the purposes of my consideration of planning issues in contest between the parties, it is necessary to consider various provisions from two local environmental plans and three state environmental planning policies. The two local environmental plans requiring discussion are:
* Waverley Local Environmental Plan 2012 (the WLEP); and
* Tweed Local Environmental Plan 2000 (the Tweed LEP).

(The necessity to examine a provision of what might otherwise be regarded as an irrelevant local environmental plan is later explained in the context of my resolution of the conflicting positions of the parties concerning whether a number of provisions of the WLEP giving rise to consideration of, and seeking dispensation from compliance with, development standards set by the WLEP were operative or not).

1. The three state environmental planning policies requiring to be considered are:
* State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (the SEPP);
* State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (the Education SEPP); and
* State Environmental Planning Policy (Affordable Rental Housing) 2009 (the Affordable Rental Housing SEPP).
1. It is appropriate to set out the relevant provisions of the two local environmental plans and those of the three state environmental planning policies before turning to address, further, matters of description and analysis arising in these proceedings.

Waverley Local Environmental Plan 2012

1. The site is zoned RE2 Private Recreation under the WLEP. The element of the proposed development being the seniors’ living apartments and associated facilities comprises development that is prohibited in the zone. The bowling club use and the now-abandoned childcare centre are uses permitted in this zone.
2. However, the Director-General of the Department of Planning (the Department) (as were the relevant descriptors in 2017) issued an instrument known as a site compatibility certificate pursuant to cl 24 of the SEPP. This site compatibility certificate (further details of which are later set out) has the beneficial and facultative effect of overriding the prohibition in the WLEP and permitting development for the site for seniors housing.
3. The Director-General’s site compatibility certificate was issued on 25 September 2017 and has a life of two years.
4. As a consequence, if the Club is not granted development consent for its proposal before 25 September 2017, the site compatibility certificate lapses and a further site compatibility certificate process would be required to be undertaken for the Club to seek a further site compatibility certificate to provide a basis for such a proposed development on the site.
5. The objectives in the Land Use Table for the RE2 Zone are:

**1   Objectives of zone**

•   To enable land to be used for private open space or recreational purposes.

•   To provide a range of recreational settings and activities and compatible land uses.

•   To protect and enhance the natural environment for recreational purposes.

1. In addition to the zoning and the Land Use Table, there are three other provisions of the WLEP which require consideration in these proceedings. They are:
2. Clause 4.3 *Height of buildings*;
3. Clause 4.4 *Floor space ratio*; and
4. Clause 4.6 *Exceptions to development standards*.
5. It is appropriate to set out each of these clauses, commencing with cl 4.3 *Height of buildings*. This clause is in the following terms:

**4.3   Height of buildings**

(1)   The objectives of this clause are as follows:

(a)   to establish limits on the overall height of development to preserve the environmental amenity of neighbouring properties and public spaces and, if appropriate, the sharing of views,

(b)   to increase development capacity within the Bondi Junction Centre to accommodate future retail and commercial floor space growth,

(c)   to accommodate taller buildings on land in Zone B3 Commercial Core of the Bondi Junction Centre and provide an appropriate transition in building heights surrounding that land,

(d)   to ensure that buildings are compatible with the height, bulk and scale of the desired future character of the locality and positively complement and contribute to the physical definition of the street network and public space.

(2)   The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

1. The relevant sheet of the Height of Buildings Map covering the site discloses that the maximum permitted development height on the site is 8.5 metres. As originally proposed at the commencement of the hearing, there were significant breaches of this height limit envisaged by the development proposal. Issues remaining relating to the proposed Building A’s height require later merit consideration.
2. The second provision requiring consideration is cl 4.4 *Floor space ratio*. This clause is in the following terms:

**4.4   Floor space ratio**

(1)   The objectives of this clause are as follows:

(a)   to ensure sufficient floor space can be accommodated within the Bondi Junction Centre to meet foreseeable future needs,

(b)   to provide an appropriate correlation between maximum building heights and density controls,

(c)   to ensure that buildings are compatible with the bulk, scale, streetscape and desired future character of the locality,

(d)   to establish limitations on the overall scale of development to preserve the environmental amenity of neighbouring properties and minimise the adverse impacts on the amenity of the locality.

(2)   The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

1. The relevant sheet of the Floor Space Ratio Map covering the site discloses that the maximum permitted floor space ratio (FSR) is 0.50:1. As with the building height limit, the proposed development envisages a FSR for development on the site significantly exceeding that which is permitted by the WLEP provision. As a matter of merit consideration, FSR compliance contributes to the issues arising for consideration of the height (and hence number of residential levels) proposed for Building A.
2. The third clause of the WLEP requiring consideration (including consideration as to whether it is overridden by the SEPP) is cl 4.6 *Exceptions to development standards*. This clause is a beneficial and facultative one, which provides a mechanism by which a development proponent can seek a dispensation from complying with a development standard set in the WLEP. The clause requires any request for such a dispensation to address those matters mandated in cl 4.6(3) and (4). This clause, relevantly, is in the following terms:

**4.6   Exceptions to development standards**

(1)   The objectives of this clause are as follows:

(a)   to provide an appropriate degree of flexibility in applying certain development standards to particular development,

(b)   to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2)   Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3)   Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating:

(a)   that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b)   that there are sufficient environmental planning grounds to justify contravening the development standard.

(4)   Development consent must not be granted for development that contravenes a development standard unless:

(a)   the consent authority is satisfied that:

(i)   the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii)   the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b)   the concurrence of the Secretary has been obtained.

(5)   …

(6)   …

(7)   …

(8)   …

State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004

1. As earlier noted, the SEPP is a beneficial and facultative environmental planning instrument that has the effect, for applications that are otherwise compliant with the framework for the various types of accommodation falling within its various chapters, of setting aside barriers which would otherwise arise under local environmental plans in specified circumstances where it was considered that the social policy objectives of the SEPP warranted such ousting occurring. A number of provisions of the SEPP warrant being set out to enable matters engaged for consideration in these proceedings to be understood. The first is cl 24. It is in the following terms:

**24   Site compatibility certificates required for certain development applications**

(1)   This clause applies to a development application made pursuant to this Chapter in respect of development for the purposes of seniors housing (other than dual occupancy) if:

(a)   the development is proposed to be carried out on any of the following land to which this Policy applies:

(i)   …

(ii)   …

(iii)   land that is used for the purposes of an existing registered club, or

(b)   …

(1A)   …

(2)   A consent authority must not consent to a development application to which this clause applies unless the consent authority is satisfied that the relevant panel has certified in a current site compatibility certificate that, in the relevant panel’s opinion:

(a)   the site of the proposed development is suitable for more intensive development, and

(b)   development for the purposes of seniors housing of the kind proposed in the development application is compatible with the surrounding environment having regard to (at least) the criteria specified in clause 25 (5) (b).

(3)   Nothing in this clause:

(a)   prevents a consent authority from:

(i)   granting consent to a development application to which this clause applies to carry out development that is on a smaller (but not larger) scale than the kind of development in respect of which a site compatibility certificate was issued, or

(ii)   refusing to grant consent to a development application to which this clause applies by reference to the consent authority’s own assessment of the compatibility of the proposed development with the surrounding environment, or

(b)   otherwise limits the matters to which a consent authority may or must have regard (or of which a consent authority must be satisfied under another provision of this Policy) in determining a development application to which this clause applies.

(4)   (Repealed)

1. The process for applying for a site compatibility certificate is set out in cl 25 of the SEPP. The relevant elements of this clause (as at September 2017) are set out below:

**25   Application for site compatibility certificate**

(1)   An application for a site compatibility certificate for the purposes of clause 24 may be made to the Director-General:

(a)   by the owner of the land on which the development is proposed to be carried out, or

(b)   by any other person, with the consent of the owner of that land.

(2)   An application must be:

(a)   in writing, and

(b)   in the form (if any) approved by the Director-General from time to time, and

(c)   accompanied by such documents and information as the Director-General may require.

