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| Case Name: | Thompson Health Care Pty Limited v Ku-ring-gai Council |
| Medium Neutral Citation: | [2020] NSWLEC 1363 |
| Hearing Date(s): | 16, 17 and 20 July 2020 |
| Date of Orders: | 14 August 2020 |
| Decision Date: | 14 August 2020 |
| Jurisdiction: | Class 1 |
| Before: | Walsh C |
| Decision: | See orders at [132] |
| Catchwords: | DEVELOPMENT APPLICATION– seniors housing development – residential care facility – breach of three development standards in State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 – neighbour objections |
| Legislation Cited: | Environmental Planning and Assessment Act 1979 Ku-ring-gai Local Environmental Plan (Local Centres) 2012 Ku-ring-gai Local Environmental Plan 2015 State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 State Environmental Planning Policy (State and Regional Development) 2011 State Environmental Planning Policy No 55—Remediation of Land State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development |
| Cases Cited: | Australian Turf Club v Liverpool City Council (No 2) [2014] NSWLEC 1099 Botany Bay City Council v Pet Carriers International Pty Ltd (2013) 201 LGERA 116; [2013] NSWLEC 147 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 Jigari Pty Ltd v City of Parramatta Council [2018] NSWLEC 1568 Ku-ring-gai Council v Pathways Property Groups Pty Ltd [2018] NSWLEC 73 Manderrah Pty Ltd v Woollahra Municipal Council and Anor [2013] NSWLEC 1196 Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 |
| Texts Cited: | A guide for councils and applicants – Housing for seniors or people with a disability, SEPP (Seniors Living) 2004 Apartment Design Guide – NSW Department of Planning AS4282-1997 Control of the obtrusive effects of outdoor lighting Ku-ring-gai Local Centres Development Control Plan Ku-ring-gai Local Strategic Planning Statement |
| Category: | Principal judgment |
| Parties: | Thompson Health Care Pty Limited (Applicant) Ku-ring-gai Council (Respondent) |
| Representation: | Counsel: M Staunton (Applicant) J Smith (Respondent)  Solicitors: Sattler & Associates Pty Ltd (Applicant) Sparke Helmore (Respondent) |
| File Number(s): | 2019/246008 |
| Publication Restriction: | Nil |

Judgment

1. This is an appeal under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (‘EPA Act’) against the deemed refusal of development application No. DA0168/19 by Ku-ring-gai Council (‘Council’) for a seniors housing development at 46, 48 and 50 Cowan Road St Ives, legally described as Lots 2, 3 and 4 in DP 22368 (‘site’).

The site and setting

1. I rely on Council’s Amended Statement of Facts and Contentions filed 5 June 2020 ('Ex 1 – Tab 1') for much of the material in this and the following two descriptive sections of the judgment.
2. The site, if consolidated as proposed, would form an irregular, although somewhat parallelogram-shaped, parcel with a total area of some 5,900m2. The frontage to Cowan Road would be some 80.985m. The side boundaries would be in the order of 76m in length. The site slopes away from Cowan Road to the west, with a level change of about 5.8m to 6.8m from front to rear.
3. At present the site is occupied by three separate detached dwellings (2 x 2-storey and a single level dwelling), each with access to, and setback generously from, Cowan Road.
4. Multiple dwelling housing is located on the land to the immediate south (at 30-32 Cowan Road) and north (at 52 Cowan Road), both accommodations are seniors living developments, according to Ex 1 – Tab 1. Further to the south (at 24 Cowan Road) is a 2 storey multi dwelling complex comprising villas and townhouses.
5. The locality is characterised by such single and 2 storey detached dwelling houses on larger landscaped parcels interspersed with seniors housing development.
6. Pymble Golf Course is located to the immediate west of the site. William Cowan Oval is to the east of, and opposite, the site on Cowan Road.
7. The site is within walking distance of the St Ives centre and a range of retail/commercial facilities, public open space areas and public transport services.

Statutory considerations

1. The site is located within a strip of land along the western side of Cowan Road zoned R3 Medium Density Residential under the Ku-ring-gai Local Environmental Plan (Local Centres) 2012 (‘LEP’). Across Cowan Road, William Cowan Oval is zoned RE1 Public Recreation under the same plan. Pymble Golf Course, to the west, is zoned RE2 Private Recreation under Ku-ring-gai Local Environmental Plan 2015.
2. The proposal relies on State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (‘SEPP’). Relevant particulars of the SEPP are introduced below.
3. Ku-ring-gai Local Centres Development Control Plan (‘DCP’) also applies and arose in evidence.
4. The proposal is regionally significant development under State Environmental Planning Policy (State and Regional Development) 2011, as it has a capital investment value in excess of $30 million.

The proposal

1. The application before the Court seeks consent for the demolition of the existing buildings and the construction of a 99 bed residential aged care facility, and associated works, as described below:

* Lower basement level - providing parking for 37 vehicles as well as plant and store rooms.
* Basement/lower ground floor level - comprising parking for 18 vehicles, garbage room, loading areas, and utilities and store rooms as well as kitchen, laundry, nurse station, lounge and dining area, and 19 resident rooms containing 19 beds.
* Ground floor - entry lobby, reception, lounge and dining rooms, function room, store rooms and 40 resident rooms containing 40 beds.
* First floor - lobby, lounge and dining rooms, theatre, salon, store rooms, nurse station, and 40 resident rooms containing 40 beds.
* Associated works including specified hard and soft landscaping, fencing, stormwater management and other infrastructure.

