



Land and Environment Court New South Wales

Medium Neutral Citation:

**GPV Adamstown Pty Ltd AFT GPV Adamstown Trust v
Newcastle City Council [2022] NSWLEC 1572**

Hearing dates:

20 September 2022

Date of orders:

20 October 2022

Decision date:

20 October 2022

Jurisdiction:

Class 1

Before:

Horton C

Decision:

The Court orders that:

- (1) The appeal is upheld
- (2) Development consent is granted to development application DA2021/01754 for development described as construction of a new 5 storey health services facility and office premises, car parking, related landscaping and signage at 43 Date Street, Adamstown, subject to conditions of consent at Annexure A.
- (3) All exhibits are returned, except for Exhibits A and B

Catchwords:

DEVELOPMENT APPLICATION: health services facility in R4 High Density Residential zone – Adamstown Renewal Corridor – whether provision of parking is sufficient – whether setbacks are acceptable

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 4.17, 7.12, 8.7
Land and Environment Court Act 1979, s 34
Newcastle Local Environmental Plan 2012, Sch 5, cl 4.3, 4.4, 5.10, 5.21, 6.1, 6.2
State Environmental Planning Policy (Planning Systems) 2021, Sch 6, s 5
State Environmental Planning Policy (Transport and Infrastructure) 2021, Sch 3, s 2.48
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

Texts Cited:

Category: Principal judgment

Parties: GPV Adamstown Pty Ltd AFT GPV Adamstown Trust
(Applicant)
Newcastle City Council (Respondent)

Representation: Counsel:
A McKelvey (Solicitor) (Applicant)
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Newcastle City Council (Respondent)

File Number(s): 2022/105457

Publication restriction: No

JUDGMENT

- 1 **COMMISSIONER:** A health facility is proposed at a site known as 43 Date Street Adamstown. Development application no DA2021/01754 sought consent for demolition of an at-grade car park, and erection of a health services facility over five levels, two levels of car parking, two levels of consulting rooms/administration and the top level proposed as operating theatres (the DA).
- 2 As the proposed development is identified by s 5(b), Sch 6 of the State Environmental Planning Policy (Planning Systems) 2021 as private infrastructure and community facilities over \$5m, the DA was considered by the Hunter Central Coast Regional Planning Panel (HCCRPP).
- 3 The DA was lodged on 5 January 2022, and publicly notified between 20 January and 4 February 2022.
- 4 On 12 April 2022, the Applicant filed this Class 1 Appeal against the deemed refusal of the DA, under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 5 On 13 July 2022, the HCCRPP formally refused the development application.
- 6 On 14 July 2022, the Court arranged a conciliation conference between the parties in accordance with s 34(1) of the Land and Environment Court Act 1979 (LEC Act), at which I presided.
- 7 At the conciliation conference, the parties reached in-principle agreement on a number of matters in contention, subject to the resolution of certain issues which the parties' advised me were capable of resolution. I adjourned the conference to allow the

parties to continue to resolve those matters.

8 On 22 August 2022, the parties advised the Court that all matters had been resolved, but for two contentions related to traffic and parking, and planning and urban design.

9 On this basis, as no such agreement was reached, the parties by consent sought for the conciliation to be terminated so that the proceedings be disposed following a hearing, pursuant to s 34(4)(b)(i) of the LEC Act.

10 On 24 August 2022, the Applicant, by Notice of Motion, formally incorporated the adjoining site No 282 Brunker Road, into the proposal to allow for aspects such as parking, waste, servicing and deliveries to occur on this parcel for the proposed development.

11 The two sites are identified at Figure 1 of the joint expert report prepared by the town planning experts (Exhibit 2), re-produced below:



12 The Amended Statement of Facts and Contentions filed 16 September 2022, (Exhibit 1) identifies the site comprising two lots;

- (1) The site at 43 Date Street, legally described as Lot 11 in DP 1221375, is predominately hardstand consisting of a historic car park, now unused, that was previously associated with a Returned Services (RSL) Club.
- (2) The site at 282 Brunker Road, legally described as Lot 10 in DP 1221375, was an RSL Club, but which has changed use to a medical centre and consists of the converted building fronting Brunker Road, with car parking underneath in addition to open, at grade, parking located on the western portion of the site towards the Date Street frontage which forms the southern boundary of the site.