(3)   Subject to subclause (4) (b), the Director-General must provide a copy of the application to the General Manager of the council for the area in which the development concerned is proposed to be carried out (the ***relevant General Manager***) within the period of 7 days after the application is made.

(4)   Subject to subclause (5), the Director-General:

(a)   may determine the application by issuing a certificate or refusing to do so, and

(b)   if the Director-General refuses to issue a certificate at any time within the period of 7 days after the application is made—is not required to comply with subclause (3).

(5)   The Director-General must not issue a site compatibility certificate unless the Director-General:

(a)   has taken into account the written comments (if any) concerning the consistency of the proposed development with the criteria referred to in paragraph (b) that are received from the relevant General Manager within 21 days after the application for the certificate was made, and

(b)   is of the opinion that the proposed development is compatible with the surrounding land uses having regard to (at least) the following criteria:

(i)   the natural environment (including known significant environmental values, resources or hazards) and the existing uses and approved uses of land in the vicinity of the proposed development,

(ii)   the impact that the proposed development is likely to have on the uses that, in the opinion of the Director-General, are likely to be the future uses of that land,

(iii)   …,

(iv)   …,

(v)   without limiting any other criteria, the impact that the bulk, scale, built form and character of the proposed development is likely to have on the existing uses, approved uses and future uses of land in the vicinity of the development,

(vi)   ….

(6)   ….

(7)   A certificate may certify that the development to which it relates is compatible with the surrounding land uses only if it satisfies certain requirements specified in the certificate.

(8)   ….

(9)   A certificate remains current for a period of 24 months after the date on which it is issued by the Director-General.

(10)   ….

1. The SEPP also sets out a range of matters concerning various development attributes likely to be engaged by an application where, if the requirements in the clause are satisfied, a consent authority is not permitted to refuse to approve a compliant development of the type engaged by this development proposal made by the Club. The relevant elements of cl 50 are in the following terms:

**50   Standards that cannot be used to refuse development consent for self-contained dwellings**

A consent authority must not refuse consent to a development application made pursuant to this Chapter for the carrying out of development for the purpose of a self-contained dwelling (including in-fill self-care housing and serviced self-care housing) on any of the following grounds:

(a)   **building height:** if all proposed buildings are 8 metres or less in height (and regardless of any other standard specified by another environmental planning instrument limiting development to 2 storeys),

(b)   **density and scale:** if the density and scale of the buildings when expressed as a floor space ratio is 0.5:1 or less,

(c)   …

(d)   …

(e)   …

(f)   …

(g)   (Repealed)

(h)   …

1. The SEPP has, in appropriate circumstances, the effect of ousting provisions that are contained in any other environmental planning instruments (here, relevantly, the WLEP). This is achieved by virtue of cl 5(3) of the SEPP, a provision in the following terms:

**5   Relationship to other environmental planning instruments**

(1)   …

(2)   …

(3)   If this Policy is inconsistent with any other environmental planning instrument, made before or after this Policy, this Policy prevails to the extent of the inconsistency.

1. Because the height and FSR aspects of this proposed development do not satisfy the relevant “must not refuse” elements of cl 50 of the SEPP, those matters, for SEPP purposes, thus engage merit considerations. The interaction or not of cl 4.6 of the WLEP and such merit considerations is later discussed.

State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017

1. The Education SEPP is also a beneficial and facultative environmental planning instrument that has the effect of setting aside barriers which would otherwise arise under local environmental plans in specified circumstances where it was considered that the social policy objectives of this SEPP warranted such ousting occurring. A number of provisions of this SEPP also warrant being set out to enable matters engaged for consideration in these proceedings to be understood.
2. It is unnecessary to set out all the potentially relevant provisions of the Education SEPP. It is sufficient to note that Schedule 2 sets out the nature of development on a school site which is capable of being complying development. One of the elements in the schedule deals with the building heights. It is in the following terms:

**2   Building height**

The building height of a building (whether a new building, or an existing building as a result of an addition or alteration):

(a)   must not exceed 4 storeys, and

(b)   must not exceed 22m from ground level (mean).

1. This building height provision, for potential future development, is engaged with respect to land on the western side of Henrietta Street - land that is, effectively, owned by the school (whilst not presently incorporated within the special purposes zone for the school). However, I am satisfied that, for the purpose of assessing what is the possible future development character of the element of Henrietta Street, on its western side opposite the site of the Club's proposed development, the above provision is to be taken into account.
2. Finally, with respect to the Education SEPP, it has, in cl 8, an overriding of inconsistency provision to the same effect as cl 5(3) of the SEPP.

State Environmental Planning Policy (Affordable Rental Housing) 2009

1. Although Mr Galasso sought to draw support, by analogy, from cl 29 of the Affordable Rental Housing SEPP in support of his argument as to why it was not necessary for there to be a successful request pursuant to cl 4.6 of the WLEP to permit the Club's proposal to be approved, as I have concluded that there is a separate and different basis why cl 4.6 is ousted, it is not necessary to set out any of the provisions of the Affordable Rental Housing SEPP, merely to note that they were addressed during the course of the hearing.

The site compatibility certificate process

Introduction

1. As earlier set out, cll 24 and 25 of the SEPP contained a provision by which a development proponent could apply to the Director-General of the Department for a site compatibility certificate. Such a certificate, if issued, permits a proponent to seek development consent for a seniors’ living development, where such development would otherwise be prohibited.
2. On 21 August 2017, the Club applied for such a certificate to permit it to undertake a seniors’ living development on the site. As set out earlier, cl 25(3) of the SEPP (as applicable in September 2017) required that the Director-General of the Department provide a copy of the Club's application for a site compatibility certificate to the General Manager of the Council. This was done.
3. The Council provided comments to the Department concerning the application. The Council's comments dealt with a number of topics relevant to matters with which I am concerned, with the Council commenting on the proposed built form in the following terms:

**Built form changes**

The consideration of any proposed changes to development standards must not form part of this SCC application. The current development standards under Waverley Local Environmental Plan 2012 include a height of 12.5m and a floor space ration of 0.9:1 and were developed following consultation with the community through an extensive strategic planning process.

The SC application seeks a height of 20m and a floor space ratio of 1.87:1. As previously stated, changes of this nature cannot be thoroughly assessed under this process and without any community involvement. There is no compelling evidence that provides justification for the proposed concepts on urban design, land use, traffic and environmental grounds. As such, the Department should require the removal of any changes to development standards in the SCC application and require that they be comprehensively assessed under a development application.

Council raises no objection to the potential to include seniors living as an additional permitted use on the site, whilst retaining the current zoning and development standards.

1. As part of the departmental assessment of the site compatibility certificate application, the assessment report observed in response to this element of the Council’s comments:

DPE Comment: The site compatibility certificate process does not endorse a building height or floor space ratio for the site. The Department agrees that the suitability of the 5 to 7 storey components of the proposal require further assessment. It is considered that the final design, building height limits, and the appropriateness of the proposed 5 to 7 storey sections, can be adequately considered and determined at the development application stage. This is discussed in further detail below.

The Department notes support for seniors living under the existing development standards. If an SCC is issued for the site, the SEPP allows Council to consider a development application on the site which exceeds those development standards based on merit. The contextual fit and impacts of the development would be considered as part of the application.

1. The Department’s assessment report also included the following relevant comments:

In the wider area, the maximum number of storeys along Birrell Street is 8 storeys at No 205 and 5 storeys in part of the Waverley College approximately 250m west near the intersection of Carrington Road. However, the predominant built form along Birrell Street is 4 storey residential flat buildings and 1-2 storey dwelling houses. In Langlee Avenue, the predominant built form is 2-3 storey dwelling houses, with a single 4 storey residential flat building on the eastern corner of Langlee Avenue and Birrell Street.

It is noted that the 5-7 storey buildings are inconsistent with the height of buildings in the immediate vicinity. A height of 7 storeys is also inconsistent with the maximum building heights provided in Waverley LEP 2012 which are between 8.5m (2 storeys) and 12.5m (4 storeys).

