Land and Environment Court

New South Wales

Case Name:	Pavlakos Capital Pty Limited v Canterbury Bankstown Council
Medium Neutral Citation:	[2023] NSWLEC 1256
Hearing Date(s):	14-16 March 2023
Date of Orders:	31 May 2023
Decision Date:	31 May 2023
Jurisdiction:	Class 1
Before:	Dickson C
Decision:	The Court orders that: (1) The appeal is upheld. (2) Subsequent to the grant of leave to the Applicant to amend their development application during the proceedings, the Applicant is to pay the Respondent's costs thrown away as a result of the amendments made to the proposal, as agreed or assessed, within 28 days pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979. (3) The Development Application, DA-440/2018, seeking consent for the demolition of existing structures and construction of a four-storey in-fill affordable housing development over a basement car park, utilising the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009 at 71-83 Graham Road & 35-37 Karne Street, South Narwee (Lot 2, Lot 3, Lot 7 and Lot 8 in DP 23841 and Lots A and B in DP 387057), is determined by the grant of consent, subject to the conditions in Annexure A. (4) The exhibits are returned with the exception of Exhibits A, F, 1 and 3.
Catchwords:	DEVELOPMENT APPLICATION – consent sought for

	demolition and construction of a four storey in-fill affordable housing development – whether the development application was properly made – determination of applicable fee – requested variation to the floor space ratio and maximum building height – whether the written requests satisfy the requirements of cl 4.6 of Canterbury Local Environmental Plan 2012 – whether the development application satisfies the acoustic requirements of State Environmental Planning Policy (Infrastructure) 2007 – whether the development is compatible with the desirable elements of the character of the local area – whether the development has unacceptable impacts on adjoining properties - whether the development provides acceptable amenity.
Legislation Cited:	Architects Act 2003 Canterbury Local Environmental Plan 2012, cll 4.3, 4.6 Environmental Planning and Assessment Act 1979, ss, 4.15, 4.17, 4.64, 8.7, 8.15 Environmental Planning and Assessment Regulation 2000, cll 3, 48, 49, 50, 246, 246A, 246B, 248, 252, 255, 256 Environmental Planning and Assessment Regulation 2021, Sch 6, s 3 Land and Environment Court Act 1979, s 39 State Environmental Planning Policy (Affordable Rental Housing) 2009, cll 4, 13, 14, 16, 16A State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Housing) 2021 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (2002 EPI 530), cll 4, 6A, 28, 30 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
Cases Cited:	Baron Corporation Pty Limited v Council of the City of Sydney (2019) 243 LGERA 338; [2019] NSWLEC 61 Big Property Group Pty Ltd v Randwick City Council [2021] NSWL LEC 1161 Commitment Pty Ltd v Georges River Council (No 2) [2022] NSWLEC 94 HP Subsidiary Pty Ltd v Parramatta City Council [2020] NSWLEC 135

	Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 Parsonage v Ku-ring-gai (2004) 139 LGERA 354; [2004] NSWLEC 347 The Benevolent Society v Waverley Council [2010] NSWLEC 1082
Texts Cited:	Canterbury Development Control Plan 2012 NSW Department of Planning and Environment, Apartment Design Guide, 2015
Category:	Principal judgment
Parties:	Pavlakos Capital Pty Limited (Applicant) Canterbury Bankstown Council (Respondent)
Representation:	Counsel: R O'Gorman Hughes (Applicant) M Bonnano (Solicitor) (Respondent) Solicitors: HWL Ebsworth (Applicant) Canterbury Bankstown Council (Respondent)
File Number(s):	2021/357097
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER:** This appeal concerns a development application seeking consent for the demolition of existing structures and construction of a four-storey in-fill affordable housing development over a basement car park, utilising the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH). The development is proposed at 71-83 Graham Road & 35-37 Karne Street South Narwee (Lot 2, Lot 3, Lot 7 and Lot 8 in DP 23841 and Lots A and B in DP 387057). The Applicant filed a Class 1 Application, appealing the actual refusal of the development application pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (the EPA Act).

2 The matter was listed for conciliation on 9 May 2022 pursuant to s 34 of the Land and Environment Court Act 1979. The conciliation was terminated. The

Applicant was granted leave by the Court to amend their development application on 13 October 2022. The Applicant was further granted leave to amend their development application during the hearing in response to the expert evidence of the planning experts. Leave was not opposed by the Respondent and the parties agree that for the purposes of s 8.15(3) of the EPA Act that the amendments are not minor.

3 Despite the amendments to the development application, the Respondent maintains that it warrants refusal on the following grounds:

(1) That the development application is invalid as it was not properly made in accordance with the Environmental Planning and Assessment Regulation 2000 (EPA Regulation);

(2) That the development application should be refused because it exceeds the maximum 11.5m building height standard and the written request to vary the standard pursuant to cl 4.6 of the Canterbury Local Environmental Plan 2012 (LEP 2012) is not well founded;

(3) That the proposed development is incompatible with the desirable elements of the desired future character of the local area;

(4) That the proposed development fails to achieve the solar access standard in SEPP ARH. That being that 70% of living and private open space areas achieve 3 hours of solar access between 9am and 3pm on June 21;

(5) That the proposed development fails to provide adequate quality communal open space or visual and acoustic privacy for future residents;

The site and its context

4 The subject site comprises six allotments occupying the corner of Graham Road and Karne Street South, being:

- 35 Karne Street South (Lot 3 DP 23841)
- 37 Karne Street South (Lot 2 DP 23841)
- 71-73 Graham Road (Lot B DP 387057)
- 75 Graham Road (Lot A DP 387057)
- 77-79 Graham Road (Lot 7 DP 23841)
- 81-83 Graham Road (Lot 8 DP 23841)

5 As a combined site the land is regular in shape with a combined frontage of 35.96m to Graham Road and 40.535m to Karne Street South. All the existing

structures are proposed to be demolished as part of the development application.

6 The site, and adjoining properties to the west along Graham Road, are zoned R4 High Density Residential pursuant to LEP 2012.

7 Opposite the site on Karne Street South is Robert Gardner Reserve and to the north of the site is a further public open space adjoining the road corridor for the M5 Motorway.

The proposal

8 The development application seeks consent for demolition of existing structures and construction of a four-storey residential flat building over basement car parking. The development contains a total of 41 dwellings of which 5 dwellings are proposed as adaptable units. Pursuant to SEPP ARH the following 22 apartments are proposed to be used for the purpose of affordable housing:

- Level 1: A12, A13, A14, A16, A17, B11, B12, B13, B14, B15, and B16.
- Level 2: A22, A23, A24, A26, A27, B21, B22, B23, B24, B25 and B26. (Exhibit L)

9 The basement car park contains 38 parking spaces (including 4 accessible spaces), 16 bicycle spaces, 6 motorbike spaces and the required allocation of residential storage in the form of lockable cages.

Was the development application validly made?

10 A consent authority is required to provide intending Applicants for development consent the following forms and materials including forms and the scale of fees. At the time of the lodgement of the development application, cl 48 of the EPA Regulation stated:

> 48 Consent authority to provide development application forms to intending Applicants (cf clause 45A of EP&A Regulation 1994)
>
> The consent authority must provide any person intending to make a development application with:
>
> (a) the consent authority's scale of fees for development applications generally, and

(b) if the consent authority has determined the fee to accompany that particular application, advice of the amount determined, and

(c) if the consent authority requires such an application to be in a particular form, blank copies of that form.