Contextual note

1. There have been a number of changes to the proposal since the lodgement of the appeal and filing of original contentions by Council. The most notable is the deletion of one storey, and reduction in bed numbers from a total of 133 beds down to the now proposed 99. The more notable amendments include: (1) reducing the height and scale of the building, (2) introducing various changes to landscaping and fencing, (3) privacy treatments to certain accommodation windows, and (4) certain other changes to mitigate against loss of amenity for neighbours. In light of the amendments to the application, for which the Court has granted leave, the experts providing sworn evidence in the case have come to an agreed position that the application adequately addresses all of the contentions raised by Council otherwise suggested as providing cause for the Court to refuse the application. In light of the expert evidence, Council determined that it would no longer press the contentions, noting that this position was on the basis of certain agreed conditions applying to any consent (Ex 8).
2. As indicated by Preston CJ in *Botany Bay City Council v Pet Carriers International Pty Ltd* (2013) 201 LGERA 116; [2013] NSWLEC 147 (‘*Pet Carriers*’) at [101], “ordinarily, the Court determines the proceedings on the substantive issues joined between the parties”. Nonetheless the Court, in stepping into the shoes of the consent authority, can identify matters which it believes warrant further attention in proceedings. There is a need for due notice to be given to the parties were this to occur (ibid, and *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 (‘*Initial Action*’) at [126]-[133]). Of relevance here is that, following public notification, the proposal was subject to many submissions objecting to its approval, both in its original form and following the amendments. Notwithstanding the agreed position of the parties, it is necessary and appropriate that I give consideration to these submissions in the evaluation of the application before me (s 4.15(1)(d) of the EPA Act). During the hearing, I had the opportunity to interrogate the experts in regard to certain issues raised in lay submissions and, as explained below, received new evidence in regard to certain matters of which I gave notice to the parties.
3. There were also significant jurisdictional considerations raised in this matter. The proposal would contravene the three development standards relating to height contained at cl 40(4) of the SEPP. As explained below, there is power available to a consent authority, and the Court in this instance, to consent to development, notwithstanding such contraventions. However, this requires the Court, and in this case myself, to form positive opinions of satisfaction directly. Written evidence, and my examination of the experts, informed me in regard to the forming of such opinions, relevantly.
4. In the consideration of issues, I first address the jurisdictional questions and then turn to the examination of the issues raised by objectors.

Issues

Jurisdictional consideration - contravention of development standards

1. Clause 40(4) of the SEPP provides as follows:

….

**Height in zones where residential flat buildings are not permitted** If the development is proposed in a residential zone where residential flat buildings are not permitted—

(a)  the height of all buildings in the proposed development must be 8 metres or less, and

**Note.**  Development consent for development for the purposes of seniors housing cannot be refused on the ground of the height of the housing if all of the proposed buildings are 8 metres or less in height. See clauses 48 (a), 49 (a) and 50 (a).

(b)  a building that is adjacent to a boundary of the site (being the site, not only of that particular development, but also of any other associated development to which this Policy applies) must be not more than 2 storeys in height, and

**Note.**  The purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.

(c) a building located in the rear 25% area of the site must not exceed 1 storey in height.

1. Residential flat buildings are not permitted in the R3 Medium Density Residential zone, within which the site is located, which means the height controls at cl 40(4) are triggered. The proposal seeks consent for development that would breach all three of the development standards in cl 40(4).
2. The permissive powers at cl 4.6(2) of the LEP apply here, even though the contravention is related to the SEPP (*Ku-ring-gai Council v Pathways Property Groups Pty Ltd* [2018] NSWLEC 73).
3. Clause 4.6(2) of the LEP provides (relevantly):

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 ...

1. The permissive power in cl 4.6(2) is subject to the restrictions in cl 4.6(3) and (4):

(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 Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

1. The Court must form two positive opinions of satisfaction under cl 4.6(4)(a) to enliven the permissive power under cl 4.6(2) to grant development consent notwithstanding the contravention (*Initial Action* at [14]). The first opinion is in regard to a written request from the applicant seeking to justify the contravention of the development standard and, specifically, whether it has adequately addressed the two matters required to be demonstrated at cl 4.6(3). The second opinion requires me to make my own finding of satisfaction that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objective of the zone in which the development is proposed to be carried out.
2. To open the gate to the application of these permissive powers, mindful of cl 4.6(3) of the LEP, the applicant has prepared three written requests seeking to justify the contraventions of these development standards. The three written requests are attached to a supplementary Statement of Environmental Effects prepared by Boston Blyth and Fleming and dated 16 July 2020. This document is marked Exhibit O in the tendered written evidence. To be clear the written requests were also prepared by Boston Blyth and Fleming. For convenience, I will refer to the written requests as follows:

* The written request seeking a variation of the development standard for building height at cl 40(4)(a) of the SEPP will be referred to as WR1.
* The written request seeking a variation of the development standard for building height at cl 40(4)(b) of the SEPP will be referred to as WR2.
* The written request seeking a variation of the development standard for building height at cl 40(4)(c) of the SEPP will be referred to as WR3.

Considering contravention of the development standard for building height at cl 40(4)(a) – 8 metres

1. Under cl 40(4)(a) of the SEPP, the height of all buildings in the proposed development must be 8m or less. It is noteworthy that a distinctive definition of building height is adopted in the SEPP as follows (cl 3(1)):

**height** in relation to a building, means the distance measured vertically from any point on the ceiling of the topmost floor of the building to the ground level immediately below that point.

1. WR1 indicates that the building exceeds this height control by up to 2.8m or some 35%. Figure 1 in WR1 (p5) shows the location of the contravention. It occupies a considerable portion of the western area of the building, although setback from all site boundaries.

Whether compliance unreasonable or unnecessary in the circumstances of the case

1. According to *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (‘*Wehbe*’) (at [42]-[51]), and as confirmed in *Initial* *Action*, establishing that the objective of a development standard has been achieved notwithstanding non-compliance with the standard is one way of demonstrating that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case. It is this first and “most commonly evoked” (*Wehbe* at [42]) “way”, which is adopted in WR1.
2. There are no specific objectives nominated for the development standards at cl 40(4) of the SEPP. In regard to cl 40(4)(a), WR1 relied on the objectives of cl 4.3 of the LEP, as follows:

(a) to ensure that the height of development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres,

(b) to establish a transition in scale between the centres and the adjoining lower density residential and open space zones to protect local amenity,

(c) to enable development with a built form that is compatible with the size of the land to be developed.

1. I am satisfied with the adoption of this process; that is, the use of the objectives to cl 4.3 of the LEP as a means of understanding the ends sought by the development standard at cl 40(4)(a) of the SEPP. This is because the objectives to cl 4.3 of the LEP are concerned with the “end” of achieving reasonable height of buildings for a development, and cl 40(4)(a) of the SEPP has essentially the same aim.
2. In regard to objectives (a) and (b) in cl 4.3 of the LEP, WR1 relies on the height controls under the LEP applying to the site, which permit 11.5m high buildings. The argument is that buildings of up to 11.5m height represent the height anticipated for development on this site and, as the proposal does not reach that controlling height, the proposal’s height would be deemed to be in alignment with the objectives of cl 4.3 of the LEP relating to: (a) the scale of development at this site as part of a “centre”, and (b) the transition in scale between the centre and adjoining lower density areas. In regard to objective (c) in cl 4.3 of the LEP, WR1 refers to the site as involving the consolidation of parcels which is suggested as facilitating the provision of side and rear building setbacks which exceed that which would be required under the DCP controls. In particular it is argued that the contravening portion of the building is setback some 12m from side and rear (western) boundaries, whereas the DCP envisages 6m side and rear setbacks (3m for non-habitable rooms) (p12). The arguments put in the written request satisfactorily demonstrate that the objectives to cl 4.3 of the LEP are achieved with the building height as proposed.
3. Given my findings directly above, and at [[29](#_Ref46233874)], I am satisfied that strict compliance with the height standard at cl 40(4)(a) of the SEPP is unreasonable and unnecessary in the circumstances of the case