Any future development application for the site should address:

•   the contextual fit of a 7 storey element at north west corner;

•   adequate solar access being provided to dwellings to the south of the site;

•   a transition from the 5 storey element at the eastern end of the site to the two storey dwellings on Langlee Avenue; and

•   providing open space across the site which is practical and of high amenity.

It is considered that the final design and building heights, and the appropriateness of the proposed buildings on the site, can be adequately considered and determined at the development application stage.

1. The report recommended that the Director-General’s delegate issue a site compatibility certificate for the then proposed scheme.
2. On 25 September 2017, Mr Stephen Murray, the Department’s Executive Director, Regions wrote to the Club’s representative, in his capacity as the Director-General's delegate for the purposes of dealing with this site compatibility certificate application, advising that he had determined that a certificate should be issued. The letter had the formal certificate appended to it. In his letter, Mr Murray said, relevantly:

I, the Executive Director, Regions as a delegate of the Secretary have determined the application under clause 25(4)(a) of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors Housing SEPP) by issuing a site compatibility certificate subject to satisfaction of certain requirements specified in the certificate (clause 25(7)). I have attached the Certificate of Site Compatibility.

In issuing this Certificate, I have determined that the site is suitable for more intensive development and that use of the site for seniors housing is compatible with the surrounding environment and land uses having regard to the criteria set out in clause 25(5)(b) of the Seniors Housing SEPP.

I note that the final layout and heights, building construction and onsite facilities in the proposed seniors housing development will be subject to the resolution of issues relating to building height, bulk and scale, heritage, traffic, flora, potential land contamination, open space and landscaping. The Certificate has been conditioned to confirm that these matters will need to be addressed through a development application process.

1. The relevant element of the site compatibility certificate issued by Mr Murray was in the following terms:

I, the Executive Director, Regions as a delegate of the Secretary have determined the application under clause 25(4)(a) of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors Housing SEPP) by issuing a site compatibility certificate subject to satisfaction of certain requirements specified in the certificate (clause 25(7)). I have attached the Certificate of Site Compatibility.

In issuing this Certificate, I have determined that the site is suitable for more intensive development and that use of the site for seniors housing is compatible with the surrounding environment and land uses having regard to the criteria set out in clause 25(5)(b) of the Seniors Housing SEPP.

I note that the final layout and heights, building construction and onsite facilities in the proposed seniors housing development will be subject to the resolution of issues relating to building height, bulk and scale, heritage, traffic, flora, potential land contamination, open space and landscaping. The Certificate has been conditioned to confirm that these matters will need to be addressed through a development application process.

1. As can be seen, the site compatibility certificate required that matters set out in Schedule 2 to the certificate were required to be satisfied before development consent could be granted to a seniors’ living development on the site.
2. Schedule 2 was in the following terms:

**Requirements imposed on determination:**

1   The final layout, building construction and onsite facilities in the proposed seniors housing development will be subject to the resolution of issues relating to:

•   building height, bulk and scale, including

-   the contextual fit of a 7 storey element at north west corner;

-   adequate solar access being provided to dwellings to the south of the site; and

-   a transition from the 5 storey element at the eastern end of the site to the two storey dwellings on Langlee Avenue.

•   heritage, including an assessment of significance and exploration of options for the adaptive re-use of the existing clubhouse building;

•   traffic;

•   potential for land contamination, given the site’s use as a bowling club; and

•   existing trees, landscaping and providing open space across the site which is practical and of high amenity.

The site compatibility certificate for the development proposal

1. I have set out, above, the process by which the site compatibility certificate was sought for a seniors’ living development on the site and the nature of the certificate, which was granted (including the matters set out in Schedule 2 to that certificate).
2. It is appropriate to note the broad form of the development proposal for which that certificate was granted (although it is not necessary to reproduce an image of it). In short, the scope of the then envisaged development was significantly more intense than that which is the subject of the development proposal I am now considering. That which the Club originally envisaged proposed that the whole of the site be developed, including all three of the bowling greens.
3. It is to be observed that the Club submitted two concept proposals, in the alternative, for consideration for the issuing of a site compatibility certificate. The sole difference between them was that one concept plan showed all the development proposed for the site, being for seniors’ living development of varying types, whilst the second substituted, in the south-western corner of the site, a proposal that one of the buildings be a childcare facility.
4. The bowling activities of the Bowling Club were proposed to be relocated to the Bondi Golf & Diggers Club. This did not eventuate, as was described in the affidavit of 27 February 2019 deposed by Ms Spizzo, the Club's solicitor in these proceedings. She set out, at [18] to [20], what transpired:

18   The SCC retained club use on the land but relocated the bowling greens to an alternative site at Bondi Golf & Diggers Club.

19   To enable the SCC to proceed to a development application and subsequent redevelopment, land that would be used for non-club purposes (seniors housing) was required to be transferred as a ‘non-core asset’ under the *Registered Clubs Act* 1976. This required members of the Applicant to pass a successful resolution at an Extraordinary General Meeting to:

a)   relocate the bowling club to Bondi Golf & Diggers Club, and

b)   to transfer a large proportion of the landholding to a non-core asset to enable it to redevelop all of the land.

20   This resolution was defeated by the Waverley Bowling Club (**WBC**) membership on **22 August 2017**.

1. As a consequence, the Club has needed to reduce significantly the scope of the development proposal for which the site compatibility certificate had been issued as a consequence of the necessity to accommodate at least two of the Bowling Club’s bowling greens remaining on the site.
2. The site compatibility certificate, issued in September 2017, nonetheless retains its validity for the purposes of facilitating a seniors’ living development on the site, provided such a proposed development achieves development consent during the life of the certificate (that is, on or before 24 September 2019).
3. For merit purposes in the present proceedings, the only matter pressed by the Council from Schedule 2 of the site compatibility certificate as still requiring satisfactory resolution is the question of the contextual fit of Building A (being the seven-storey element proposed for the north-western corner of the site). It remains the Council's position, as later discussed, that the height, bulk and scale of Building A is inappropriate.
4. It is the Council's position that development in this portion of the site should be reduced by three residential levels so as to comprise a four-storey development (including the uppermost proposed communal open-space level). This matter is later addressed in my merit assessment of the proposed development for which consent is now sought at the conclusion of the hearing process (modifications having continued to be made throughout the hearing, as later discussed, to address matters of concern to the Council and to objectors to the proposed development).
5. Finally, it is to be noted that there is a relevant further provision of the SEPP that is specifically directed to circumstances when a seniors’ living development is proposed to be co-located with a registered club. Two of them warrant particular note in these proceedings. They are contained in cl 23 of the SEPP and are in the following terms:

**23   Development on land used for the purposes of an existing registered club**

(1)   A consent authority must not consent to a development application made pursuant to this Chapter to carry out development on land that is used for the purposes of an existing registered club unless the consent authority is satisfied that—

(a)   the proposed development provides for appropriate measures to separate the club from the residential areas of the proposed development in order to avoid land use conflicts, and

(b)   an appropriate protocol will be in place for managing the relationship between the proposed development and the gambling facilities on the site of the club in order to minimise harm associated with the misuse and abuse of gambling activities by residents of the proposed development.

(2)   For the purposes of subclause (1) (a), some of the measures to which a consent authority may have regard include (but are not limited to) the following—

(a)   any separate pedestrian access points for the club and the residential areas of the proposed development,

(b)   any design principles underlying the proposed development aimed at ensuring acceptable noise levels in bedrooms and living areas in the residential areas of the proposed development.

1. It is to be observed that:
2. the redesigned entrance from Birrell Street satisfies cl 23(2)(a); and
3. the acoustic experts’ agreement on relevant conditions of consent will ensure that the requirements of cl 23(2)(b) are met.
4. For cl 23(1)(b), there is a specific management plan incorporated as part of the conditions of consent to address this requirement.
5. Finally, with respect to the proposed new premises for the Bowling Club on the site, it is to be observed that its fitout is to be the subject of a separate development application to the Council and is, therefore, not dealt with in these proceedings.