11 At the time of the lodgement of the development application, cl 50 of the EPA Regulation stated:

> 50 How must a development application be made? (cf clause 46A of EP&A Regulation 1994)
>
> (1) A development application:
>
> (a) must contain the information, and be accompanied by the documents, specified in Part 1 of Schedule 1, and
>
> (b) if the consent authority so requires, must be in the form approved by that authority, and
>
> (c) must be accompanied by the fee, not exceeding the fee prescribed by Part 15, determined by the consent authority, and
>
> (d) must be delivered by hand, sent by post or transmitted electronically to the principal office of the consent authority, but may not be sent by facsimile transmission.
>
> …
>
> (3) Immediately after it receives a development application, the consent authority:
>
> (a) must register the application with a distinctive number, and
>
> (b) must endorse the application with its registered number and the date of its receipt, and
>
> (c) must give written notice to the Applicant of its receipt of the application, of the registered number of the application and of the date on which the application was received.

12 Part 15 of the EPA Regulation is concerned with the determination of fees for development applications. The relevant sections are:

> 246A What is the maximum fee? (cf clause 92 of EP&A Regulation 1994)
>
> (1) The fee for a development application must not exceed the maximum amount determined in accordance with this Division.
>
> (2) The services covered by the fee for a development application include the following:
>
> (a) the receipt of the application, and any internal referrals of the application,
>
> (b) consideration of the application for the purpose of determining whether any further information is required in relation to the proposed development,
>
> (c) inspection of the land to which the proposed development relates,

(d) evaluation of the proposed development under section 4.15 of the Act, including discussion with interested parties,

(e) preparation of internal reports on the application,

(f) preparation and service of notices of the consent authority's determination of the application,

(g) the monitoring and reviewing by the Planning Secretary of the practices and procedures followed by consent authorities in dealing with development applications:

(i) for the purpose of assessing the efficiency and effectiveness of those practices and procedures, and

(ii) for the purpose of ensuring that those practices and procedures comply with the provisions of the Act and this Regulation,

(h) the monitoring and reviewing by the Planning Secretary of the provisions of environmental planning instruments:

(i) that control development, or

(ii) that are required to be taken into consideration by consent authorities when dealing with development applications,

for the purposes of assessing the effectiveness of those provisions in achieving their intended effect and making recommendations for their improvement,

(i) the operational expenses of the Building Professionals Board established under the Building Professionals Act 2005,

(j) the online delivery of planning services and information by the Planning Secretary, including:

(i) the compilation and maintenance of the NSW planning database, and

(ii) the operation of the NSW planning portal, and

(iii) the enhancement of the NSW planning database and the NSW planning portal.

…

246B Fee for development application (cf clause 93 of EP&A Regulation 1994)

(1) The maximum fee for development involving the erection of a building, the carrying out of work or the demolition of a work or a building, and having an estimated cost within the range specified in the Table to this clause is calculated in accordance with that Table.

(2) Despite subclause (1), the maximum fee payable for development for the purpose of one or more advertisements is:

(a) $285, plus $93 for each advertisement in excess of one, or

(b) the fee calculated in accordance with the Table,

whichever is the greater.

(3) The fees determined under this clause do not apply to development for which a fee is payable under clause 247.

Table

Estimated cost	Maximum fee payable
Up to $5,000	$110
$5,001–$50,000	$170, plus an additional $3 for each $1,000 (or part of $1,000) of the estimated cost.
$50,001–$250,000	$352, plus an additional $3.64 for each $1,000 (or part of $1,000) by which the estimated cost exceeds $50,000.
$250,001–$500,000	$1,160, plus an additional $2.34 for each $1,000 (or part of $1,000) by which the estimated cost exceeds $250,000.
$500,001–$1,000,000	$1,745, plus an additional $1.64 for each $1,000 (or part of $1,000) by which the estimated cost exceeds $500,000.
$1,000,001–$10,000,000	$2,615, plus an additional $1.44 for each $1,000 (or part of $1,000) by which the estimated cost exceeds $1,000,000.
More than $10,000,000	$15,875, plus an additional $1.19 for each $1,000 (or part of $1,000) by which the estimated cost exceeds $10,000,000.

…

248 Additional fee—residential apartment development

An additional fee, not exceeding $3,000, is payable for development involving an application for development consent, or an application for the modification of the development consent, that is referred to a design review panel for advice.

…

252 Additional fees—development requiring advertising (cf clause 99 of EP&A Regulation 1994)

(1) In addition to any other fees payable under this Division, a consent authority may charge up to the following maximum fees for the giving of the notice required for the development:

(a) $2,220, in the case of designated development,

(b) $1,105, in the case of advertised development,

(c) $1,105, in the case of prohibited development,

(d) $1,105, in the case of development for which an environmental planning instrument or development control plan requires notice to be given otherwise than as referred to in paragraph (a), (b) or (c).

(2) The consent authority must refund so much of the fee paid under this clause as is not spent in giving the notice.

…

255 How is a fee based on estimated cost determined**?** (cf clause 102 of EP&A Regulation 1994)

(1) In determining the fee for development involving the erection of a building, the consent authority must make its determination by reference to a genuine estimate of:

(a) the costs associated with the construction of the building, and

(b) the costs associated with the preparation of the building for the purpose for which it is to be used (such as the costs of installing plant, fittings, fixtures and equipment).

(1A) In determining the fee for development involving the carrying out of a work, the consent authority must make its determination by reference to a genuine estimate of the construction costs of the work.

(1B) In determining the fee for development involving the demolition of a building or work, the consent authority must make its determination by reference to a genuine estimate of the costs of demolition.

(2) The estimate must, unless the consent authority is satisfied that the estimated cost indicated in the development application is neither genuine nor accurate, be the estimate so indicated.

256 Determination of fees after development applications have been made (cf clause 103 of EP&A Regulation 1994)

(1) The determination of a fee to accompany a development application must be made before, or within 14 days after, the application is lodged with the consent authority.

(2) A determination made after the lodging of a development application has no effect until notice of the determination is given to the Applicant.

(3) A consent authority may refuse to consider a development application for which a fee has been duly determined and notified to the Applicant but remains unpaid.

13 There are a number of agreed facts in relation to this contention. They are:

- The Applicant lodged the development application on 10 October 2018.
- At that time a fee of $25,090.34 was paid by the Applicant to the Respondent.
- On the development application form, the Applicant nominated an estimated cost of development of $5,876,984.00.

- The development application was accompanied by a DA Cost Report prepared by a quantity surveyor. That report estimated the total construction budget to be $11,753,968, with the separable portion applicable to the affordable housing component having an estimated budget of $5,876,984.00.
- On 19 June 2019 the Respondent wrote to the Applicant advising:

> "Upon lodgement of the development application with Council, the incorrect cost of works was lodged. The DA fees have been corrected to include the full costs of the development, as shown within the DA Cost Report submitted to Council.
>
> The change in the cost of works for the development, results in $8324.35 of additional fees that are required to be paid to Council. If you can please pay the additional fees as soon as possible that would be greatly appreciated."
>
> (Exhibit 7)

14 The receipt for the payment of fees was tendered with the Court as Exhibit K. It itemises the fees paid as follows:

DA Ass. Fee – New Dwell	$5,881.61
Planning Reform Fee (b	$3,756.27
DA Compliance and Enfo	$14,692.46
Notif. Fee- RFB T'ho	$380.00
DA – Advert. Fee (News	$380.00
Total	$25,090.34

15 In its primary submission, the Respondent contends that cl 50(1)(c) of the EPA Regulation provides that a development application must be accompanied by a fee, which in their view must constitute the correct fee, for the application to be "made". In advancing this position they rely on the decision of *Commitment Pty Ltd v Georges River Council* (No 2) [2022] NSWLEC 94 at [59] which held that an Applicant "makes" the development application when there is substantial compliance with cl 50(1) of the EPA Regulation and that substantial compliance includes the payment of the fee. The Respondent submits that in these proceedings the short payment of fees means that there has not been substantial compliance with the requirements of cl 50 of the EPA Regulation and that the development application has not been made. As there is not development application that meets the statutory requirements, the Respondent argues that the Court as the consent authority has no legal basis for determining the application.