13 Relevantly, the development on the site at 282 Brunker Road was the subject of development application no DA 2015/043 ('Stage 1 DA'), for which consent was granted. The notice of determination and the conditions of consent relevant to that consent are found at Exhibit C, Tab 3, and the architectural plans are at Tab 4.

The site and its context

The Site is located at the corner of Victoria Street and Date Street, Adamstown, with a frontage to Victoria Street of 46.79m, and a frontage to Date Street of 66.27m. By virtue of an adjoining lot, now joined to the site, the site extends through to Brunker Road.

15 The site falls around 3.75m from Brunker Road to Date Street.

16 On 14 July 2022, the Court, in the company of the legal representatives and experts, observed the site, the character of Brunker Street to the east of the site, and the mix of low scale single dwellings, larger multi-unit housing and residential flat buildings to the south, north and west of the site fronting Date Street.

17 The Court also observed a narrowing in the width of Date Street in the vicinity of the site, and was taken to the intersection of Date Street and Glebe Road.

18 The site is located within the R4 High Density Residential zone according to the Newcastle Local Environmental Plan 2012 (NLEP), in which health services facilities are permitted with consent, where consistent with the objectives for development in the zone.

19 The objectives 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.
- To promote a denser urban form along transport corridors while respecting the residential character of adjoining streets.
- To maximise redevelopment and infill opportunities for high density housing within walking distance of centres.
- To provide for commercial development that contributes to the vitality of the street where provided within a mixed use development.
- To promote a balance of residential accommodation within a mixed use development.

20 Relevantly, a portion of the site at 282 Brunker Road is also located partly within the B2 Local Centre zone, in which health services facilities are also permitted with consent, where consistent with the following objectives:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To provide for residential development that maintains active retail and business frontages in order to contribute to a safe, attractive, friendly, accessible and efficient pedestrian environment.
- To maintain the hierarchy of urban centres throughout the City of Newcastle and not prejudice the viability of the Newcastle City Centre.

21 The site is also located within the Adamstown Renewal Corridor, to which certain controls apply under Section 6.08 of the NDCP. The strategic overview for the area seeks, relevantly, to improve the streetscape through development and landscaping. (Ex 2, folio 100)

The site is shown to be in 'Precinct 2 – Glebe Rd (mixed use focus)', on Map 1, Section 6.08 of the NDCP. The character statement for Precinct 2 is in the following terms:

Precinct 2 – Glebe Road (mixed use focus) character statement - Precinct 2 transverses Glebe Road from Wood Street (near Adamstown Station) to the west and Bryant Street to the east and also partly engulfs the Adamstown commercial centre. The amenity of Glebe Road is affected by the relatively high volumes of through traffic. This precinct will support Adamstown commercial centre with opportunities for mixed use development, consisting of commercial uses and services along Brunner and Glebe Roads. Increased residential densities are proposed for the remainder of the precinct and at upper levels. This precinct has a target of providing three hundred (300) additional dwellings. The eastern extremities of this precinct, adjoining the Adamstown playing fields, will continue to provide neighbourhood level retail and services.

23 The aims of Section 6.08 include, relevantly:

4. To activate street frontages and provide opportunities for mixed uses and activities.

...

6. To improve the public domain through landscaping and activation of public and private interfaces.

24 Section 6.08.01 provides guidance on land use and development in the precinct, with which the Respondent submits the proposal conforms:

3. Provide a range of compatible uses including higher density residential and employment including commercial, wholesaling, and retailing (other than groceries, clothing, newsagencies, or chemists).

The two issues

25 The Respondent contends that:

- (1) Firstly, the proposed development provides insufficient car parking and results in an overall loss of 11 parking spaces when both the proposed development, and the existing medical facility at 282 Brunner Road, Adamstown, are considered.
- (2) Secondly, the proposal does not meet the controls for setbacks and envelopes under Section 6.08 of the Newcastle Development Control Plan 2012 (NDCP).

Traffic and parking

26 The proposal provides two levels of carparking. The architectural drawings describe the Level 1 carpark, accessed through the existing open car park at 282 Brunner Road, as 'Level 1 – patient car park' (DA06), and the Level 2 car park, accessed from Victoria Street, as 'Level 2 – staff car park' (DA07).