Whether sufficient environmental planning grounds to justify contravening the development standard

1. Mindful of *Initial Action* (at [24]), the focus for consideration of the sufficiency of environmental planning grounds is that aspect of the development which contravenes the standard. WR1 refers to four environmental planning grounds. In this judgment it is sufficient for me to rely on two of these.
2. WR1 provides an indication of the implications of the reduction of floor space available where the contravening element of the proposal be excluded (p14):

“(Compliance with the SEPP Seniors’ 8m height of buildings control) would necessitate the deletion of approximately 22 resident rooms across 2 levels representing a reduced bed yield of 22.2%. Such reduction would also represent a loss of approximately 825 square metres of floor space reducing the GFA to 5065 square metres and an FSR of 0.858:1. Such FSR would be well below the clause 48(b) SEPP HSPD “cannot refuse” density and scale standard of 1:1.”

1. As a first planning ground, WR1 refers to document published by NSW Department of Infrastructure, Planning and Natural Resource produced document titled “A guide for councils and applicants – Housing for seniors or people with a disability, SEPP (Seniors Living) 2004,” dated May 2004. WR1 indicates that (at p9) this document refers to a stated intention of the SEPP to particularly encourage residential care facilities (as opposed to other types of seniors housing) by facilitating development at an FSR of 1:1 (p9). The suggestion is that strict compliance with the height of buildings standard would thwart the intention of development incentives otherwise encouraged in the SEPP, thus discouraging the provision of residential care accommodation. To round out this first environmental planning argument, WR1 then suggests strict compliance would not accord with object 1.3(c) of the EPA Act which is:

to promote the orderly and economic use and development of land

1. As a second planning ground, WR1 refers to demographic evidence which indicates a particular local demand for accommodation of this form. WR1 refers to a document called “Ku-ring-gai Council local strategic planning statement” and supplied certain excerpts from it. According to WR1, and not disputed, the statement (adopted by Council on 17 March 2020) indicates that the Ku-ring-gai population has a high proportion of 65+ and 85+ population groups as compared to the North district and greater Sydney region. For example, there is an indication that people aged 85 years and over make up 3.2% of the Ku-ring-gai population compared to 1.8% of the greater Sydney region. There is also an indication of continuing growth of the population aged 65 and over.
2. WR1 indicates that, while the proposal would currently provide for 99 high care beds to assist in meeting suggested identified demand, compliance with the height of building standards would reduce that level of supply by 22 beds. This was seen to be directly contrary to the aims of the SEPP which include at cl 2(1)(a):

(a) to increase the supply and diversity of residences that meet the needs of seniors or people with a disability

1. I am satisfied with the substance of the grounds raised in WR1 and adjudge them as sufficient environmental planning grounds to justify contravening the 8m height standard at cl 40(4)(a) of the SEPP.
2. It follows that I am satisfied with respect to cl 4.6(4)(a)(i) of the LEP because WR1 has adequately addressed the matters required to be demonstrated under cl 4.6(3) of the LEP.

Whether development in the public interest because of consistency with the objectives of the particular standard and the objectives for development within the zone

1. In regard to the objectives behind cl 40(4)(a) of the SEPP, I adopt the finding above (at [[28](#_Ref46235319)]-[[30](#_Ref46235338)]), where I consider the same question in light of the content of the written request.
2. I now turn to the question of consistency with the zone objectives. There are four nominated objectives for the R3 Medium Density Residential zone in the LEP, as follows:

• To provide for the housing needs of the community within a medium density residential environment.

• To provide a variety of housing types within a medium density residential environment.

• To enable other land uses that provide facilities or services to meet the day to day needs of residents.

• To provide a transition between low density residential housing and higher density forms of development.

1. In regard to the first objective, the proposal would clearly provide for the housing needs of seniors and people with disabilities within a medium density residential environment. In regard to the second objective, the proposed housing form here is a high care residential facility adding to the variety of available accommodation types in that medium density environment. The third objective is not relevant to this application. In my opinion, the fourth objective is best seen as an explanatory objective, similar to that described in *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 (‘*Baron*’) at [32]. It is explaining the R3 Medium Density Residential zone’s juxtaposition with the R2 Low Density Residential zone and R4 High Density Residential zone. The proposal would contribute to the achievement of this zone objective and provides an appropriate transition to the R2 Low Density Residential zoned land nearby.
2. I am satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development within the R3 zone. I am therefore satisfied regarding cl 4.6(4)(a)(ii) of the LEP.
3. Given my findings directly above, and at [[38](#_Ref46312331)], the requirements to enable the permissive powers of cl 4.6(2) of the LEP, in terms of the contravention of the cl 40(4)(a) of the SEPP, have been met.

Considering variation of the development standard for building height at cl 40(4)(b) – 2 storeys

1. Under cl 40(4)(b) of the SEPP, a “building that is adjacent to a boundary of the site … must be not more than 2 storeys in height”.
2. As indicated in WR2, parts of the western portion of the building breach the 2 storey building height control. Figures 1 and 2 provide “blanket diagrams” indicating the extent of contravention. As might be expected, the contravention in cl 40(4)(b) of the SEPP is similar, in footprint, to that relating to cl 40(4)(a), occupying an area of the western portion of the building but setback from side and rear boundaries.

Whether compliance unreasonable or unnecessary in the circumstances of the case

1. WR2 also adopts the first *Wehbe* way to attempt to demonstrate that compliance is unreasonable or unnecessary in the circumstances of the case. That is, because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. As noted above, there are no specified objectives which frame cl 40 of the SEPP. Pertinent here is that the SEPP includes a “note” directly following cl 40(4)(b), and no doubt applicable to that subclause, as follows:

**Note**. the purpose of this paragraph is to avoid an abrupt change in the scale of development in the streetscape.

1. It seems to me to be entirely reasonable that WR2 adopts the stated “purpose”, as detailed within the abovementioned note, as the implicit objective of the standard (p21). In turn it is reasonable for adoption for an analysis under the first *Wehbe* way.
2. WR2 responds to this nominated purpose as follows (p29):

“The provision of a 2 storey compliant building height and form to the street, consistent with the predominantly 2 storey streetscape established along the western side of Cowan Road, represents a contextually appropriate 2 storey streetscape outcome which avoids an abrupt change in the scale of development in the streetscape.