16 In reply to the submissions of the Applicant, Mr Bonanno submits that the reference to "DA Compliance and Enfo" on the receipt arises from "a fee which came into effect from 26 June 2018 under cl 4.64 of the Regulations, (f1)". This appears to be a reference to the following section of the EPA Act:

> 4.64 Regulations—Part 4 (cf previous s 105)
>
> (1) In addition to any other matters for or with respect to which regulations may be made for the purposes of this Part, the regulations may make provision for or with respect to the following—
>
> …
>
> (f1) the reimbursement of the costs incurred by councils in investigating and enforcing compliance with the requirements of this Act relating to development requiring consent (including complying development) by a levy on Applicants making development applications and the procedures for the imposition and collection of the levies,
>
> …

17 Further, if the primary submission is not accepted, the Respondent acknowledges that it failed to determine requested additional fee (the $8324.35 requested on 19 June 2019) within the timeframe prescribed by cl 256(1) of the EPA Regulation. However, it argues it did so in circumstances where the estimated cost of development had been misstated by the Applicant on the Development Application form.

18 In the alternative, the Applicant argues that the development application is not invalid and refutes the Respondents arguments on three principal grounds. Firstly, it submits that the fees were determined by the Council at the time of lodgement and paid, satisfying cl 50 of the EPA Regulation.

19 Secondly, the Applicant submits there is no power for a Council to re-determine the fees payable on a development application months or years after the application is made. The Applicant submits that where a decision maker's first exercise of power is spent and the decision maker is therefore *functus officio*, a purported second exercise of the power (in this case the letter of 19 June 2019) is beyond power. Mr O'Gorman Hughes submits that the relevant statutory provisions have as their purpose the provision of certainty. He emphasises that the Council has the role of determining the fee, noting that cl 256 of the EPA Regulation merely nominates the maximum. Further, such a

determination is required within 14 days of lodgement: cl 256(1) EPA Regulation. He concludes that construing the statutory scheme in a way that permits a Council to re-determine fees payable months or years after the original determination is not consistent with the purpose of the provisions or their context.

20 Thirdly, that the statutory basis for the fee asserted by the Respondent in its correspondence of 19 June 2019 (in particular the nomination of a "compliance and enforcement fee") is unclear. The Applicant submits that applying cl 246B of the EPA Regulation to the total cost of the development results in a fee of $16,722.26 payable, significantly less than the fee the Applicant had paid at lodgement.

Findings

21 In its Class 1 jurisdiction the Court does not have a judicial review function. Further, the Applicant does not appeal the determination by the consent authority of the application development application fee. The issue before the Court is limited to whether the development application was properly made: cl 50 of the EPA Regulation.

22 In relation to cl 50(1) of the EPA Regulation, there is no contention that the requirements of subcll (a), (b) or (d) were not met by the development application. I accept that it is clear from the wording of subcl (1)(b) that the applicable fee for the development application is determined by the Council. Neither the EPA Regulation nor the EPA Act include a provision for the redetermination or review of that decision.

23 I accept the submissions of Mr O'Gorman Hughes that cl 246A of the EPA Regulation operates to set a maximum ceiling of the fee that is able to be determined by the Council. That maximum fee is determined by three provisions. Firstly, the application of the table at cl 246B of the EPA Regulation, and secondly the additional fee for residential apartment development nominated by cl 248 of the EPA Regulation as $3,000. Thirdly, the provisions of cl 252 of the EPA Regulation allow for an additional $1,105 in the case of development for which an environmental planning instrument or development control plan requires notice to be given. I note that the addition of an

advertising fee nominated by cl 246B(2) is not applicable in this instance because the fee determined by the Table in cl 246 is greater than the nominated fee for advertising.

24 The determination of the maximum fee applicable is relevant to determining whether the development application was "made" because it was "accompanied by the fee, not exceeding the fee prescribed by Part 15, determined by the consent authority": cl 50(1) of the EPA Regulation.

25 Applying cll 246B, 248 and 252 of the EPA Regulation I find that the maximum fee applicable is $20,877.26. This total fee is based on the application of cl 246B of the EPA Regulation to the nominated development value of $11,753,968 and the addition fees as cll 248 and 252 for residential apartment development and advertising respectively. On this basis I am satisfied that the development application was validly made.

26 In response to Mr Bonnano's submissions, whilst s 4.64: Regulations of the EPA Act makes a provision at subcl (f1) for the EPA Regulation to include a regime of fees for the reimbursement of the costs incurred by councils in investigating and enforcing compliance through a levy on development applications. As yet no such provision has been made by the legislation.

Planning Framework

27 Prior to considering the contentions raised by the Respondent in support of the refusal of the development application or undertaking an assessment of the merit of the development application, it is necessary to address any relevant preconditions to the grant of consent: *HP Subsidiary Pty Ltd v Parramatta City Council* [2020] NSWLEC 135 at [16].

28 The development application is accompanied by the consent of the respective owners of the land as required by cl 49(1)(b) of the EPA Regulation. Despite the commencement of Environmental Planning and Assessment Regulation 2021 (EPA Regulation 2021), the EPA Regulation continues to apply to the development application pursuant to s 3 of Sch 6 of the EPA Regulation 2021, as it was submitted prior to 1 March 2022.

29 State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) applies to the proposal at cl 4(a)(i) and 4(b). Clause 6A of SEPP 65 is in the following terms:

> 6A Development control plans cannot be inconsistent with Apartment Design Guide
>
> (1) This clause applies in respect of the objectives, design criteria and design guidance set out in Parts 3 and 4 of the Apartment Design Guide for the following:
>
> (a) visual privacy,
>
> (b) solar and daylight access,
>
> (c) common circulation and spaces,
>
> (d) apartment size and layout,
>
> (e) ceiling heights,
>
> (f) private open space and balconies,
>
> (g) natural ventilation,
>
> (h) storage.
>
> (2) If a development control plan contains provisions that specify requirements, standards or controls in relation to a matter to which this clause applies, those provisions are of no effect.

30 The SEPP 65 design quality principles and the Apartment Design Guide (ADG) have been taken into consideration in determining the application: cl 28(2) of SEPP 65. Consistent with the findings that follow, consideration of the principles does not in my assessment generate an inconsistency which warrants the refusal of the development application.

31 Where an application relates to residential apartment development, cl 50(1A) of the EPA Regulation requires that the application must be accompanied by a statement by a qualified designer, defined at cl 3 of the EPA Regulation as a person registered as an architect in accordance with the Architects Act 2003. The statement must conform to the provisions of cl 50(1AB), which include attestations in relation to cl 28(2)(b) and (c) of the SEPP 65. I rely on the statement completed by the architect Austin Tuon (registration: 8171) to this effect. Further, cl 30(2) of SEPP 65 requires the consent authority, or the Court on appeal, to be satisfied that the proposed development demonstrates that adequate regard has been given to the design quality principles, and the objectives specified in the ADG for the relevant design criteria. On the basis

of the architect's statement demonstrating how the objectives of Parts 3 and 4 of the ADG have been achieved, I am satisfied that adequate regard has been given to the design principles and the provisions of the ADG.

32 Pursuant to State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the EPA Regulation, the development is BASIX affected development. The development application is accompanied by the required BASIX certificate.

33 The provisions of SEPP ARH apply to the development. The State Environmental Planning Policy (Housing) 2021 commenced on 26 November 2021. Schedule 7A includes a savings provision, the effect of which is that the provisions of the SEPP ARH continue to apply to the development application given my findings at [25] in relation to the Respondent's first contention.