The evolution of the development proposal

1. The development proposal originally lodged with the Council in December 2018 has undergone multiple and significant revisions since the original application was lodged with the Council. Indeed, two elements of this revision process warrant specific noting. First, on the Friday prior to the scheduled commencement of the hearing on Tuesday 27 August 2019, an application was made to me, on behalf of the Club, seeking to make further significant (and ameliorative) changes to the plans for the proposed development.
2. I granted leave for the Club to rely on those amended plans, subject to two requirements.
3. The first was the making of the conventional costs order mandated by s 8.15(3) of the *Environmental Planning and Assessment Act 1979* (the EP&A Act), that the Club pay the Council’s costs thrown away as a consequence of the amendments. The making of this costs order was not a matter of controversy.
4. Second, however, I considered it was appropriate, in light of the fact that there had been significant public interest in, and objection to, the Club's proposed development, that there be an opportunity for these revisions to the plans to be explained to those attending the on-site element of hearing the objectors’ concerns at the commencement of the site inspection. To facilitate this, the scheduled 9.30 am commencement of the site inspection was postponed until 11.00 am to permit the explanation of these revisions to be given to those attending the site meeting.
5. Although several of the objections (which were subsequently tendered as Exhibit 11) raised issues with the inconvenience of the rearrangement of the time of the hearing of objector evidence, unfortunately it was not possible to deal with this matter in any other fashion as there was only limited time in the Court diary for me to be able to hear and determine the matter.
6. However, I was satisfied that the amendments that were to be explained were entirely ameliorative (as were the further amendments which were made after the further joint conferencing processes that took place after the site inspection). As I later note, I have had regard to the written and oral objector material to the extent that that it addresses matters that remain in contention in the proceedings after the wide-ranging agreement between the experts.
7. It is to be observed that these amendments arose from the discussions that occurred during the joint expert conferencing process in the various disciplines where expert evidence was anticipated to be required. These disciplines were:
* urban design and town planning (together);
* traffic and parking;
* acoustics; and
* heritage.
1. The timetable for the hearing also required further adjustment to permit additional joint conferencing to take place in response to the revisions to the plans for which leave was given on the Thursday before the commencement of the hearing. As a consequence of this further timetable revision, joint expert conferencing (including one on a multi-disciplinary, “all in” basis) was to happen on the afternoon after the site inspection, with further supplementary joint expert reports to be filed and served on the morning of Wednesday 28 August 2019. This gave both the Club and the Council, and their legal advisers, sufficient opportunity to contemplate matters arising out of the joint experts’ responses to the objectors’ submissions and to what was revealed during the course of the site inspection. Matters arising out of this process are later separately discussed.

The site inspection

1. Although, ordinarily, the Class 1 Practice Note for development appeals envisages that objector evidence would be limited to a maximum of six persons giving a presentation to the decision-maker, in the circumstances of the controversy of this proposal I considered it appropriate to permit a greater number of objectors to address me and outline their concerns about the development.
2. The site inspection commenced in the existing premises of the Bowling Club. Thirteen objectors raised a range of issues concerning specific aspects of the proposed development in addition to objections which were expressed by some submitters concerning the entire development as inappropriate. Following hearing from objectors in the current clubhouse, the site inspection then proceeded to hear evidence from objectors at locations in the vicinity of the site or at/near their residences.
3. It is to be observed that those who object to the redevelopment proposal as a broad concept were addressing a proposition where “the horse had bolted”, as it were. This arises because the issuing of the site compatibility certificate in September 2017 set aside all the local planning restrictions that would otherwise have rendered a proposed seniors’ living development on the site impermissible.
4. The permissibility, having been established by the site compatibility certificate being issued by the Director-General's delegate, meant that the matters with which I am able to deal in these proceedings are confined to matters of design and impacts - not the question of whether such a development is, at a broad level of generality, appropriate for this site.
5. Notes were taken of the oral submissions, and those notes, together with the copies of speaking notes used by the objectors, were subsequently tendered (becoming Exhibit 11). It is unnecessary, for present purposes, to detail specific items pressed by the objectors, as many of them were responded to by the Club in the further revised plans coming out of the additional joint expert conferencing which took place immediately after the site inspection. These are later described.

The public submissions concerning the proposed development

1. It is also to be noted that, during the course the hearing, the Council tendered three volumes of public submissions which had been made during the course of the Council’s processes of public exhibition and notification of several versions of the Club's development proposal. As required by s 4.15(1)(d) of the EP&A Act, I have had regard to those written submissions to the extent that they remain relevant to the plans in the final form about which I am required to make a determination.

The expert evidence and its outcomes

Introduction

1. Both the Council and the Club engaged experts in a range of disciplines with those disciplines addressing the various contentions pressed by the Council as raising concerns about the appropriateness of approval of the Club's proposed development. I set out later the nature of the very significant revisions to the plans proposed as a consequence of the further joint conferencing arising after the objectors’ evidence at the commencement of the hearing and the site inspection.
2. It is appropriate to list the experts and to sketch a brief description of the resolutions reached (noting that, as dealt with fully in the next section of this judgment, there remained a difference between the town planning/urban design experts as to the appropriate height for Building A in the north-western corner of the site).
3. It is also to be observed that there was an “all in” joint conference during that final joint conferencing phase, an “all in” joint conference which enabled integrated outcomes resolving many of the remaining issues.

Town planning/urban design

1. Town planning/urban design evidence was given by:
2. Ms Kristy Hodgkinson, town planner for the Club;
3. Mr Simon Parsons, urban designer for the Club;
4. Mr Stuart McDonald, town planner for the Council; and
5. Mr Russell Olsson, urban designer for the Council.
6. As earlier set out, the joint conferencing process resolved the outstanding design issues concerning location of the driveways on both Henrietta Street and Langlee Avenue; the heights of Buildings B, C and D; internal pedestrian pathway locations; additional landscaping on the northern boundaries of 38 Langlee Avenue and 2 Henrietta Street; and the locating of the primary entrance to the relocated Bowling Club to be from Birrell Street.

Traffic and parking

1. Traffic and parking evidence was given by:
2. Mr Chris Palmer for the Club; and
3. Mr Ken Hollyoak for the Council.
4. My examination of the internal council referrals concerning the earlier iterations of the proposed development, together with matters raised in the public submissions, caused me to ask that the traffic and parking experts provide a specific response to the issues of traffic impacts on the intersection of Birrell Street and Langlee Avenue, and in Birrell Street itself, if the proposed development was to go ahead. Their agreed expert opinion was that there would be only minor impacts and that these would be acceptable. As I understood their position, two significant mitigating factors were engaged in this regard. First, the proposal to widen Langlee Avenue along the eastern frontage of the site was a positive outcome of the proposed development. Second, the deletion of the childcare centre that had originally been proposed removed a significant traffic pressure point that would have been associated with the development.
5. It is also to be noted that a revised driveway design with a flattened, longer portion at the mouth of the driveway leading to Langlee Avenue and coming from underneath Building C has now been designed in order to ensure that, at night, exiting vehicles with headlights on low beam will not cause light nuisance to the occupants of an apartment in the residential flat building on the eastern corner of Langlee Avenue and Birrell Street (this being an apartment visited during the site inspection where the owner expressed concern about the risk of headlight nuisance if the eastern driveway was relocated so as to be no longer immediately adjacent to 38 Langlee Avenue).

Heritage

1. Heritage evidence was given by:
2. Mr James Phillips for the Club; and
3. Mr Paul Davies for the Council.
4. As earlier noted, the issue of providing an appropriate view corridor (to what will be the stripped-back form of the heritage item comprising the existing Bowling Club premises) was resolved to the satisfaction of these experts by a further revision to the design of the northern elements of Building B and the setting down of that building compared to that which was in the proposal at the commencement of the hearing.