The 3 storey building elements located beyond the front street facing facade alignment occur as the site falls away towards the rear of the property consistent with the 2/ 3 storey stepped building heights established by adjoining development and development generally located along the western side of Cowan Road…”

1. These arguments satisfactorily demonstrate that cl 40(4)(b) of the SEPP’s stated “purpose”, of avoiding an abrupt change in scale at the streetscape, is achieved with the building heights as proposed. Given my findings at [[47](#_Ref46238734)], I am satisfied that WR2 has adequately demonstrated that strict compliance with the 2 storey height standard at cl 40(4)(b) of the SEPP is unreasonable and unnecessary in the circumstances of the case.

Whether sufficient environmental planning grounds to justify contravening the development standard

1. Given the alignment of the substance of the contravention, WR2 (concerned with a 2 storey height control) generally follows the detailed rationale outlined in WR1 (concerned with an 8m height control) with respect to the planning grounds justifying the contravention. There is a slight increase in the reduction of building area and habitable rooms associated with the 2 storey control than the 8m control (25 rooms vs 23 rooms).
2. I am satisfied that the environmental planning grounds contained in WR2, relating to: (1) the promotion of orderly and economic use and development of land, and (2) concerned with social benefit, or meeting a projected need for housing of this type, are sufficient to justify contravening the two storey height standard at cl 40(4)(b) of the SEPP.
3. Given my finding directly above, and at [[49](#_Ref46240659)], I am satisfied with respect to cl 4.6(4)(a)(i) of the LEP because WR2 has adequately addressed the matters required to be demonstrated under cl 4.6(3) of the LEP.

Whether development in the public interest because of consistency with the objectives of the particular standard and the objectives for development within the zone

1. In regard to the question of consistency with the zone objectives, I rely on my findings at [[40](#_Ref46239923)]-[[41](#_Ref46239929)] above.
2. In regard to the question of consistency with the objectives of the development standard at cl 40(4)(b) of the SEPP, I rely on my findings at [[49](#_Ref46240659)] above.
3. Therefore, I am satisfied regarding cl 4.6(4)(a)(ii) of the LEP.
4. My findings at [[52](#_Ref46316192)] and [[55](#_Ref46316204)] mean that the requirements to enable the permissive powers of cl 4.6(2) of the LEP in terms of the contravention of the cl 40(4)(b) of the SEPP have been met.

Considering variation of the development standard for building height at cl 40(4)(c) – 1 storey at rear

1. Under cl 40(4)(c) of the SEPP, “a building located in the rear 25% area of the site must not exceed 1 storey in height.”
2. As indicated in WR3, parts of the western portion of the building breach this single storey building height control. Figures 1 – 4 in WR3 provide plan and elevational views, indicating the extent of contravention. The contravention with respect to cl 40(4)(c) of the SEPP is of a lesser footprint than the contraventions described earlier in the judgment. However, the height of the contravention is greater. This might be better described by saying that elements of the 3 storey component of the proposed building are located within the rear 25% area of the site.

Whether compliance unreasonable or unnecessary in the circumstances of the case

1. WR3 also adopts the first *Wehbe* wayto attempt to demonstrate that compliance is unreasonable or unnecessary in the circumstances of the case. That is, because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. As noted above, there are no specified objectives which frame cl 40 of the SEPP.
2. The written request relied on the findings in *Manderrah Pty Ltd v Woollahra Municipal Council and Anor* [2013] NSWLEC 1196 (‘*Manderrah’*), where Tuor C found (at [70]) as follows:

“The primary objective of cl 40(4)(c) is to limit the bulk and scale of a building to protect the amenity of the rear of adjoining properties. Placing built form into the rear of a property which generally forms part of its open space and adjoins the open space of other properties to the side and rear can have significant impacts on amenity not only from loss of solar access, privacy and views but also from the presence of increased or new building bulk and the removal of landscaping.”

1. The position adopted by Commissioner Tuor in *Manderrah* has been subsequently accepted by Dickson C in *Jigari Pty Ltd v City of Parramatta Council* [2018] NSWLEC 1568 at [83]. In light of this I am comfortable in accepting the position of WR3, that the implicit objective of cl 40(4)(c) of the SEPP is to:

“limit the bulk and scale of a building to protect the amenity of the rear of adjoining properties”.

1. The written request examined the amenity considerations raised in *Manderrah* (at [70]) for the properties in the vicinity of the rear of the site:

* Pymble Golf Course west of the rear boundary of the site,
* The multi storey seniors housing development at No. 52 Cowan Road adjoining the northern boundary of the site, and
* The multi storey seniors housing development at No. 30 – 32 Cowan Road adjoining the southern boundary of the site.

1. WR3 included examination of overshadowing, privacy, views, and visual amenity/bulk/removal of landscaping, with respect to relevant neighbouring properties.
2. First, I will attend to overshadowing. WR3 provides as follows with respect to overshadowing of the northern adjoining property (p47):

“As the rear 25% site area encroaching 2 and 3 storey built form elements are located to the south of the rear open space of the northern adjoining property, the breaching elements will not give rise to any overshadowing impact to this northern adjoining property between 9am and 3pm on 21st June…”

1. WR3 provides as follows with respect to overshadowing of Pymble Golf Course to the rear (p47):

“… some overshadowing will occur to the adjacent golf course however such shadowing will be limited to a relatively small area of the golf course between 9am and approximately 11:30am on 21st June. I note that no shadowing will occur to the club house or other member/ visitor amenities/ facilities at any time on 21st June.”