34 The development application seeks consent under Div 1 of SEPP ARH as in-fill affordable housing. I am satisfied the division applies as the site is within an accessible area being with 800m of Narwee Railway Station: cl 4(1) of SEPP ARH. The architectural plans demonstrate, and the planning experts agree, that the proposed development meets the floor space ratio (FSR) requirements of cl 13 of SEPP ARH.

35 At cl 14 of the SEPP ARH, the policy sets out a number of grounds which cannot be used as a basis for refusal of consent if certain criteria are met. Relevant to these proceedings it provides:

> 14 Standards that cannot be used to refuse consent
>
> (1) Site and solar access requirements A consent authority must not refuse consent to development to which this Division applies on any of the following grounds—
>
> …
>
> (e) solar access
>
> if living rooms and private open spaces for a minimum of 70 per cent of the dwellings of the development receive a minimum of 3 hours direct sunlight between 9am and 3pm in mid-winter.
>
> …

36 Clause 16A of the SEPP ARH requires consideration of “whether the design of the development is compatible with the character of the local area”. This is the focus of Contention 2, which is discussed commencing at [56].

37 Section 4.6 of State Environmental Planning Policy Resilience and Hazards 2021 (SEPP RH) nominates matters in relation to remediation of land that must be considered before the development application is determined. The development application is accompanied by a preliminary Site Investigation Report which concludes that the site is suitable for the proposed development and residential use, subject to the recommendations of the report. Compliance with the report is a requirement of the draft conditions of consent. In determining the development, I have given consideration to whether the subject site is contaminated as required by s 4.6 of SEPP RH. The statement of environmental effects notes that the sites have been utilised historically for residential use and that the development application will maintain residential use of the site, although at a higher density. Further, the Applicant’s stage 1 contamination report concludes the site is suitable for ongoing residential use. I have considered whether the land is contaminated in accordance with s 4.6 SEPP RH, and I accept that the site will be suitable for the proposed development.

38 As noted at [6] the site is zoned R4 High Density Residential. Development for the purpose of a residential flat building is permitted with consent in the zone. In determining the development application, I have given consideration to the zone objectives which are:

- To provide for the housing needs of the community within a high density residential environment.
- To provide a variety of housing types within a high density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

39 The development relies on a variation to the applicable Height of Building standard at cl 4.3 of LEP 2012. Applying cl 4.3, the maximum height limit applicable to the site is 11.5m. The development proposes a maximum height of 13.54m. The Applicant’s request to vary the development standard is discussed commencing at [46].

40 It is agreed between the parties, and I accept on the evidence, that the proposed development complies with the remaining development standards and requirements of LEP 2012.

Other Relevant Planning Controls

41 The Canterbury Development Control Plan 2012 (DCP 2012) applies to the development application. The Respondent relies on the following provisions in Part C4: Residential Flat Building of DCP 2012 in support of its contentions:

> 4.2.2.2: Height
>
> …
>
> Objective
>
> O1 To ensure that development is of a scale that is visually compatible with adjacent buildings, character of the area, and the objectives of the zone.
>
> Controls
>
> Height
>
> C1 Development for the purposes of residential flat buildings must not exceed the following numerical requirements:
>
> > (a) Maximum three storeys and 10m maximum external wall height, where the height of buildings under the LEP is 11.5m.
>
> …
>
> C4.2.2.4 Building Depth
>
> Objectives
>
> O1: To promote improved levels of residential amenity for new and existing development, to preserve sunlight, privacy and general amenity for existing dwellings.
>
> O2: To ensure that development is of a scale that is visually compatible with adjacent buildings, character of the area, and the objectives of the zone.
>
> Controls
>
> C1 Building depth must not exceed a maximum of 25m.
>
> C2 The building depth may be increased to 35m in the R4 Zone provided facades incorporate deep soil courtyards that are:
>
> > a) Parallel to front or rear boundaries (or that have an orientation which is generally parallel to those boundaries) provided that the adjacent deep soil setbacks each accommodate at least three major canopy trees; or
> >
> > (b) Parallel to side boundaries (or have an orientation that is generally parallel to side boundaries) provided that the facades will incorporate deep soil courtyards that each have a minimum area 6m by 6m and will each accommodate at least one major canopy tree.

…

C4.2.3.2 Roof Design and Features

Objectives

O1 To ensure that roof design is compatible with the building style and does not visually dominate the building or other roofs in the locality.

O2 To promote roof design that assists in regulating climate within the building.

O3 To reduce the impact of large surfaces of roof when viewed from other buildings and public spaces.

Controls

Building three storeys or less

…

C3 Roof pitches are to be compatible and sympathetic to nearby buildings.

Public Submissions

42 The original development application and the amended development application were notified and advertised consistent with the requirements of DCP 2012. A total of seven submissions were received by the Respondent. The issues raised in the submissions can be summarised as follows:

- The proposed four-storey height of the development is inconsistent with adjacent buildings. The height should be limited to a three-storey building.
- The development will result in a loss of privacy to the western side of the building at 67-69 Graham Road due to the window placement proposed.
- The development will result in increased traffic congestion, and due to the number of units and limited onsite parking, will rely on on-street parking.
- The intersection of Karne Street South and Graham Road is already a busy thoroughfare, the development will make utilisation of the intersection more difficult.
- Trucks (including garbage trucks) will have difficulty accessing the cu-de-sac at the end of Karne Street South.

43 In determining the development application, I have read and considered the submissions received by the public as required by s 4.15(1)(d) of the EPA Act.

Expert Evidence

44 The Court was assisted in the proceedings by evidence from Planning and Urban Design experts as follows:

- Mr Anthony Betros, Town Planner for the Respondent

- Mr Andrew Martin, Town Planner for the Applicant
- Mr Peter Smith, Urban Designer for the Applicant.

45 These experts prepared a joint report (Exhibit 2) and were called for cross examination.

Should the variation to the maximum height standard be upheld?

46 The proposed residential flat building breaches the maximum height limit by some 2.04m associated with the lift overrun in Building B, the extent of which is indicated in the architectural plans.

47 The Applicant's written request describes the exceedance as follows:

> "The requested variation is as follows:
>
> • Maximum height variation as measured to the lift overrun to the lift in Block B is 2.04m being the maximum extent of the height variation. The height has been determined by using a site level (existing) of RL22.15 and a finished level of RL35.69 (see Figures 1 and 2 below showing the extent of the height variation).
>
> • The subject application includes a variation to the height of 1.828m for the roof of Block A and 1.73m for the roof of Block B.
>
> The extent of the height breach relates to the upper half of the walls and main roof over the highest part of the building being the lift overrun."
>
> (Exhibit F)

48 Clause 4.6(4) of LEP 2012 establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent (Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 at [13] ("Initial Action")). It is well established that the state of satisfaction required by cl 4.6(4)(a) of LEP 2012 mandates that the Court, in exercising the functions of the consent authority, must in fact be satisfied of the matters in cl 4.6(3), and that the state of satisfaction must be reached by reference to the written request. Further, the "development" referred to in subcll 4.6(2), (3) and (4) of LEP 2012 is the development that is the subject of the development application, being the proposed residential flat building *Baron Corporation Pty Limited v Council of the City of Sydney* (2019) 243 LGERA 338; [2019] NSWLEC 61 ("*Baron*") at [9]. The matters at 4.6(3) of LEP 2012 are as follows:

> (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.

49 Further, the consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a) of LEP 2012. The consent authority must be satisfied that the Applicant's written request has adequately addressed the matters required to be addressed by cl 4.6(3) and that the proposal development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4), as follows:

(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.