Acoustics

1. Acoustic evidence was given by:
2. Mr Glenn Leembruggen for the Club; and
3. Mr Stephen Cooper for the Council.
4. It is to be observed that acoustic issues associated with vehicle movements (particularly exiting vehicles) along the driveway to the Langlee Avenue frontage were resolved by the combination of the enclosure of that driveway within Building C and the setting back of the graded element of that driveway as a consequence of the flattened pad at its Langlee Avenue end.
5. During the hearing, further joint conferencing took place between these experts to address the issue of potential noise impacts (particularly structural noise transmission from the new Bowling Club premises to residences which would be within Building A). By the conclusion of the hearing, agreement had been reached between Mr Leembruggen and Mr Cooper as to the suite of appropriate acoustically related conditions to be incorporated in the development consent conditions. Agreement on these conditions resolved all outstanding acoustic issues.

Overall outcome of the expert conferencing process

1. As I indicated to the advocates during the course the hearing, my consideration of the now revised version of the proposal as had emerged from the further joint expert conferencing that had taken place after the site inspection meant that the outcome of the proceedings was that the grant of development consent was inevitable. This was only subject to resolution by the parties of outstanding matters concerning what conditions should be attached to such consent and my determination as to the height and form of Building A. I indicated that I was satisfied that, subject to those two matters, the proposed development was appropriately responsive to contentions raised by the Council and matters arising from the objectors’ submissions where those warranted adjustment to the design.

The amendments proposed during the hearing

1. Although the proposed development had been significantly modified by the amendments for which leave had been given very shortly prior to the commencement of the hearing, further amendments were proposed by the Club as a consequence of consideration of the specific matters raised during the course of the objectors’ evidence and the subsequent further joint conferencing process earlier noted. These amendments were to the following effect:
* The two-way vehicle driveway proposed to be adjacent to 38 Langlee Avenue was relocated to be within Building C. This resulted in the creation of a significantly wider landscaping strip becoming available between that building and 38 Langlee Avenue. This driveway, now within Building C, in addition to enabling the additional landscaping, also has the effect of resolving any potential acoustic impacts that would have otherwise potentially arisen for the occupants of 38 Langlee Avenue;
* The path which had been proposed to run along the northern face of Building C was relocated to the southern side of that building providing a significant privacy improvement for the apartments proposed for the lowest level of that building;
* Buildings C and B would no longer be proposed to be constructed at the level of the current bowling greens (being higher than the existing ground level in the car-park to the south of those bowling greens) but would now be constructed at that existing ground level with the swimming pool at the lowest level of Building B being sunk below ground level;
* Removal of a level from each of Buildings B and C;
* The relocation of the vehicle entrance from Henrietta Street to be within the footprint of Building D. This amendment had the effect of making available a wider landscaping strip between that building and 2 Henrietta Street. This driveway, now within Building D, in addition to enabling the additional landscaping, also has the effect of resolving any potential acoustic impacts that would have otherwise potentially arisen for the occupants of 2 Henrietta Street; and
* Increased setbacks to Building B along the southern and eastern boundary by three metres and 1.4 metres to address potential privacy impacts on 38, 36 and 34 Langlee Avenue.
1. As earlier noted, acoustic issues arising from the interface of the new Bowling Club and the residential levels proposed above it were resolved by the settlement of agreed acoustic conditions in the proposed conditions of consent.
2. The revised plans in Exhibit A (plans which incorporated the suite of amendments arising out of the process undertaken after the site inspection and the subsequent joint conferencing) were further amended by substituting three new plans incorporating the new entrance arrangements for the relocated Bowling Club (together with the necessary and unexceptional consequential amendments required to be made to the two basement levels below in order to fit with the revised arrangements for the Bowling Club premises).
3. The chamfered edge of Building B, at its north-western edge, was further revised as a consequence of the agreement by the heritage experts that a more appropriate way of preserving a viewing of the retained heritage elements of the present Bowling Club premises would be to have the northern end of Building B squared off, as originally proposed, but with the upper levels of that building set back significantly from the northern building line of the ground level (thus creating a different, but still acceptable to the heritage experts, viewing corridor to the heritage item).
4. The altered configuration of the driveway emerging from beneath Building C into Langlee Avenue mitigated the potential for adverse headlight glare impacts on residences on the eastern side of Langlee Avenue.
5. Finally, as to issues arising during the course of the hearing, it is appropriate to note that the concern expressed by Mr McDonald and Mr Olsson about the proposed location of the primary entrance to the new Bowling Club premises being from Henrietta Street was resolved by a redesign that incorporated the primary access being from Birrell Street (including the accessible access), with the only club access from Henrietta Street being for cyclists, with the bicycle rack for such patrons being relocated slightly.

Widening Langlee Avenue

1. It is also to be observed that, already incorporated in the development proposal, there will be a significant benefit that will arise from the proposed development by the dedication of a strip of land along the eastern side of the site permitting the widening of Langlee Avenue for this portion of its length to be a two-way thoroughfare with parking availability on either side of the street.

Conditions of consent

1. As a result of the joint expert conferencing process and of the negotiations which have taken place between the parties concerning the Council's “without prejudice” proposed conditions of development consent, the terms of conditions which would attached to a development consent are agreed.
2. Although there will be some potential, minor revisions that may be necessary arising from my determination concerning the appropriate height of Building A, I am satisfied that the conditions can be revised and settled between the parties to provide a proper foundation for granting development consent on the basis of the form I have determined is appropriate for Building A.

Are dispensations for breaches of cll 4.3 and 4.4 of the LEP required?

Introduction

1. I have earlier set out the terms of cll 4.3 and 4.4 of the WLEP. These provisions establish, through their associated maps, the maximum height and the maximum FSR permitted for development on the site by the WLEP. It is clear that those maxima, as derived from the WLEP, are breached by this proposed development (and those breaches are not cured by the reduction in height and floor space from Building A that I have determined to be the appropriate outcome for a building on the north-western corner of the site).
2. As a consequence, it is the Council's position that the Club must make a request pursuant to cl 4.6 of the WLEP seeking to receive dispensation from the development standards which would otherwise apply under the WLEP for maximum height and FSR.
3. The position advanced by Mr Galasso on behalf of the Club is that such a request is not required as there are, in his submission, two separate fashions by which the provisions of the SEPP operate to provide what he describes as pathways by which the SEPP ousts the necessity for such a cl 4.6 request.
4. However, against the possibility that I would not accept that either of these pathways had the effect of setting aside the necessity for a cl 4.6 request to be granted, the Club has provided a cl 4.6 request (revised to reflect the plans for which consent is presently sought). This contingent document has been prepared by Ms Hodgkinson.
5. The Council's position with respect to this document is that it does not satisfy the requirements of cl 4.6, particularly as those requirements are now to be understood following the decision of the Court of Appeal in *RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130, a decision which confirmed that a cl 4.6 request must address and justify the proposed development elements that breached the relevant development standard, rather than seeking to justify such a breach on the basis of the perceived benefit or appropriateness of the whole development.
6. It was the Council's position that this cl 4.6 request did not do this but sought to rely, impermissibly, on a justification of the whole of the proposed development. Given the conclusion that I have reached, that a cl 4.6 request is not required, it is unnecessary to examine further this conflict concerning the request which has been provided.
7. However, it is also appropriate to note that, in addition to the two pathways advanced by Mr Galasso on behalf of the Club, Mr McEwen, in a quite proper exercise of his professional obligations, also drew my attention to a third potential pathway by which I might conclude that a cl 4.6 request might not be required.
8. He drew my attention to the judgment of McColl JA in *Hastings Point Progress Association Inc v Tweed Shire Council* [2009] NSWCA 285 (*Hastings Point*) (at [1] to [10]) and explained how I might, consistent with that decision, conclude that the three relevant clauses of the WLEP were not engaged and that the SEPP, by virtue of its overriding provision in cl 5(3) should be regarded as ousting the necessity for a successful cl 4.6 request.
9. The critical paragraphs in McColl JA's decision in *Hastings Point* are [7] to [9]. These paragraphs are in the following terms:

7   Had cl 8 of the TLEP 2000 been drafted in a manner which required the Tweed Shire Council to take into consideration the factors to which it referred, there would have been no inconsistency in the sense to which I have referred between it and cl 17 of the SEPP - SL.