1. WR3 provides as follows with respect to overshadowing of 30 - 32 Cowan Road (p48):

“… all apartments within the senior housing development to the south of the subject site, No. 30-32 Cowan Road, will continue to receive direct sunlight to a living room and/or dining room and to their primary open spaces for at least three hours between 9 AM and 3 PM on 21 June in strict accordance with clause 6C.3 of KDCP…”

1. The arguments submitted in WR3 are accepted by Council’s planning expert (Supplementary Joint Expert Town Planning Report Ex 7) and supported by shadow diagrams provided as an attachment to WR2. The written request demonstrates to me that the proposal, including in regard to this contravention of building height to the rear, provides reasonable protection of the amenity of the rear of adjoining properties insofar as solar access is concerned.
2. I now turn to privacy. WR3 relies on a number of elements to argue privacy protection notwithstanding the height breach. First, is in regard to the provision of 6m deep soil side setbacks for landscape planting along both side and rear boundary setbacks. Second, is the fact that the 3 storey elements are setback 12m to the side boundary, notwithstanding, the DCP would allow buildings of the same height at a minimum of 6m side boundary setback (DCP cl 6A.3 is cited, which indicates as such for multi dwelling housing). Third, is the provision of fixed louvre privacy screens to all two storey side boundary-facing windows located in the rear 25% area. The louvres direct sightlines towards Pymble Golf Course, rather than the residential neighbours. WR3 argues that louvres are unnecessary for the third storey as: (a) this building element is setback 12m to side boundaries, and (b) the “green roof” forms on the middle level limits downward views to the rear open space of adjoining properties on both sides. A line of sight diagram, indicating this limitation as far as Unit 1 in 30-32 Cowan Road is concerned, is provided (WR3, p42).
3. These arguments indicate a number of features of the proposal which seem to me, together, to ably address a concern that the privacy enjoyed by adjoining residents would be unreasonably impacted upon as a consequence of the height contravention in the rear 25% area. Rather, the proposal provides reasonable protection of the amenity of the rear of adjoining properties insofar as privacy is concerned.
4. WR3 then moves onto view loss. It argues that it is clear from the analysis of view corridors that the rear 25% encroachment of two and three storey building forms would not bring about any significant impact. I agree that existing views are dominated by the Pymble Golf Course and these would be retained despite the contravention.
5. WR3 then groups the following as a single topic for consideration in regard to the protection of amenity of the rear of adjoining properties: visual amenity/bulk/removal of landscaping. I now turn to it.
6. WR3 argues that amenity is protected in regard to this topic, which might be seen as centred on the effects of the visual bulk of the building from the rear of adjacent properties, notwithstanding the height contravention because: (a) the LEPs building height controls already allow building bulk of this scale, (b) side and rear building setbacks are compliant or exceed (in regard to the third storey) DCP requirements for similar buildings, and (c) certain intervening hedge screening is retained and there is otherwise considerable landscaping proposed along both side and rear boundaries. It seems to me that this neutral or positive comparison of the proposed (contravening) building’s visual configuration for the rear 25% of the site, with that which might be expected of other residential buildings under current planning controls, coupled with positive landscaping screening arrangements intended on the site, is a reasonable way to demonstrate that amenity of adjoining properties to the rear is protected in regard to visual bulk, notwithstanding the contravention of cl 40(4)(c) of the SEPP.
7. To conclude on this point, firstly, I am satisfied that, in this instance, the grouping of issues adopted for consideration in WR3 adequately covers the essential issue of amenity as raised in the adopted implicit objective in relation to cl 40(4)(c) of the SEPP. I have found satisfaction, with regard to the arguments put, that protection of the amenity of the rear of adjoining properties would occur notwithstanding the height contravention in the rear 25% of the site. Or put another way, the written request has established to my satisfaction that the implied objective of cl 40(4)(c) of the SEPP has been achieved with the proposal notwithstanding the non-compliance. I am satisfied that WR3 has adequately demonstrated that compliance with cl 40(4)(c) of the SEPP is unreasonable and unnecessary in the circumstances of this particular case.

Whether sufficient environmental planning grounds to justify contravening the development standard

1. This contravention has considerable alignment with those addressed in WR1 and WR2. WR3 (concerned with single storey height limits in the rear 25% of the site) generally follows the detailed rationale outlined in WR1 (concerned with an 8m height control) and WR2 (concerned with 2 storey height adjacent to site boundaries) with respect to the planning grounds justifying the contravention. Of the three contraventions, this matter has the least effect in terms of reduction of building area and habitable rooms. WR3 indicates compliance with cl 40(4)(c) of the SEPP would necessitate the deletion of approximately 22 resident rooms across 2 levels representing a reduced bed yield of 22.2%.
2. I am satisfied that the environmental planning grounds contained in WR3 relating to (1) the promotion of orderly and economic use and development of land, and (2) concerned with social benefit, or meeting a projected need for housing of this type, are sufficient to justify contravening the two storey height standard at cl 40(4)(c) of the SEPP.
3. Given my finding directly above, and that at [[73](#_Ref46332114)], it follows that I am satisfied with respect to cl 4.6(4)(a)(i) of the LEP because WR3 has adequately addressed the matters required to be demonstrated under cl 4.6(3) of the LEP.

Whether development in the public interest because of consistency with the objectives of the particular standard and the objectives for development within the zone

1. In regard to the question of consistency with the zone objectives, I rely on my findings at [[40](#_Ref46239923)]-[[41](#_Ref46239929)] above.
2. In regard to the question of consistency with the objectives of the development standard at cl 40(4)(c) of the SEPP, I rely on my findings at [[73](#_Ref46332114)] above.
3. Therefore, I am satisfied regarding cl 4.6(4)(a)(ii) of the LEP.
4. My findings at [[76](#_Ref46332588)] and [[79](#_Ref46332549)] mean that the requirements to enable the permissive powers of cl 4.6(2) of the LEP in terms of the contravention of the cl 40(4)(b) of the SEPP have been met.
5. The states of satisfaction required by cl 4.6 of LEP have been reached in regard to the contravention of the SEPP’s cl 40(4)(c). There is, therefore, power to grant development consent to the proposed development notwithstanding the breach of this development standard.

Findings in regard to contraventions of height standards in the SEPP

1. I note here that the Court has power to grant development consent for development that contravenes a development standard, if it is otherwise satisfied (under cl 4.6(4)(a)), without obtaining or assuming the concurrence of the Planning Secretary under cl 4.6(4)(b), by reason of s 39(6) of the Land and Environment Court Act. In accordance with the findings in *Initial Action* at [29], I have considered the matters in cl 4.6(5) in coming to my conclusions in regard to each of the contraventions and find no matters of significance arise in regard to these cl 4.6(5) matters.
2. I have found in regard to each of the contraventions of the SEPP that the permissive powers of cl 4.6(3) of the LEP are engaged. Therefore, mindful of cl 4.6(2) of the LEP, it is open to the Court to grant development consent notwithstanding these contraventions.