50 On appeal, the Court has the power under cl 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(6) of the *Land and Environment Court Act 1979*, but should still consider the matters in cl 4.6(5) of LEP 2012 (Initial Action at [29]).

Is compliance with the standard unreasonable or unnecessary?

51 The common ways in which an Applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42]-[51] ("Wehbe") and repeated in Initial Action [17]-[21]:

(1) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;

(2) the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;

(3) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;

(4) the development standard has been abandoned by the Council;

(5) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

52 The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (Initial Action [22]).

53 The Applicant's written request justifies the contravention of the height of buildings development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the standard. The objectives of the height standard at cl 4.3 of LEP 2012 are:

> 4.3 Height of buildings
>
> (1) The objectives of this clause are as follows—
>
> (a) to establish and maintain the desirable attributes and character of an area,
>
> (b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,
>
> (c) to support building design that contributes positively to the streetscape and visual amenity of an area,
>
> (d) to reinforce important road frontages in specific localities.
>
> …

54 The reasoning in the written request can be summarised as follows:

(a) To establish and maintain the desirable attributes and character of an area,

- The written request identifies the desirable attributes of the locality contributing to the desired future character of the area as: defined front setbacks; solidity of built form; landscaping in the front setback and limited structures in the front setback. The written request notes that the existing character is typified by single, and two storey dwellings interspersed with residential dwellings and other flat buildings. Further, it asserts that the overall character is envisaged to change towards higher density development given the building envelope controls and zoning in LEP 2012.

- The written request argues that the proposed development is compatible with this character because:

  "• The built form will read predominately as a 3 storey building which is compatible with the characteristic streetscape elements and the likely future character.

  • The upper level is recessive and will not read as a 4th storey due to additional setbacks from the leading edge of the Level 2 roof below and therefore the roof level is favoured to achieve the additional GFA for affordable housing than ground level or other levels of the building.

  • The roof pitch is of a similar style and compatible notwithstanding a lower pitch than the surrounding gable and hip roofs.

  • The front, rear and side setbacks comply with the DCP.

  • The setbacks to Graham Road have potential to support extensive landscape with the 6m setback.

  • The proposal removes the existing zero setback and creates a DCP compliant 6m setback to Graham Road.

  • The proposal creates an opportunity to provide a unified cohesive design response to the corner which [currently] comprises 6 individual allotments.

  • The proposal provides the necessary front and side setbacks which when coupled with the upper level setbacks from Graham Road and the eastern boundary provide the necessary relief to the streetscape and neighbouring properties.

  • The proposed built form complements the streetscape and positively relates to existing 3 and 4 storey flat buildings along Graham Road.

  • The site is a corner site serving as a bookend to the R4 High Density Residential zone.

  • The build form provides a strong leading 3 storey edge to both street frontages with a greater upper level setback to Graham Road.

  • The proposed 4th level is setback > 12m from the Graham Road boundary.

  • Affordable housing provisions influence future character and provides suitable justification for the clause 4.6 variation. Clause 19 of the ARH SEPP can be satisfied due to the justification provided above."

(b) to minimise overshadowing and ensure there is a desired level of solar access and public open space.

- The written request notes that the solar access diagrams accompanying the development application demonstrate that reasonable solar access is maintained to the most affected building being, 67-69 Graham Road. The height exceedance does not exacerbate overshadowing impacts,
- The level of overshadowing of Graham Road and Karne Street South is consistent with that anticipated by the planning controls.
- The development provides communal open space at ground level and on the southern portion of the upper level fronting Graham Road. The view-from-the-sun analysis demonstrates good solar access to the communal open space.

- 70% of the proposed units receive solar access in mid winter, meeting the requirements of the planning controls.

(c) to support a design that contributes positively to the streetscape and visual amenity of the area

- The design adopts a built form dispersed across two distinct blocks to provide articulation and reduced scale of built form.
- The proposed design presents as a three-storey form to all street frontages which is compatible with the character of the streetscape. This is achieved by the significant (9m) setback to the eastern boundary and the recessed upper floor.
- The design incorporates a series of planted courtyards with deep soil and on structure zones to provide landscaping to respond to the existing character in the locality.

(d) to reinforce important road frontages in specific locations

- The written request notes that this objective is not specifically relevant to the subject site.

55 Relevant to the question of whether compliance with the development standard is unreasonable in circumstances that the objectives of the control are met, the Respondent contends that the development is not consistent with the desirable elements of the character of the locality and is non-compliant in terms of solar access. It is therefore appropriate to summarise in this portion of the judgment, the contrasting expert evidence on these two contentions.

Is the development compatible with character?

56 The question of compatibility of the proposed development with the character of the locality was the subject of expert evidence.

57 Andrew Martin argues that the proposed development provides a built form that is compatible with both the established character of the locality and its emerging or future character. He argues that this future character is responsive to the R4 High Density Residential zoning and the higher density and built form controls in LEP 2012 along with incentive provisions such as those contained in SEPP ARH.

58 Mr Martin describes the existing character as being single and two storey dwellings that are interspersed with two, three and four storey residential flat buildings. Further, as detailed at [54], Mr Martin has identified the desirable

elements of that existing character and how the proposed development is compatible with it.

59 Peter Smith's evidence accords with that of Mr Martin, with the following additional arguments:

- The proposed development is a four-storey residential flat building. The street wall presents as three storeys in height with the upper level set back so that from many viewpoints in the street in front of the building, the upper floor will not be visible.
- The additional floor space arising from the provisions of SEPP ARH is accommodated at the upper level without any unreasonable impact on either the amenity of the adjacent properties or the development itself.
- The setback of the upper level provides a reasonable visual relationship with the adjoining development. A pedestrian passing the property will compare the proposed three-storey street with the existing three-storey height character of existing residential flat buildings in the vicinity. The development will not appear out of character.

60 In the alternative, Mr Betros argues that the proposed development remains incompatible with the character of the locality despite the amendments made by the Applicant. His reasoning is as follows:

(1) The front setback to Graham Road includes a substation and a series of hard surfaced pathways and planters. Similarly, the frontage to Karne Street South is occupied by a driveway, bin store and under croft. These elements compromise the effectiveness of the landscape proposed and contribute to the perceived bulk of the buildings.

(2) The existing character of the area is dominated by single-storey dwelling houses and parks along both sides of Karne Street South. The medium density zoned land along the western side of the street has a height limit of two storeys. The same controls apply to the eastern side of Karne Street South to the south of the intersection with Graham Road. The property to the east of the site is three storeys in scale (67-69 Graham Road).

(3) Given the existing character, and the zoning and controls applicable to the proximate context, a built form which incorporates a significant fourth storey element is inconsistent and incompatible with the existing and desired future character.

Findings

61 The requirement for consideration of compatibility of the development with the character of the locality is required, prior to determination, by cl 16A of SEPP ARH. In determining the development application, I have considered the

compatibility of the development with the character of the locality. In doing so I prefer the description of that existing character advanced by Mr Martin as being typified by single, and two storey dwellings interspersed with residential dwellings and other flat buildings. Whilst Mr Betros is correct to assert that existing character along both sides of Karne Street South is single-storey dwelling houses and parks, this is not the extent of the relevant locality. In concluding this is the dominant character of the area, he gives insufficient weight to the existing residential flat buildings in Graham Road.

62 Further, in the context of the written request pursuant to cl 4.6 of LEP 2012, subcl (1)(b) of cl 4.3: Height of Buildings seeks to establish and maintain the desirable attributes and character of the area. Cognately, subcl (1)(c) of the height standard seeks to support building design that contributes positively to the streetscape and visual amenity of an area.