27 In considering the issues with respect to traffic and car parking, the Court was assisted by Mr David Ryner, on behalf of the Respondent and Mr Jeffrey Garry on behalf of the Applicant, who conferred in the preparation of a joint expert report (Exhibit 3).

28 The traffic experts agree that a combination of requirements found in the relevant table in the NDCP, and the 'Guide to Traffic Generating Developments', published by Transport for NSW (Exhibit D), require provision of 72 car parking spaces, and that the Applicant proposes only 67 spaces, leaving a deficit of 5 spaces.

29

Additionally, the Respondent identifies 6 spaces being removed from the existing car park at 282 Brunner Road. This comprises 3 spaces to be removed to provide vehicular access to the Level 1 car park, and another 3 spaces removed to provide pedestrian stair and ramp access.

30 The combination of the deficit and the existing spaces proposed to be removed results in the shortfall of 11 spaces.

31 Section 7.03.02 (A) of the NDCP deals with Parking provision, and the objectives relevantly provide:

Ensure an appropriate level and mix of parking provision, having regard to the likely demand and the impacts of over/undersupply of parking.

32 Control 1, at Section 7.03.02 (A), refers to Table 1 for the applicable parking rates in the following terms:

Car parking is generally provided in accordance with the rates set out in Table 1 – Parking Rates, except for car parking for non-residential development in the Newcastle City Centre, which is provided at the rate of one space per 60m² gross floor area. Council reserves the right to vary the rates, subject to merit assessment of the proposal.

33 Control 3, Section A7.03.02, provides guidance on calculating parking rates for uses not otherwise identified on Table 1 in the following terms:

Parking provision for developments not listed in Table 1 is assessed having regard to Transport for NSW guidelines, and/or demonstration of parking requirements from surveys of comparable establishments and the following criteria:

- (a) the proportion of visitors or patrons likely to arrive by car
- (b) the availability and level of service of public transport relative to the site
- (c) the number of employees and their likely spread of work hours
- (d) the hours of operation
- (e) the location of the premises, particularly in relation to schools, local services, and employment, retail and recreational facilities
- (f) the number of occasions during the year when the proposed development is likely to be fully utilised
- (g) the availability and affordability of public parking within a reasonable distance of the proposed development
- (h) the availability of additional parking facilities to cover peak demands.

34 The NDCP permits parking rates to be varied, according to Section 7.03.02, subsection (B), where the objective to allow variations to on-site provision (objective 1), and the following controls are achieved:

1. Applicants comprehensively justify any departure from the parking rates set out in Table 1 in the Statement of Environmental Effects or Traffic Impact Study.

2. Council has regard to the following when considering any departures from the parking rates set out in Table 1:

- (a) the size and nature of the development, including any change of use proposed, the amount of additional floor area relative to the existing floor area and the increased parking demand likely to be generated
- (b) the applicability of other Council policies
- (c) the mix of uses, the hours of operation and timing of peak demand for each use, including any overlap of parking demand
- (d) results of any comprehensive parking survey submitted in support of the application

(e) whether a Green Travel Plan has been provided and a written agreement between Council and the owner/occupier is established for implementation of the Green Travel Plan

(f) whether a car sharing scheme is proposed to be implemented

(g) access to public transport services and the probable transport mode of staff and patrons or customers of the development

(h) availability and accessibility of public parking facilities in the vicinity of the proposed development

(i) the availability of kerb-side parking opportunities in the vicinity of the proposed development

(j) continuity, streetscape and heritage significance

(k) existing and likely future traffic volumes on the surrounding road network, traffic circulation and safety

(l) the impacts of providing on-site parking

(m) anticipated impacts of not providing for adequate on-site car parking.

35 In seeking to justify a variation in parking rates, the Applicant relies on a Traffic and Parking Assessment prepared by Intersect Traffic dated July 2022 (Parking Assessment) (Exhibit B, Tab 1).

36 Intersect Traffic has also prepared a Parking Survey of Health Square Centre (Health Square) at 20 Smith Street, Adamstown dated 1 August 2022 (Comparative Survey) (Ex B, Tab 10), and assessed parking use at the Charlestown Private Hospital facility. Both are said to be similar in scale, their proximity to existing commercial shopping precincts, and on the basis that the onsite parking is accessed from two streets.