Lay submissions

Overdevelopment

1. Concerns were raised about the size and scale of the development. For example, it was noted that the proposal occupied three individual parcels of land compared to other accommodation generally occupying a single site. Due to its scale, the proposal was seen to be inconsistent with the desired character of the area. The height contraventions, considered above, and floor space of the development, were also seen to be adverse factors. A further factor was what was seen as an exceedance of the landscape area control in the SEPP. Clause 48(c) provides that “if a minimum of 25 square metres of landscaped area per residential care facility bed is provided”, then a development application for a residential care facility could not be refused on the basis of “landscaped area”. The argument put was that compliance with this control would result in a scaling back of the development to a more appropriate level.
2. The planning and urban design experts were in agreement that the proposed scale of the development is satisfactory (planning experts were G Boston for the applicant and P Johnston for Council, urban design experts were R Olsson for the applicant and M Zanardo for Council).
3. Having reviewed the written evidence and examined the oral evidence in the hearing, it is clear to me that these experts have considered this question closely. Their position might be summarised as follows: (1) the proposal more than complies with the otherwise height, FSR and building setback controls applying to the site under the LEP for similar permissible development (such as multi dwelling housing), (2) the proposal generally provides for 6m deep soil at side and rear setbacks, and appropriate landscape treatment along these boundaries (a response which may not always be expected under existing controls for similar permissible development), and (3) there are appropriate arrangements for dealing with amenity considerations, a matter which is considered below.
4. I accept the evidence of the experts in regard to the scale of the development. I do not see the proposal as an overdevelopment of the site and agree with the experts that the consolidation of the three blocks of land are a factor in delivering the capacity for high standard edge landscape treatment, as is proposed. There is no requirement to provide a landscaped area of 25m2 per bed under the SEPP. I mention that I accept the argument put by the applicant’s experts that the intended large “internalised” landscaped courtyard (not included in the landscaped area calculation) could be expected to be a well-used recreational aspect of the facility, and I am not inclined to view that the proposal is deficient in the landscaped area.

Amenity

Solar access

1. 30-32 Cowan Road, is to the immediate south of the site and Unit 1 within this development is at the lowest level of this development and the most immediately affected by overshadowing from a new building on the site. The concern is in regard to loss of solar access to living areas and private courtyard areas.
2. I have already drawn certain conclusions, at [[66](#_Ref46750209)]-[[67](#_Ref46494948)], in regard to the solar access which remains available to 30-32 Cowan Road with development of the proposal. I note the uncontested evidence from Mr Boston that there is now accordance with the DCP provisions relating to solar access (see [[66](#_Ref46750209)]). In addition I note that the design principles at Div 2 of the SEPP relevantly provides as follows (cl 35):

The proposed development should—

(a) ensure adequate daylight to the main living areas of neighbours in the vicinity and residents and adequate sunlight to substantial areas of private open space

…

1. Of note is the fact that some revisions were made to the proposal to reduce building massing at the roof level to allow some additional sunlight access in midwinter to windows along the northern side of Unit 1 in 30-32 Cowan Road (Ex T, Sheet DA-17 Solar Analysis).
2. It is clear from the solar analysis drawings that there will be quite good solar access to the private open space at the rear of Unit 1. The proposed side setbacks, coupled with landscape treatment as intended, will ensure the proposal does not unreasonably affect the adequacy of the daylight to the main living areas to the south; and the changes to the roof line will mean sunlight will enter the rooms along the western side of Unit 1 even in midwinter. I am satisfied that the proposal will not affect the adequacy of solar access to Unit 1 30-32 Cowan Road. A condition of consent (Condition 124) requires the maintenance of a proposed hedge along the southern boundary to a height of 2.5m above ground level at the boundary to protect this solar access into the future.

Visual privacy

1. Neighbours to both north and south of the site raise concern about visual privacy. The concern was that residents of the proposal would look out into windows and private courtyards on all levels of the adjoining developments. Neighbours suggested there was at least a need for either privacy screens or the placement of obscure glazing on these windows to prevent overlooking.
2. As indicated above, the proposal provides for fixed privacy louvres on windows at the lower two levels on both north and south facades of the development. The rooms oriented to the west would to be able to look out of over Pymble Golf Course. The proposed screening was detailed in Ex V and provides for 30 degree angled louvres to again direct outlook from rooms on the north and south facades of the development towards the golf course.
3. Rooms at the upper level located on the north and south facades of the building would not have privacy screens fitted under the proposal. The planning and urban design experts on both sides expressed satisfaction with this arrangement in oral evidence. In considerable alignment with cl 4.6 written requests, there were three factors in the justification: (1) the additional side boundary setback associated with the uppermost level of the development at the rear (approx. 12m from the boundary), (2) the fact that lower levels of adjacent developments would be obscured from these upper rooms by a non-access section of roof on the middle level (the “green roofs”), and (3) the fact that there was an existing side boundary setback to the elevated levels of existing adjoining development (both living areas and decks). In addition, the experts referenced the Apartment Design Guide (‘ADG’), under State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, which they agreed was accepting of a 12m setback, in similar circumstances, without privacy treatment.
4. The concern here is principally the elevated properties on either side. I had the opportunity to view from one of these – Unit 5 at 30-32 Cowan Road. A similar situation would arise with respect to others. In fact, many of the elevated apartments in both 52 Cowan Road and 30-32 Cowan Road as well as 28 Cowan Road (albeit to a lesser extent in regard to the latter property), are faced with a situation where there will be a new considerable scale building which has some visual presence when enjoying time on balconies and sometimes within living areas. The question is the reasonableness of the affectation here.
5. In the examination of this question, the option is available to me to require fixed louvres, or the like, on the windows to upper level rooms on the northern and southern elevations. While I believe such a requirement could provide for some benefit to neighbours in elevated units to the north and south of the proposal, I am not inclined to require it.
6. It seems reasonable to accept the position adopted in the ADG as a baseline position in regard to acceptability. This is a position adopted by the experts for the case at hand which would not require any fixed louvres. There would need to be something out of the ordinary to require a step away from it. I do not see anything out of the ordinary in this instance. Rather, I am inclined to see the privacy benefit that might be provided by imposing this louvre screening would be secondary, rather than of a major benefit, to these elevated properties. That is, the extent of active overlooking that might occur from these high care rooms into sensitive space within the elevated properties cannot be expected to be great. On the other hand, there would be a considerable benefit to residents of these rooms if they could look out to Pymble Golf Course and trees without the impediment of louvre screens.
7. There is no reasonable justification in this instance for departure from the position adopted in the ADG and assumed by the experts (which might be assumed would apply with any similar permissible development of the site, and thus be reasonably anticipated). The proposed 12m side boundary setbacks, coupled with the setbacks in place for elevated private spaces next door to the north and south, would deliver reasonable privacy outcomes for the neighbours without a requirement for louvres or obscure glass on the uppermost level of the development.