63 The provisions LEP 2012 indicate the strategic intent of the Council is to increase residential density in the locality through increased height and floor space provisions. I accept these broadscale controls inform but do not always determine desired future character although I note this area is not specifically delineated in the planning controls as having specific character provisions. Further, it is not a circumstance where the existing character of the locality is sought to be preserved by the planning controls. The objective of the Height Standard and the Respondent's contention is considered in this context.

64 Further, it is not likely to envisage a development will have the same building envelope as allowed for in LEP 2012 when incentives, such as those in SEPP ARH, seek to expand the development potential of a site as an offset to the provision of, in this case, affordable housing. I concur with the reasoning of O'Neil C in *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161 at [40] ("*Big* Property") in this regard.

65 In determining whether the proposed development meets subcl (1)(a) of the height standard, I accept the evidence of Mr Graham, summarised at [54], detailing the desirable attributes of the existing character.

66 I am satisfied that the appearance of the proposed development is in harmony with the buildings surrounding it and the character of the street. I accept that

the proposed development is not the same as the form of development, which is currently in the immediate vicinity of the site. However, I am satisfied that the development is compatible with existing development in the broader locality, is consistent with the built form controls in the planning controls and responds to the essential elements that make up the character of the locality. Further, I accept the analysis of Mr Smith that the setback of the upper level provides a reasonable visual relationship with the adjoining development. A pedestrian passing the property will compare the proposed three-storey street with the existing three-storey height character of existing residential flat buildings in the vicinity. The development will not appear out of character. Each of the elements support a conclusion of compatibility of the proposed development with the character of the local area.

67 I am satisfied that objective (a) and (c) of the Height of Buildings standard at cl 4.3 of LEP 2012 is met despite the variation to the standard.

68 The preceding analysis supports a conclusion that the Respondent's contention that the development application is incompatible with desirable elements of the desired future character of the area is not made out. I am not persuaded that the development should be refused on this ground.

Is the solar access to the proposed apartments compliant?

69 The experts agree that the ADG at Objective Part 4A-1 sets out the relevant criteria for solar access to be applied to the development, that being:

> "1. Living rooms and private open spaces of at least 70% of apartments in a building receive a minimum of 2 hours direct sunlight between 9 am and 3 pm at mid winter in the Sydney Metropolitan Area and in the Newcastle and Wollongong local government areas
>
> …
>
> 3. A maximum of 15% of apartments in a building receive no direct sunlight between 9 am and 3 pm at mid-winter".

70 Mr Martin and Mr Smith argue that the proposed development is compliant with these provisions. Compliance is also asserted by the Architectural Plans which nominate that 33 units (80%) achieve a minimum of 2 hours direct sunlight between 9 am and 3 pm to living areas, 39 units to their private open space, and only 2 units (5%) receive no direct sunlight. (Exhibit H)

71 Mr Betros argues that the standard is not met on the basis of Units A04 and A05, as the solar gain for these apartments was not direct. He argued that although the units received two hours of sunlight, the angle of the sun at the end of the period fell on the windows at an angle that was too oblique. On this basis he argues that these two units should not be counted and that only 31 units met the ADG criteria. Further, he argues that the reliance on skylights for solar gain to the upper-level apartments is indicative of a poor design response on a large site with limited constraints.

Findings

72 The Respondent contends that the proposed development fails to achieve the solar access standard in SEPP ARH. I note that the provisions of cl 14 of SEPP ARH are matters that cannot be used to refuse consent if the nominated standards are met. Relevantly, subcl (1)(e) relates to solar access and requires living rooms and private open spaces for a minimum of 70% of dwellings to achieve three hours of sunlight between 9am and 3pm in mid-winter. This 'do not refuse' standard is not met by the proposed development.

73 I note that the Court previously had a planning principle directed to solar access arising from the decision of the Court in *Parsonage v Ku-ring-gai* (2004) 139 LGERA 354; [2004] NSWLEC 347 at [8]. That principle, in part included the following consideration:

> "To be assessed as being in sunlight, the sun should strike a vertical surface at a horizontal angle of 22.5o or more. (This is because sunlight at extremely oblique angles has little effect.) For a window, door or glass wall to be assessed as being in sunlight, half of its area should be in sunlight. For private open space to be assessed as being in sunlight, either half its area or a useable strip adjoining the living area should be in sunlight, depending on the size of the space. The amount of sunlight on private open space should be measured at ground level."

74 In the decision *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082 at [144] the planning principle was amended, with the following consideration replaced as follows:

> "For a window, door or glass wall to be assessed as being in sunlight, regard should be had not only to the proportion of the glazed area in sunlight but also to the size of the glazed area itself. Strict mathematical formulae are not always an appropriate measure of solar amenity. For larger glazed areas, adequate solar amenity in the built space behind may be achieved by the sun falling on comparatively modest portions of the glazed area."

75 Moore SC, as he then was, explained the genesis of the change as arising from two factors: firstly that the consideration paid no regard to the orientation of the glazed surface to the sun and, in my view provides no functional assistance in decision making; and secondly, the reliance on a numeric standard of 50% of the glazed area could result in a reduction in glazed area to meet compliance.

76 The preceding history of the evolution of the Courts reasoning in relation to solar access is relevant to the consideration of Mr Betros' evidence. Mr Betros argues against adopting the exclusion of the two apartments, he advances this on the basis of the angle of solar access to the glazed surface. Further, the objective of the provision at Objective 4A-1 in the ADG seeks to "optimise the number of apartments receiving sunlight to habitable rooms, primary windows and private open space". Despite the assertion of the angle of solar gain reducing its effectiveness, it is accepted that the architectural plans demonstrate it is received by the primary windows of the apartments. On this basis I prefer and adopt the evidence of Mr Martin and Mr Smith that the proposed development is compliant with the requirements of Part 4A-1 of the ADG.

77 I am satisfied that subcl (1)(b) of the Height of Buildings standard at cl 4.3 of LEP 2012 is met despite the variation to the standard.

78 On this basis I find that the Respondent's contention that the development application fails to achieve the solar access standard in SEPP ARH, is not made out. I am not persuaded that the development should be refused on a ground of inadequate solar access when the provisions of the ADG are met.

79 Pursuant to cll 4.6(3)(a) and 4.6(4)(a)(i) of LEP 2012 I am satisfied that the Applicant's written request adequately demonstrates the matters in cl 4.6(3)(a) of LEP 2012.

Are their sufficient environmental planning grounds to justify the contravention?

80 Clause 4.6(3)(b) requires the consent authority to consider a written request from the Applicant that seeks to justify the variation by demonstrating there are sufficient environmental planning grounds.

81 The written request seeks to justify the contravention of the height development standard on grounds that it describes as environmental planning grounds. Those grounds can be summarised as follows.

- The proposed development designates 50% of the total gross floor area (GFA) to the provision of affordable housing and it is the effect of accommodating the floor space bonus afforded under SEPP ARH which results in the height exceedance. Further, the request relies on the acceptance of such an argument as an environmental planning ground in the decision of the Court in *Big Property* at [40].
- Further, the written request proffers additional grounds including:

> "• Provision of 50% of the total GFA as affordable housing which achieves the intent of the ARHSEPP and the Councils Draft Residential Housing Strategy (DRHS).
>
> • The provision of a recessed 4th storey that is not generally visible from the street and is consistent with the existing and future character. Given the prevalence of 3 and 4 storey buildings in the locality the proposed height is deemed to be compatible with the established and future character.
>
> …
>
> • Well defined 3 storey building base with physical central break to create two blocks offering reduced bulk and scale to the neighbouring apartment building to the east at 67-69 Graham Road.
>
> • The 4th level has been recessed through the use of extensive setbacks above the 3rd level parapet ensuring that the upper level and roof are not clearly visible from the street level below.
>
> …"
>
> (Exhibit F)

Findings

82 In Initial Action at [24], Preston CJ stated, that the "focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds". Further, he stated:

> "…the written request must demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard so as to enable the consent authority to be satisfied under cl 4.6(4)(a)(i) that the written request has adequately addressed this matter: see Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 at [31]."