8   However, as Young JA points out at [94] that is not how cl 8(1) is drafted. It mandates that the Council may grant consent to development only if the three conditions to which it refers are satisfied. In other words, it mandates that consent be refused unless each of those conditions are satisfied. That provision cannot, in my view, operate concurrently with cl 17 of SEPP - SL which permits the development to which it refers “despite the provisions of any other environmental planning instrument if the development is carried out in accordance with this Policy”.

9   This is not to say that the consent authority is not required by s 79C to take those conditions into account in its consideration of a development that otherwise complies with SEPP-SL. But having done so, the consent authority has a discretion to grant consent, notwithstanding that it is not satisfied of each of the three conditions in cl 8(1). The inconsistency arises because cl 8(1) mandates refusal in those circumstances.

1. The terms of cl 8(1) of the Tweed LEP considered by her Honour were:

**8   Consent considerations**

(1)   The consent authority may grant consent to development … only if:

(a)   it is satisfied that the development is consistent with the primary objective of the zone within which it is located, and

(b)   it has considered those other aims and objectives of this plan that are relevant to the development, and

(c)   it is satisfied that the development would not have an unacceptable cumulative impact on the community, locality or catchment that will be affected by its being carried out or on the area of Tweed as a whole.

(2)   …

(3)   …

Consideration

1. Mr McEwen also submitted to me, however, that it was open to me to conclude the *Hastings Point* decision of the Court of Appeal could be distinguished in the present circumstances. I am unable to accept this proposition, as the reasoning of McColl JA is both clear, and clearly applicable, for the reasons set out below.
2. It is therefore unnecessary to explore further the validity or otherwise of the two pathways advanced by Mr Galasso as a basis for setting aside any possibility of the necessity for a successful request relying on cl 4.6 of the WLEP to dispense with the building height and FSR development standards set by the WLEP. This is because, I am satisfied, on a proper analysis of the decision in *Hastings Point*, the inevitable conclusion to be reached is that such a request is unnecessary.
3. Whilst, in the WLEP, there is no single term that is the equivalent of cl 8(1) of the Tweed LEP that has the effect of agglomerating three elements of satisfaction mandated before development consent can be granted, cll 4.3 and 4.4 of the WLEP each impose specific numerical standards that must be satisfied. In each instance, development consent cannot be granted unless the relevant called-up numerical development standard is satisfied for each of these provisions. Whilst cl 4.6 of the WLEP does not, in itself, impose numerical standards, it does impose, in cl 4.6(4)(a) and (b), a series of mandated states of satisfaction to be achieved before the beneficial and facultative power to dispense with compliance with the development standards can be invoked. Indeed, cl 4.6 is, in qualitative terms, quite thematically compatible with what was considered by her Honour in cl 8(1) of the Tweed LEP.
4. As a consequence, I am satisfied that the decision in *Hastings Point* binds me for the purposes of my consideration of this proposed development.
5. Although not raised in submissions to me (and therefore I do not rely on this for my conclusion that cl 5(3) of the SEPP does have the effect of ousting these mandated requirements of the WLEP), I am fortified in this conclusion by:
6. The language used by Mr Murray in his letter to the Club providing the site compatibility certificate;
7. The language of the site compatibility certificate itself; and
8. The nature of the matters requiring to be considered that were set out in Schedule 2 to the site compatibility certificate.
9. All of these descriptors are ones raising qualitative matters (resolution of issues) rather than ones of mandating satisfaction of prescriptive requirements. The language used in this context, to my mind, solely engages matters of merit consideration in the fashion that has been undertaken in these proceedings through the joint expert conferencing process with the subsequent ameliorative and merit responsive amendments to the Club’s development proposal for the site.
10. The fact that virtually all of the matters called up for consideration by Schedule 2 of the site compatibility certificate (together with a broad range of the matters addressed by the experts arising not only from their own consideration and discussion of the development proposal but also in response to matters of detail pressed by the objectors in their written submissions and orally during the course the site inspection) have been resolved by merit changes is reflective of that use of language.
11. I have therefore concluded, for the reasons set out above, that there is no necessity for the Club to rely on a successful request pursuant to cl 4.6 of the WLEP to permit it to be granted consent for a development which does not otherwise comply with the building height or FSR development standards derived from cll 4.3 and 4.4 of the WLEP.

The sole remaining merit issue

Introduction

1. I have earlier described the range of further amendments to the design of the proposed development that resulted from the Club's response to the further joint conferencing of the experts after the hearing of the objectors’ submissions at the Bowling Club on the first morning of the hearing. As I indicated during the course of closing submissions, the Club is to be commended for its quite positive responses to those concerns.
2. From the perspective of the various expert disciplines, all of the merit issues concerning the proposed development, bar one, were resolved. That single remaining merit issue relates to the height (and, with the height, the overall bulk and scale) of the proposed seven-storey building (Building A) in the north-western corner of the site in the elbow of the intersection of Henrietta and Birrell Streets.
3. All the issues resolved through the joint conferencing process have resulted in appropriate and ameliorative changes to the plans.
4. Whilst, during the course of the submissions (and reflected in the written objections lodged with the Council during the various phases of consultation concerning the iterations of the proposed development), there were objections to the concept of a proposed development of this nature, with those objections being expressed in absolute terms, that is not a matter to which I can pay attention in these circumstances, because the issuing of the site compatibility certificate, earlier described, has the effect of rendering a development of this broad nature permissible on the site.

The competing positions on the seven-storey building

The Club's position

1. Unsurprisingly, Ms Hodgkinson and Mr Palmer have consistently provided written evidence that a seven-storey building in the north-eastern corner of the site was an appropriate response to the contextual issues requiring consideration for that element of a proposed development on the site. They were strongly of this view despite the fact that the ground floor of this proposed development would accommodate the new clubhouse facilities for the Bowling Club and that this necessitated a greater floor-to-ceiling height for that level when compared to that which would ordinarily be expected of a residential development.
2. For the purposes of their contextual analysis supporting the appropriateness of the proposed seven-storey Building A, Ms Hodgkinson and Mr Palmer relied on what might be described as “a line of best fit”, on a before-and-after basis, drawn by the project’s architect. This line, broadly but certainly not entirely, took its cues from the eight-storey building to the east and the five‑storey school building to the west. This line was depicted on the first sheet of Exhibit H. This showed that, if one was to adopt the “line of best fit” proposed by the architect in this diagram, the uppermost point of Building A would be touched by the line but Building A would, in effect, be entirely below this line. A copy of this sheet from Exhibit H, showing the brown line in the “without Building A” and “with Building A” context, is reproduced as Annexure A to this decision. It will be necessary, in my consideration of the merits of the proposed height for Building A, to discuss this diagram and its brown line further.
3. In this regard, they relied on what they considered was the contextual rhythm of development in Birrell Street from a point significantly to the east (commencing, generally, with the eight-storey residential development on the southern side of Birrell Street slightly to the east of the intersection of that street with Bennett Street), through to the five-storey development of the large main building of Waverley College on its Birrell Street frontage. They also relied, in the sense of definition of the relevant visual catchment (particularly the visual catchment observable from within Waverley Park) on other taller residential buildings within the viewshed of various locations in the park which were visited during the course of the site inspection. Additionally, although I understood it to be a minor aspect of this broader viewshed support relied upon for the application, they also had had regard to the water tank atop the ridgeline above the park to the north-west of the playing fields in the park.
4. Mr Galasso also relied for support for this proposed building on:
* the fact that all the low-rise residential properties on the western side of Henrietta Street, along the length of that street opposite the site, were to be regarded as being in the ownership of the school;
* what he submitted was the likelihood that, in the future, those properties would be developed for further facilities for the school;
* the Education SEPP permitted the erection of a four-storey building to a maximum height of 22 metres on those properties and areas of the school site currently used for staff parking, with such development not requiring rezoning of those properties as SP2 as a consequence of the facultative provisions of the Education SEPP;
* such a potential, hypothetical, future development on that element of the school site would extend to at least RL114.75 based on the present existing ground level, on this element of the western side of Henrietta Street;
* this hypothetical permissible development would extend to a height which was at least 400 millimetres above the maximum proposed height for the seven-storey building on the site (the lift overrun of which is proposed to be at RL114.35); and
* under these additional circumstances, the proposed seven-storey building did constitute an appropriate and acceptable contextual fit in what would be the future Birrell Street streetscape context.