37 On these grounds, the site at Smith Street is comparable in terms of size, tenant uses and parking supply, and as spaces were available at all times, the same can be expected at the subject site.

38 That said, a distinction is drawn in two ways. Firstly, the Health Square site has two operating theatres, while only one operating theatre is proposed on the subject site. Secondly, the car park at the Health Square site is controlled by boom gates and an intercom system which better regulates its use.

39 By contrast, the experts agree that up to 6 spaces in the car park at 282 Brunker Road are used by motorists unrelated to the development.

40 Intersect also undertook a DCP compliance audit (Ex B, Tab 6) for the completed development at 282 Brunker Road, based on the actual occupancy of the development, being less than that predicted at the time of lodgement of the development application, resulting in a requirement for 83 spaces. This is in contrast to the requirement of 88 spaces, predicted at the time the DA was lodged, based on the use and occupancy.

41 However, as 94 spaces were provided, there are 6 surplus spaces and the Applicant argues it is reasonable for those additional spaces to account in part for those removed at [29].

42 The experts also agree that management of the existing and proposed car parking can be improved by adopting a Plan of Management (Ex 3, Annexure C), proposed at Condition 72 of the without prejudice conditions of consent.

- 43 That said, the Respondent submits the method adopted by Mr Garry and those contracted to undertake the Comparative Survey is flawed, as the survey comprised review of video data within the Health Square parking structure and did not interview drivers or observe actual behaviour, survey parking demand or on-street parking.
- 44 Similarly, the Parking Assessment has not considered the impact of losing 11 spaces from the existing car park at 282 Brunner Road, in accordance with Section 7.03.02 (B) (2)(m) of the NDCP.
- 45 Furthermore, regardless of occupancy, car parking rates are calculated on the use or uses proposed for a site, at the rate determined in the NDCP.
- 46 To transfer an alleged surplus of 6 spaces from the existing car parking at 282 Brunner Road would effectively modify the terms of the consent granted to that development, prior to which the Court must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application, and the reasons given by the consent authority for the grant of the consent that is sought to be modified, in accordance with s4.55(3) of the EPA Act.
- 47 The parking survey has not undertaken an analysis of on-street parking, and so the total demand for parking, and the degree of spare capacity in on-street parking, if any, is unable to be derived from the studies provided by the Applicant in support of the development application.
- 48 While I accept that certain inferences are able to be made from a review of video footage of driver behaviour in a car park, such as those described in the Comparable Survey, video footage cannot depict the total demand for parking in, or around, the facility. The method adopted limits an understanding of the parking behaviour to decisions made by motorists entering the car park alone, and not those made outside it, such as on-street parking, or the proportion of multi-purpose trips accounted for.
- 49 Accordingly, I give the Comparable Survey, and the results summarised in Table 8 of the Parking Assessment, little weight. The Parking Assessment does not overcome the deficit of 5 spaces evident in the proposal.
- 50 That said, I accept that the Parking Management Plan agreed between the experts is likely to improve the operation of the existing car park at 282 Brunner Road, and so address, in part or whole, the 6 spaces lost to the proposal.
- 51 I also consider it reasonable to discount the 6 spaces lost to provide vehicular and pedestrian access to the proposal from 282 Brunner Road car park for three reasons:
- (1) Firstly, on the basis of the assessment undertaken by Intersect Traffic in support of the Stage 1 DA (Ex C, Tab 5) which assessed the then proposed development to require 85 spaces, but asserts a total of 90 were proposed. As stated at [41], 94 spaces are provided.
 - (2) Relatedly, the terms of the consent at [13] permits parking for 90 vehicles, and not the 94 now found to be on the site of 282 Brunner Road. Accordingly, the existing development exceeds the parking for which consent was granted by

four spaces.

- (3) Secondly, the experts agree there is evidence of two vacant spaces during peak periods, which is supportive of a modest surplus in supply.
- (4) Thirdly, given the specialist function of the facility, and the particular staffing regime intrinsic to its function. Unlike more conventional commercial premises that are subject to wide variation in staffing densities, I accept that certain ratios, and daily patterns of work apply to a health facility in which a consultant, and attendant staff, operate in particular modes.