Visual bulk

1. There were also objections from north and south neighbours in regard to the visual bulk of the proposal. I had the opportunity to view from units on both sides. As indicated in my response to WR3, I am comfortable with the building’s bulk with respect to the non-compliance with the SEPP’s requirement for one storey building height for the rear 25% of a site. I can extend this to the overall visual bulk of the proposal. In a visual sense it is reasonable to compare the proposal with what might be expected of an alternative residential building under current planning controls. Here it could comprise a building taller and with more bulk than that currently proposed. This, coupled with positive landscaping screening arrangements intended on the site, means the amenity of adjoining properties would be protected in regard to visual bulk.
2. One concern raised was that a 4m wall might be built along the side boundary to the south, as a very imposing structure to neighbours to the south. While the plans before me did not indicate this, at a site visit to Unit 1, 30-32 Cowan Road, some uncertainties on the intended southern boundary treatment configuration became apparent. On the other hand, there was reasonable clarity on the proposed fencing to the northern and rear boundaries (Ex M, DA10).
3. Leave was granted for amendments to this southern boundary treatment in accordance with a detailed landscape drawing, with which the experts were satisfied (Ex S). Having heard (and read) the objections from this neighbour directly, I am satisfied that a reasonable arrangement is in place. It includes the provision of an open palisade-style fencing entirely on the site, and retention of existing fencing arrangements on the adjoining land to the south, including the existing mass sandstone wall and timber lattice fence. This “staggering” of treatments then includes a hedge on the site. There is already hedging on the neighbouring property to the south at the western end.
4. While it would not be determinative in any event, I will also mention that in regard to hedges at the northern boundary, a large existing Leyland Green Cypress hedge (Tree reference No 33), located within the site and occupying a good portion of this northern boundary, and expressed as of value to northern neighbours, would be retained (Ex N, DA-101).
5. For the reasons cited above, I am satisfied in regard to building bulk.

Acoustic privacy

1. I understand there are conditions of consent in regard to managing noise generally. One particular concern raised by objectors was in regard to the proposed Function Centre which would look out to the street front near the southern boundary. The concern was in regard to potential noise and hours of operation from functions within the centre.
2. A condition of consent agreed between the parties (Condition 123) requires the hours of the function centre to be restricted to 9 AM to 9 PM daily. It might be thought of as unlikely that a centre of this kind would generate noise nuisance. Nonetheless, this condition seems to me to be a reasonable means of controlling the risk of annoyance to neighbours.
3. Another noise related concern of neighbours was with respect to deliveries and waste pickup services. Condition 119 proposes that all deliveries and waste collection services be carried out between 7 AM and 6 PM.

Other amenity

Annoyance from smoking

1. A concern of neighbours was that staff may smoke adjacent to the private areas next door. The applicant agreed to a condition (Condition 114) which would require the premises to be “smoke-free”, including signage display to prohibit smoking on the premises. Staff, residents and visitors would also be discouraged from smoking in front of adjoining properties.

Night lighting

1. Conditions have also been agreed between the parties aimed at preventing nuisance from outdoor lighting on the premises. There are “stop points” at both construction certificate and occupation certificates stages, requiring lighting design and then provisioning to comply with AS4282-1997 Control of the obtrusive effects of outdoor lighting; and be “mounted, screened and directed in a way that it does not create a nuisance or light spill on to buildings on adjoining lots or public places”. Further, there is a general requirement to achieve these results with the operation of the premises (Condition 112). This seems to reasonably protect this amenity concern.

Infrastructure provisioning

1. Concerns were raised by objectors in regard to both sewage infrastructure capacity and stormwater management.

Sewerage

1. The applicant’s intention is that the development use an outflow line which accesses Sydney Water’s sewer main which, near the site, runs in a north-south direction within the Pymble Golf Club (‘Club’) property. Submissions were made by both local residents and on behalf of the Club itself that this sewer main had been subject to regular failures over the recent past. The Club queried whether any investigation had been undertaken to ensure there is appropriate capacity in the sewerage infrastructure for a development of this scale. A further direct concern of the Club was in regard to the prospects for there to be some inconvenience for members as a consequence of works on the golf course itself associated with the delivery of sewer to the proposal.
2. While this matter was not raised in the contentions, I gave notice to the applicant of my intention to make inquiries in regard to it in the proceedings. In turn the applicant provided evidence that approaches had been made to Sydney Water in regard to the availability of sewerage and water supply infrastructure. A letter from Sydney Water dated 31 January 2019 and entitled “feasibility letter” was tendered into evidence (Ex Q). The letter indicated that Sydney Water had assessed the application and confirmed feasible access to sewer mains was available. This satisfies the sewerage concern as far as I am concerned. While I note the Club is worried of the prospects for disruptions to activities on the golf course in relation to required works on the sewer main (or indeed stormwater main) it did not seem to me that this is a matter for consideration in this judgment. Were there to be a need for upgrade works to public infrastructure within the Club’s site (and there is no technical evidence of this need before the Court), this would be a matter for negotiations between the Club and the responsible authority.

Stormwater management

1. The key stormwater management concerns were twofold. First, there was a concern about stormwater overflow occurring into neighbouring land along the site’s southern boundary. The stormwater experts explained the intended strategy and I was satisfied that appropriate arrangements were in place to prevent unreasonable local flooding on adjoining properties.
2. Second, and continuing on from the above with respect to site outflows, the Club was also concerned about an intended connection to stormwater mains running within Pymble Golf Course. It was indicated that no approaches had been made by the applicant to the Club in regard to any future works or easement.
3. While it may often make sense to do so, there are no obligations on an applicant to negotiate with an adjoining landowner, at a time prior to development consent, with respect to a future stormwater easement. I note that a deferred commencement condition is agreed by the parties requiring the applicant to secure a drainage easement over the Club lands (Condition 1).
4. While not raised in either contentions or evidence, I would note that I have given some consideration to the likely environmental impacts of expected future off-site works (*Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41 (at [5]-[39]). I was able to gather an impression of those intended works when they were described during the site inspection. The works do not present as being of a scale where significant environmental consequences would be expected.

Electricity substation

1. The architectural plans indicate an electricity substation would be provided at the south-eastern corner of the site within a substation easement. The neighbour to the immediate south expressed concern about the health and safety risks of a substation in that location and requested it be moved to a more central location away from side boundaries.
2. Again, while this matter was not raised in the contentions, I gave notice to the applicant of my intention to raise it in proceedings. The applicant tendered evidence (Ex R) from a P Dawson of DEP Consulting dated 16 July 2020. DEP Consulting has expertise in this field and Mr Dawson was indicated as an “Accredited Service Provider – Level3 Design”. Mr Dawson indicated the “substation location” is in accordance with “Ausgrid standard NUS-174 Environmental Procedures” and the location has taken into consideration “prudent avoidance policy” to minimise exposure to electric and magnetic fields (‘EMF’) (ibid). Certain mitigation measures were indicated, and Mr Dawson found that the level of EMF “is expected to be negligible” (ibid). Electrical substations are not uncommon in residential precincts and it seems to me that the advice provided reasonably satisfies the concern raised by the objector.