83 On this basis, the elements for consideration in determining whether I am satisfied that there are sufficient environmental planning grounds are:

- Firstly, whether the grounds advanced are environmental planning grounds,

- Secondly, whether the environmental planning grounds advanced in the written request focus on the aspect or element of the development that contravenes the standard, or in the alternative, promote the benefits that will be realised by the development as a whole,
- Thirdly, I must be satisfied that the environmental planning grounds are "sufficient" to justify, or inform, the aspect or element that contravenes the development standard.

84 I am satisfied that the grounds advanced in the written request meet these requirements. The Applicant's written request defends the exceedance of the height of buildings development standard as a justified response to the provision of additional affordable housing units and the accommodation of the building envelope as a result of the FSR bonus to facilitate the effective delivery of new affordable rental housing in accordance with SEPP ARH and to achieve consistency in the streetscape and fit with character of the locality. I note I found at [61]-[68] that the proposed development is consistent with the character of the location.

85 I am satisfied that justifying the aspect of the development that contravenes the development standard in this way can be properly described as an environmental planning ground within the meaning identified by Preston CJ in Initial Action at [23]. Further, I am satisfied that the environmental planning grounds advanced are focussed on the element of the development contravening the standard and are sufficient to justify the variation sought.

86 I find I can be satisfied that there are sufficient environmental planning grounds, and that the Applicant's written request adequately addresses the matters at subcl (3) of cl 4.6.

Is the development in the public interest because it is consistent with the objectives of the height standard and the zone?

87 To satisfy cl 4.6(4)(a)(ii) the Court must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard. At [67], [77] and [79], I found that the development is consistent with the objectives of the height standard, notwithstanding the variation sought.

88 Further cl 4.6(4)(a)(ii) requires the Court must be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the zone.

89 The objectives of the R4 High Density Residential zone are extracted at [38].

90 The written request argues that the development is consistent with these objectives. The grounds advanced in the written request can be summarised as follows:

- The use of the site for the purpose of a residential flat building and affordable housing is consistent with the objective "to provide for the housing needs of the community within a high density residential environment".
- That the provision of a variety of dwelling types (1, 2 and 3 bedroom) as well as accessible units in a high amenity building is consistent with the objective "to provide a variety of housing types within a high density residential environment". Further, the development includes a significant proportion (50%) of the proposed units to be allocated as affordable housing, further contributing to the diversity of housing types and tenure.

91 The written request notes that the final objective is not directed to the proposed development.

92 No evidence is advanced contradicting these arguments. I accept the reasons advanced in the written request establish that the proposed development is in the public interest because it is consistent with the objectives of the zone.

93 Clause 4.6(4)(b) of the LEP 2012 also requires that the concurrence of the Planning Secretary be obtained for development consent to be granted to development that contravenes a development standard. Section 39(6) of the Land and Environment Court Act 1979 gives the Court the power to grant development consent without obtaining the concurrence of the Secretary, although the Secretary's concurrence can be assumed as a result of the written notice dated 21 February 2018 attached to the Planning Circular PS 20-002 issued 5 May 2020.

94 The Council has not raised any of the matters in cl 4.6(5) as a basis upon which the power in cl 4.6(4) of the LEP 2012 ought not be exercised. As set out above, I am satisfied of the matters in cl 4.6(4) such that there is power to grant consent pursuant to cl 4.6(4) despite the contravention of the three development standards.

95 For the above reasons, I find I can be satisfied of the requirements of subcll 4.6(3) and 4.6(4) of LEP 2012 despite the contravention of the height development standard.

96 The cl 4.6 written request to vary the height standard is upheld.

Merit Assessment

97 Consequent to the proceeding findings, there is power to grant consent to the development application, subject to an assessment of the merit of the development application pursuant to s 4.15 of the EPA Act.

98 In addition to the preceding discussion of the satisfaction of the relevant preconditions, the Respondent argues that the development application warrants refusal on merit. They raise three key issues to support the assertion that the Court should determine the application by way of refusal, those being:

(1) That the proposed development is incompatible with the desirable elements of the desired future character of the local area;

(2) That the proposed development fails to achieve the solar access standard in SEPP ARH. That being that 70% of living and private open space areas achieve 3 hours of solar access between 9am and 3pm on June 21;

(3) That the proposed development fails to provide adequate quality communal open space or visual and acoustic privacy for future residents;

99 I note that the first two contentions are addressed in the preceding. For clarity I am not persuaded firstly, that the proposed development is incompatible with the desirable elements of the desired future character of the local area or secondly, that the development fails to achieve the solar access standard in SEPP ARH. Neither of these matters warrant the refusal of the development application.

100 The Respondent argues that the communal open space proposed is inadequate on two grounds. Firstly, the areas provided are fragmented and fail to provide adequate facilities. Secondly, they are overshadowed and have poor solar amenity.

101 Mr Betros supports the Respondent's contention and argues that the amenity of the proposed communal open spaces is inadequate due to their fragmentation, poor useability, poor solar amenity, and the impact the areas have on the adjacent units. In relation to the ground floor communal open space, he argues:

> "131. The ground level eastern area of communal open area which is 6-metres in width is considered to be inadequate to provide for usable communal areas whilst such area is also directly adjacent to the west facing units and balconies of the development to the east at 67-69 Graham Road.
>
> 132. There are also numerous window openings and balconies associated with primary living areas within the subject development which would be directly adjoining the eastern communal area.
>
> 133. The central communal area between the northern and southern wing returns of the built form would also be overshadowed and would consist of an under croft area and open area that would be in shadow at mid-winter. Only a small portion would be in sun during the morning hours whilst the built form (including the non-complaint 4th storey) would be responsible for overshadowing this area from noon onwards. The central communal area will also generate adverse visual and acoustic impacts to all north-facing apartments which directly face this communal area. Other east and south-facing units which have their windows oriented to the central communal area would also be affected.
>
> …
>
> 135. The 4th storey includes a communal space within the southern setback of the development. Such an area is directly adjacent to the Graham Road frontage and has minimal setback behind the built form below.
>
> …
>
> The communal area is also only readily accessible from the southern lift and stair core."
>
> (Exhibit 2)

102 In his oral evidence Mr Betros accepted that as a result of the amended plans, his previous concerns about the visual and acoustic amenity of the future units was resolved, with the exception of the preceding interaction with the communal open space.

103 In response to the evidence of Mr Betros, Mr Smith recommended some changes to the landscape plan to improve screening of the ground floor communal open space to the development to the east at 67-69 Graham Road and limit the function of this space as "principal useable open space". In addition, he argues that the development meets the requirements of Objective 3D-1 of the ADG. Namely the quantum of communal open space is more that

the 25% of site area, and the development achieved direct sunlight to 50% of the principal usable part of the communal open space for a minimum of 2 hours between 9 am and 3 pm on 21 June (mid-winter).

Findings

104 Clause 16 of SEPP ARH confirms the continued application of SEPP 65 to development for the purpose of in-fill affordable housing. Clause 30(2) of SEPP 65 requires the Court to be satisfied that the development application has had adequate regard to, among other matters, the objectives of the ADG.