The Council's position

1. The position advanced in their written and oral evidence, by Mr McDonald and Mr Olsson, was that three of the residential levels of Building A required to be removed for this building to be acceptable, in its Birrell Street context. However, if that position was to be adopted, Building A would, as I understood their evidence, still remain in breach of the FSR requirement called up by cl 4.4 of the WLEP. However, it was their position that, at such a revised height (to have a four-storey presentation to Birrell Street), the bulk and scale of the resultant building would be acceptable, in the context of its otherwise general design presentation as part of the overall development on the site.
2. I have earlier noted the position advanced by Mr McDonald concerning how he proposed that I might respond to the submissions for the Club concerning the potential for development on the Henrietta Street frontage of the school's land by taking advantage of the facultative provisions of the Education SEPP.
3. Mr McDonald and Mr Olsson both rejected the brown line drawn in Exhibit H as constituting a “line of best fit”. They expressly rejected the appropriateness of taking any cues from the eight-storey building fronting Birrell Street to the east or the appropriateness of taking such cues from the other taller residential apartment buildings in the viewshed of Waverley Park, as observed during the course of the site inspection.
4. They expressed the opinion that, at seven-storeys (even though the uppermost level was to be a set-back communal open-space level rather than a full residential one, the presentation of the current proposed form of Building A was too tall and too bulky having regard to the scale of development on the western side of Henrietta Street; the extent of the open space which would still remain on the site, as a consequence of there being two bowling greens at the Birrell Street frontage between Building A and Langlee Avenue.
5. Even having regard to the height of the residential flat building, currently existing on the eastern corner of the intersection of Birrell Street and Langlee Avenue, this did not provide an appropriate basis, in their opinion, for a building of the height, bulk and scale of Building A.
6. With respect to the “line of best fit” depicted on Exhibit H, they expressly rejected its appropriateness and suggested that, if a line of that type was to be adopted, it needed to be significantly lower than was depicted and take its cues from the more modest development to the east of Langlee Avenue.
7. However, during the course of the oral evidence, Mr McDonald accepted that, from the viewing location on the entry porch of 2 Henrietta Street, no portion of Building A would be able to be observed as a consequence of the intervention of Building D, a building which he and Mr Olsson agreed was of acceptable height, bulk and scale in the form embodied in the plans for which consent was now sought.
8. In this regard, Mr McDonald accepted that the concerns of the owner of 2 Henrietta Street were misplaced. The acceptance by the Council's experts of the now proposed dimensions of Building D, when coupled with the additional landscaping space now made possible between that building and 2 Henrietta Street as a consequence of the relocation of the Henrietta Street driveway to within that building, that there was no unacceptable visual impact on 2 Henrietta Street that would arise from the proposed development (even if Building A was to be at the height proposed by the Club).

Consideration

1. At the commencement of my analysis, it is appropriate to note that Ms Hodgkinson and Mr Palmer rejected the concept of the Bowling Club and the site being located in a bowl as was the description advanced by Mr Olsson.
2. Although there was no agreement by the Club's experts that Birrell Street should be regarded as a bowl in the relevant vicinity encompassing the site, the Club’s architect's own diagram (the first page of Exhibit H and reproduced as Annexure A) clearly shows that, in an east-west streetscape perspective, the so-called “line of best fit” has been depicted showing a distinct bowl between the peak on Birrell Street, to the east at approximately its intersection with Bennett Street, dipping to the site and then climbing to the five-storey Waverley College building to the west.
3. Whether, in three-dimensional terms, it is appropriate to refer to the site as being in a bowl is, in my assessment, a matter of irrelevance, given that the dominant discussion has addressed the issue of whether or not Building A does or does not have an appropriate and acceptable contextual fit in the streetscape of Birrell Street.
4. Whilst, in a strictly topographic sense, it would appear that Birrell Street crosses a gently sloping valley running from north to south, I accept the proposition advanced by Mr Olsson that, in the relevant sense, Birrell Street is to be regarded as a bowl when a streetscape assessment is to be undertaken. Indeed, the Club's own architect, in preparing his “line of best fit” clearly depicts, in a two-dimensional fashion, a streetscape of Birrell Street that self-evidently is to be seen to be a bowl.
5. In reaching that conclusion, I am not to be seen as accepting the appropriateness of the Club’s architect’s “line of best fit”, as I certainly do not. That line, conveniently drawn so as to demonstrate that the seven-storey height of Building A just touched it and was encompassed below it, is, in my view, an intellectually dishonest depiction in several respects.
6. First, at the eastern end, the architect takes as his cue an eight-storey residential flat building to the east of the brow of the rise in Birrell Street in the vicinity of Bennett Street.
7. At the western end, in order to continue the best fit elevation of the line above street level, the line conveniently climbs above the top of the five-storey building in the grounds of Waverley College at its Birrell Street frontage.
8. These two reference points for the eastern and western ends were necessary to be adopted in order to prop up the thesis shown in the lower of the two “line of best fit” drawings in Annexure A, into which Building A has been inserted in its conveniently “line of best fit” compliant position.
9. Whilst I accept that, in broad terms, a “line of best fit” might be appropriate, I reject the line drawn by the Club’s architect because it does not appropriately spring, at the western end, off the Waverley College building to which I have referred and continue, in a topographically mimicking fashion through to, and touching the top of, the five-storey building in Birrell Street to the east of Langlee Avenue. The necessary consequence of this is that a properly crafted “line of best fit” would be somewhat lower than that depicted in Annexure A.
10. However, I am also satisfied that simply adopting such an approach does not provide an adequate contextual basis for the assessment of Building A. There are a number of other matters which require to be taken into account. I turn, now, to set them out.
11. Although there are other eight-storey buildings or higher built form (the water tank), I am not satisfied that they are readily appreciated, in a planning sense, in the context of what might be the streetscape development profile along Birrell Street. I reached this conclusion for several reasons.
12. First, when in Waverley Park, for viewing to Birrell Street, that aspect is only appreciated when looking away from these taller structures to the north-east, north or north-west.
13. Second, there is a degree of softening of the view to Birrell Street from within Waverley Park afforded by the vegetation in the park on the northern side of Birrell Street. For these reasons, I am not satisfied that the perception of what development might be undertaken on the site should have this inferred from Waverley Park as a primary focus for consideration.
14. As I understood the weight of the town planning and urban design evidence, the primary importance was the analysis to be made of, and conclusion to be drawn from, how development on the site would be appreciated from those using Birrell Street (whatever might be the mode of use of that street or the direction in which the transit was taking place).
15. In this regard, although there will be the open space of the two retained bowling greens on the site, there will, nonetheless, be the agreed-to-be-acceptable development of Buildings B and C joining the retained elements of the existing clubhouse providing a development context presently largely absent for those passing along Birrell Street in either direction. This development context (despite it being setback some 40 metres or so from Birrell Street) does provide a degree of contextual support for an increment in development height in the north-western corner of the site.
16. It is also appropriate, in a future character sense, to have regard to the permissible height of built form capable of being erected in land owned or controlled by Waverley College along the western edge of Henrietta Street opposite the portion of the site where Building A is to be located. However, whilst the permissible maximum height of a hypothetical future development on the college site might be generally at the same RL as is the proposed height of Building A, this does not provide a basis why a building of the proposed height of Building A warrants support.
17. It is also appropriate to note that, during the course of his oral evidence on behalf of the Council, Mr McDonald, although remaining of the overall view that Building A could only be contextually acceptable if three residential levels were removed from it, did agree that, if the hypothesised future development on the school site was to be accepted (a proposition he rejected), then Building A might be rendered acceptable by removing one residential level and redesigning the penultimate residential level so that it replicated the smaller footprint presently proposed for the uppermost residential level. Although this proposition was not embraced for the Club, the Club's architect produced a plan (which became Exhibit R) conceptually showing how a reduced footprint, penultimate residential level might work. Given the conclusion that I have reached about the necessary reconfiguration of Building A to render it acceptable in its context, it is also appropriate to reproduce a copy of this plan as Annexure B to this judgment.
18. In this context, it is to be noted that there is no criticism of the design, setback and streetscape presentation of the communal open space proposed as the uppermost level of Building A.
19. Consistent with the thematic approach adopted by the Club’s architect of depicting a “line of best fit” in the fashion shown on Annexure A (although rejecting, for the reasons earlier set out, the height of that particular line), it is, nonetheless, appropriate to have that line climb from the portion of Birrell Street in the bottom of the bowl (being, effectively, where the bowling greens are proposed to be retained on the site) and rise to the west toward the five-storey building in the grounds of Waverley College at its Birrell Street frontage.
20. In this context, having regard to the possibility (but by no means the inevitability) of development on the western side of Henrietta Street taking advantage of the facultative processes in the Education SEPP, it is certainly not appropriate to approve Building A at a height which shows no effective stepping-down from the maximum permissible height achievable on the western side of Henrietta Street opposite the site, a height which could only be achieved taking full advantage of the Education SEPP.
21. Furthermore, whilst what is potentially able to be developed in that fashion is to be taken into account in assessing the future character of development along Birrell Street, I am not satisfied that this is sufficiently likely to occur to provide an appropriate, mandatory cue for Building A as presently proposed.
22. Whilst Mr McDonald and Mr Olsson remained of the view that the appropriate way to render Building A acceptable was simply to remove three of its residential levels, I am unable to accept that that is the appropriate path for approval. Equally, however, I am also unable to accept that the various reasons advanced by Mr Palmer and Ms Hodgkinson in support of the present height and configuration of Building A provide any valid basis for approving the presently proposed design.
23. First, the position advanced on behalf of the Club is heavily reliant on the “line of best fit” advanced by the Club’s architect as shown in Annexure A. For the reasons earlier described, I am satisfied that that line is to be rejected. Rejecting that line effectively removes the major element advanced on behalf of the Club for Building A in its present proposed form.
24. However, I am satisfied that a more accurately respectful “line of best fit”, if drawn (and I do not propose to attempt to do so), when coupled with appropriate weight to be given to the potential for some higher and more intensive development on the school land on the western side of Henrietta Street opposite the site, does render it inappropriate to require removal of the three residential levels from Building A.
25. On balance, the intermediate position advanced by Mr McDonald, although not one which he pressed as resolving his concerns about Building A, is the appropriate and preferable outcome (that is, the removal of one residential level and the redesign of the penultimate residential level to mimic the footprint of the presently proposed uppermost residential level). In this context, two matters are to be noted:
26. First, I am satisfied that, consistent with what was discussed by the Court of Appeal in *Ku-ring-gai Council v Bunnings Properties Pty Ltd* [2019] NSWCA 28, I have jurisdiction to determine that those changes to the design of Building A are appropriate; and
27. The conceptual drawing provided for the Club, and becoming part of Exhibit R (sheet DA 1107.1), of what such a redesigned footprint of the penultimate residential level might look like is generally acceptable. This conclusion is subject to the matter which I raised with Mr Galasso at the time that Exhibit R was tendered, namely, that such a redesign, if it was to be required (as it is now required), was not to provide an opportunity to have significantly expansive balcony areas to the north, as shown in Exhibit R. What was appropriate was to mimic the balcony areas presently proposed for the uppermost residential level whilst rendering any surplus area over the roof of the level below as non‑trafficable areas.