Construction stage

1. Neighbours’ construction stage concerns can be grouped into four headings, as itemised below.

Damage to neighbouring property

1. There was concern that, in particular, the extent of excavation associated with the development brought risk of damage to adjoining properties.
2. Agreed Condition 8 would bring a requirement for a dilapidation survey and report to be undertaken in regard to the immediate neighbouring properties north and south, prior to the commencement of construction. This would be followed by a post construction dilapidation report (Condition 61). This seems reasonable in the circumstances.

Amenity

1. The key concerns were in regard to dust and noise. A number of agreed conditions are aimed at addressing these concerns, and seem to be reasonable in the circumstances. These include:

* Condition 21 – requiring a noise and vibration management plan prior to commencement of works aimed at addressing likely noise.
* Condition 22 – addressing the risk of vibration associated with construction-related works.
* Condition 58 – requiring compliance with the plan referenced in Condition 21.
* Condition 60 – providing for dust control.

Traffic management

1. Neighbours were concerned about the particulars of construction traffic including how trucks and the like might compete for space on site, and the potential for (further) traffic blockages on Cowan Road.
2. Proposed Condition 9 provides a requirement for a Construction Traffic Management Plan (‘CTMP’). There is a list of inclusions detailed in the condition including requirements for traffic control plans. The CTMP is required to be approved by Council. I am satisfied with the proposed arrangements.

Asbestos

1. Works involving asbestos removal would be required to comply with WorkCover NSW guidelines under proposed Condition 4. This concern is adequately addressed in my view.

Property values

1. A number of lay submissions referred to concerns about losses to the value of the properties in their ownership, as a consequence of the development. A common opinion was that people had invested “life savings” into their retirement accommodation (on land neighbouring the site), and it seemed unfair that a commercial endeavour, albeit targeting the supply of seniors’ accommodation, would make commercial gains from the losses incurred on other senior citizens. Neighbours spoke of direct experience, or second-hand advice, that interest in the purchase of neighbouring property had waned substantially since the proposal was mooted.
2. While evidence of losses to property value were anecdotal rather than probative, this is not of core interest to me here. More fundamentally on this question, I follow the decision of Moore J in *Australian Turf Club v Liverpool City Council (No 2)* [2014] NSWLEC 1099 in finding that impact on property values is not a proper planning consideration.

Other matters

1. I note here briefly that I am satisfied in regard to a number of matters mentioned in relevant environmental planning instruments as requiring that disposition of me, as follows:

* In regard to State Environmental Planning Policy No 55—Remediation of Land, I am satisfied with the consideration given to whether the site is contaminated, as indicated in the Statement of Environmental Effects prepared by Boston Blyth Fleming and dated May 2019 (Ex B, p59).
* In regard to cl 6.1 of the LEP and earthworks, the relevant matters have been considered under subcl (3), as detailed in Ex U.
* In regard to cl 6.2 of the LEP and stormwater and water sensitive urban design, I am satisfied in regard to the tests at subcl (2) of the LEP based on the advice in Ex U.

Conclusion

1. A central point of attention in this judgment has been the consideration of the jurisdictional tests relating to the proposal’s contravention of three development standards relating to building height. I have found favourably in regard to the use of the permissive powers available at cl 4.6 of the LEP for each of the contraventions, opening the door to a merits consideration of the proposal.
2. In regard to the merits, and after various amendments for which leave was granted by the Court, it is notable that the experts came to agreement that the contentions raised by Council, as grounds for refusal of the application, had been adequately resolved. In turn Council did not press the contentions.
3. There were a number of issues raised in lay submissions, in particular from immediate neighbours, which came into focus during the proceedings. I also mention here that at the commencement of the hearing, I did give notice to the parties on two issues arising from lay objections, which were not included in contentions. These are mentioned above at [[111](#_Ref47366639)] and [[117](#_Ref46994264)]. In each case, the applicant provided documentary evidence to satisfy my concerns. The crucial point is that, in regard to the issues raised in lay submissions, and as indicated in the evaluation in this judgment, I was satisfied with the responses that were provided by the experts and conclude that the concerns raised have been adequately addressed.
4. I am satisfied that the application is acceptable and should be approved subject to the conditions agreed by the parties at Annexure A.

Orders

1. The orders of the Court are:
2. The applicant’s written request, prepared by Boston Blyth and Fleming and dated 16 July 2020, and made pursuant to clause 4.6 of Ku-ring-gai Local Environmental Plan (Local Centres) 2012, seeking a variation of the development standard for building height at clause 40(4)(a) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, is upheld.
3. The applicant’s written request, prepared by Boston Blyth and Fleming and dated 16 July 2020, and made pursuant to clause 4.6 of Ku-ring-gai Local Environmental Plan (Local Centres) 2012, seeking a variation of the development standard for building height at clause 40(4)(b) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, is upheld.
4. The applicant’s written request, prepared by Boston Blyth and Fleming and dated 16 July 2020, and made pursuant to clause 4.6 of Ku-ring-gai Local Environmental Plan (Local Centres) 2012, seeking a variation of the development standard for building height at clause 40(4)(c) of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, is upheld.
5. The appeal is upheld.
6. Consent is granted to development application no. DA0168/19 for demolition of existing buildings and structures and construction of a 99 bed residential aged care facility and associated works under State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 at 46, 48 and 50 Cowan Road St Ives subject to the conditions at Annexure A.
7. The following exhibits are returned: Exhibits 1-7, P, Q, R, S and U.

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P Walsh

Commissioner of the Court

[Annexure A (395418, pdf)](http://www.caselaw.nsw.gov.au/asset/173eb552ab5fc1a46de4b6e4.pdf)

[Landscape Plans (9809752, pdf)](http://www.caselaw.nsw.gov.au/asset/173eb5547b29bbfa0c69f2c5.pdf)

[Architectural Plans Part1 (32863295, pdf)](http://www.caselaw.nsw.gov.au/asset/173eb5572af829907c8d6320.pdf)

[Architectural Plans Part2 (21472782, pdf)](http://www.caselaw.nsw.gov.au/asset/173eb5597d6a13a3ad18dde2.pdf)

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