105 Whilst I accept some of the matters raised by Mr Betros are well founded, I am satisfied that they have either been addressed by the amended architectural plans or are not sufficient to establish that the provisions of Objective 3D-1 of the ADG have not been given adequate regard. In summary:

- I accept the evidence of Mr Smith that additional screen planting proposed will assist in screening of the ground floor communal open space to the development to the east at 67-69 Graham Road. Further, it was observable on the site view that the adjoining development has limited windows or balconies facing the common boundary.
- The amended plans indicate the addition of landscaped planters with soil depths to accommodate screen tree planting between the ground level communal open space and Unit A04. Further, at Level four, additional privacy screening and barriers have been included to separate the communal open space visually from the adjoining units.

106 On the preceding basis I am satisfied that proposed development provides adequate quality communal open space for future residents that is compliant with Objective 3D-1 of the ADG.

107 I accept the agreed evidence of the experts that the proposed development provides adequate visual and acoustic privacy for residents.

108 I am not persuaded that that the variation to the amenity of the proposed communal open space provided in the development application warrants the refusal of the development.

Conditions

109 The final issue in dispute between the parties is a number of conditions sought to be imposed by the Respondent. The Applicant seeks the following amendments.

(1) Deletion of Condition 2.2:

"2.2. A detailed landscape plan prepared by a qualified landscape architect or qualified landscape designer must be approved by the principal certifier prior to the issue of a construction certificate. The landscape plan must be prepared in accordance with Canterbury DCP 2012 and must include the following features, notations and specifications:

a. The location of existing and proposed structures on the subject property/properties, including existing and proposed trees, impermeable areas, landscaped areas, deep soil zones, fixed furniture, shade structures, lighting, and other features,

b. Details of earthworks and soil depths, including mounding and retaining walls and planted boxes,

c. The location, number, pot size and type of chosen plant species. Details of planting procedures and long-term maintenance (if any),

d. Details of drainage and watering systems (if any),

e. A Landscape maintenance schedule period of 12 months is to be applied to this development. During this maintenance period, the landscaping must be maintained in accordance with the details specified on the submitted landscape plan,

f. All the tree supply stocks shall comply with the guidance given in the publication Specifying Trees: a guide to assessment of tree quality by Ross Clark (NATSPEC, 2003),

g. All scheduled plant stock shall be pre-ordered, prior to issue of construction certificate or 3 months prior to the commence of landscape works, whichever occurs sooner, for the supply to the site on time for installation. Written confirmation of the order shall be provided to Council prior to issue of any construction certificate. The order confirmation shall include name, address and contact details of supplier; and expected supply date, and

h. An automatic watering system is to be installed in common areas at the Applicant's cost. Details including backflow prevention device, location of irrigation lines and sprinklers, a control details are to be communicated to Council or certifier prior to the issue of the construction Certificate. The system is to be installed in accordance with the manufacturer's specification and current Sydney Water guidelines. i. One 75ltr (minimum) major canopy tree shall be planted within the front and rear setback of the building."

Replaced by:

"2.2 Landscape works are to be carried out in accordance with the approved landscape plans 18202 prepared by Dapple Designs."

(2) Deletion of Condition 2.6:

"2.6. Before the issue of a construction certificate, the person having benefit of this Determination Notice is to ensure that a waste management plan is prepared in accordance with the EPA's Waste Classification Guidelines and the following requirements before it is provided to and approved by the certifier:

a. Council's Waste Management Development Control Plan."

(3) Amendment of Condition 2.13: the deletion of the requirement to provide foot paving across the site's entire frontage.

(4) Amendment of Condition 2.20: removal of the following two requirements:

"b) The OSD basin storage must be located in common areas of the development.

c) The total area contributing to the OSD storage area must be at least 75% of the total site area."

(5) Deletion of Condition 2.21:

"2.21.A Flood Risk Management Plan shall be provided to the PCA. The plan must address how the proposed basement is being protected from Floodwater inundation, and how all the habitable areas are not subject to flooding. Additionally, the plan must address evacuation from the site in the event of flooding."

Replaced by:

"2.21 Certification from a qualified hydrological engineer shall be provided to the PCA which addresses floodwater mitigation measures for the basement is all habitable areas."

(6) Amendment of Condition 2.29 to delete:

"• Stormwater pipes and associated pits along the northern side of the site are to be no closer than 1 metre to the boundary fence adjoining Windarra Reserve."

(7) Deletion or amendment of conditions relating to arboriculture to the extent that they are inconsistent with the Applicant's arboriculture assessment which forms part of the approved documents under the consent.

110 In addition, the Applicant seeks to include a number of additional conditions arising from the expert evidence, these amendments are accepted without contest.

Findings

111 The consent authority has power to impose conditions pursuant to s 4.17 of the EPA Act. The relevant section of the provision states:

4.17 Imposition of conditions (cf previous s 80A)

(1) Conditions—generally A condition of development consent may be imposed if—

(a) it relates to any matter referred to in section 4.15(1) of relevance to the development the subject of the consent, or

(b) it requires the modification or surrender of a consent granted under this Act or a right conferred by Division 4.11 in relation to the land to which the development application relates, or

(c) it requires the modification or cessation of development (including the removal of buildings and works used in connection with that development) carried out on land (whether or not being land to which the development application relates), or

(d) it limits the period during which development may be carried out in accordance with the consent so granted, or

(e) it requires the removal of buildings and works (or any part of them) at the expiration of the period referred to in paragraph (d), or

(f) it requires the carrying out of works (whether or not being works on land to which the application relates) relating to any matter referred to in section 4.15(1) applicable to the development the subject of the consent, or

(g) it modifies details of the development the subject of the development application, or

(h) it is authorised to be imposed under section 4.16(3) or (5), subsections (5)–(9) of this section or section 7.11, 7.12, 7.24 or 7.32.

112 I accept the Applicant's requested replacement of Condition 2.2 on two bases. Firstly, that the condition sought to be imposed by the Respondent seeks to defer the assessment and consideration of the landscaping of the proposed development post determination. I am not satisfied that this is appropriate. Secondly, on the basis that the updated landscape plan is acceptable and forms part of the approved plans in Condition 1 of the development consent.

113 The same issue infects the Respondents' Conditions 2.6, 2.20, 2.21, 2.29 and the proposed arboricultural conditions. To impose those conditions would result in the conditions being inconsistent with the development approved in Condition 1. I am not persuaded it is appropriate to do so.

114 However, pursuant to s 4.17(1)(f) I am satisfied that it is appropriate to impose the requirement to undertake construction of concrete footway paving along the site's entire frontage to Karne Street South and Graham Road to facilitate improved pedestrian access from the site to the surrounding public facilities and the Narwee Railway Station.

Final orders

115 I am satisfied that the relevant preconditions to the grant of consent are met. In particular, I am satisfied that consent should be

granted notwithstanding the development contravenes the maximum height standard. As set out above, none of the contentions raised by the Council warrant refusal of the development application. As such, there is no basis to refuse the development application and it should be granted accordingly subject to appropriate conditions of consent.

116 The Court orders that:

(1) The appeal is upheld.

(2) Subsequent to the grant of leave to the Applicant to amend their development application during the proceedings, the Applicant is to pay the Respondent's costs thrown away as a result of the amendments made to the proposal, as agreed or assessed, within 28 days pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.

(3) The Development Application, DA-440/2018, seeking consent for the demolition of existing structures and construction of a four-storey in-fill affordable housing development over a basement car park, utilising the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009 at 71-83 Graham Road & 35-37 Karne Street South, Narwee (Lot 2, Lot 3, Lot 7 and Lot 8 in DP 23841 and Lots A and B in DP 387057), is determined by the grant of consent, subject to the conditions in Annexure A.

(4) The exhibits are returned with the exception of Exhibits A, F, 1 and 3.

D Dickson

Commissioner of the Court

357097.21 Annexure A

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