Summary of outcomes

1. As a consequence of the revisions which took place during the course of the hearing (revisions which were both significant in themselves, and substantially responsive to both the matters pressed by the Council’s experts and matters raised by the objectors during the course of the public submissions to me), the sole matter of a merit nature remaining in dispute was the height of Building A (the building to be located on the present bowling green in the north-western corner of the site in the elbow of the intersection of Henrietta and Birrell Streets). The merit position of the Council was that this building, proposed to be of six levels with a rooftop communal open space as the seventh level, should be reduced by three levels, so that there was a building with a resulting height reaching RL95.05 at its lift overrun, a height reduction of 9.3 metres.
2. A subsidiary issue emerged from the joint town planning/urban design oral evidence as to whether the level below the uppermost residential level should mimic the footprint of the uppermost residential level (one of modestly less overall footprint than that presently proposed for the four residential levels below the uppermost one). A legal issue also remained as to whether or not the SEPP rendered unnecessary requests being made and sustained pursuant to cl 4.6 of the WLEP before the proposed development could be approved.
3. I have concluded that the provisions of the SEPP do have the effect of overriding both the building height development standard and the FSR development standard otherwise applicable to the site as arising from the WLEP. As a result of this conclusion, it is not necessary for me to consider whether or not the contingent requests made by the Club for dispensation utilising cl 4.6 of the WLEP from compliance with those development standards meets the relevant tests set by cl 4.6(3) and (4).
4. I have also concluded that the development, as now proposed, is capable of being granted approval subject to two changes. The first is that one residential level of Building A is deleted and, second, the level immediately below the uppermost residential level should mimic the footprint of that uppermost residential level. I earlier explained, in some detail, why I have reached this conclusion.
5. As there is now a complete set of conditions of development consent that has been agreed to by the parties, it is appropriate that the now revised plans for the proposed development (being the plans contained in Exhibit A) be granted development consent, subject to those conditions and the requirements that:
* one residential level be deleted from Building A;
* the residential level immediately below the uppermost residential level of Building A is to have its footprint amended to reflect that of the uppermost residential level; and
* the revised entry arrangements for the new bowling club premises have the primary entrance for the Bowling Club from Birrell Street.

Implementation of outcomes

1. It will be necessary for there to be a revised BASIX certificate following the deletion of one residential level in Building A and the redesign of the penultimate residential level; there will need to be revised plans, both in plan and elevation, reflecting the required changes; and there may be a need to revise the conditions of development consent that have been agreed to by the parties, if there is, for example, a necessity to recalculate development contributions as a consequence of the design changes.
2. As I indicated would be the position, I am giving this decision in sufficient time to permit these matters to be addressed in a timely fashion and enable the issuing of conditional development consent prior to the expiry of the site compatibility certificate. A timetable requires to be set for this purpose. What follows are the directions necessary to permit this to occur.

Directions

1. The directions of the Court are as follows:
2. The matter is listed for mention before me at 8.30 am on Friday 20 September 2019;
3. If revised plans and revised conditions of consent agreed by the parties and a revised BASIX certificate, together with the necessary form of orders to give effect to the granting of conditional development consent based on those plans and conditions, are provided physically (with the conditions and orders provided electronically as Word documents) to my Associate by 1.00 pm on Thursday 19 September 2019, I will make orders in chambers granting development consent and vacate the mention of the matter; and
4. Liberty to relist before me on one day’s notice.
5. The orders are also to provide that the exhibits, other than Exhibits 1, A, P and R, are returned.

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​ [Annexure A - Exhibit H - existing streetscape analysis (780 KB, pdf)](http://www.caselaw.nsw.gov.au/asset/5d7afc9ee4b0ab0bf607205a.pdf)

[Annexure B - Exhibit R - DA1107 - p1 (375 KB, pdf)](http://www.caselaw.nsw.gov.au/asset/5d7afca3e4b0ab0bf607205e.pdf)

Amendments

16 September 2019 - Amendment to firm representing the Respondent.

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