52 For the above reasons, I consider the removal of 6 spaces in the proposal acceptable, resulting in 88 spaces in the car park at 282 Brunner Road. So understood, I accept that the sites operate in unison and so it is reasonable to expect some efficiencies in parking gained by the adjacent facilities likely to share staffing and other resources that, in my view, overcomes the deficiency of 5 car spaces.

53 On this basis, I accept that the proposal, notwithstanding deficiencies in the Parking Assessment, achieves the relevant objective of Section 7.03.02 of the NDCP to ensure an appropriate level and mix of parking provision, having regard to the likely demand and the impacts of over/undersupply of parking, and so consider it appropriate to apply the provisions of the controls flexibly, pursuant to s 4.15(3A)(b) of the EPA Act.

Planning and urban design

54 The Respondent cites conflicts in the proposal with controls relating to the building setback to Date Street, and with the controls determining the building envelope at the upper levels.

55 In considering the issues with respect to urban design, the Court was assisted by Mr Damian Jaeger, on behalf of the Respondent, and Mr Wesley Wilson, on behalf of the Applicant, who conferred in the preparation of a joint expert report (Exhibit 2).

Building setback to Date Street

56 The origin of the dispute as to the building setback to Date Street lies in the form of controls applicable to the site in Section 6.08 of the NDCP.

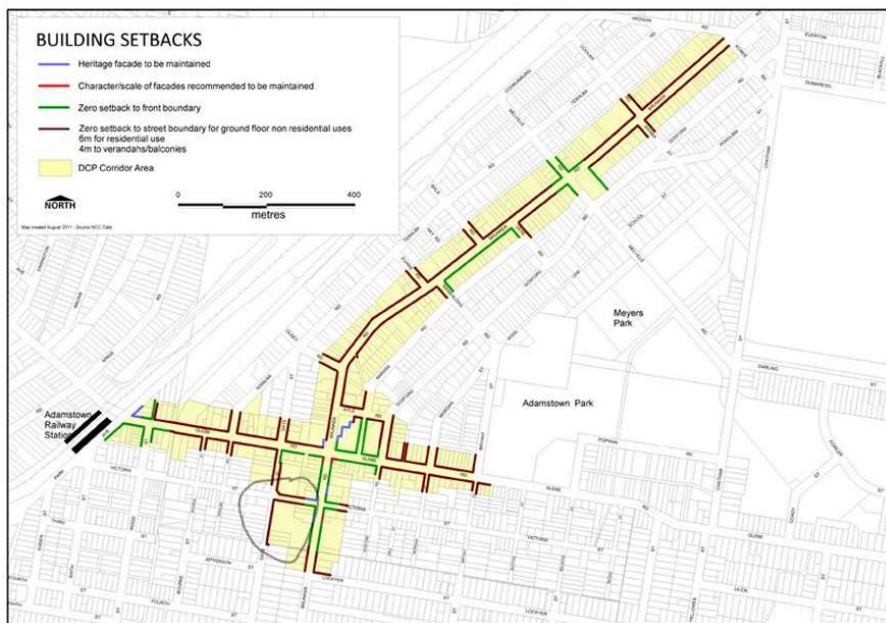
57 The Applicant submits that notwithstanding a zero setback applies to the site, a setback of between 2.44m-6.15m is provided so as to balance the building setback control with the Respondent's desire for an improved streetscape in Date Street.

58 The Respondent argues that general controls applicable the Adamstown Renewal Corridor must be read in conjunction with certain controls that are specific to Date Street. So understood, the setback allowed by the Applicant fails to provide adequate clearance between trees within the setback and nearby powerlines, and the public footpath, to ensure the objectives of relevant sections of the NDCP are achieved.

In particular, two Kauri Pines are proposed to the Date Street setback. The Respondent notes concern expressed by Ausgrid at the species, and the risk likely to flow from the proximity of the selected trees to the powerline (Ex 4, folio 258).

60 A setback of 3750m is considered appropriate by the Respondent in the circumstances of this case because the Applicant has previously dedicated a strip of 750mm in width, that together, achieves the 4500mm setback sought by the controls.

61 Building setbacks are dealt with in Section 6.08.02 (C) 'Building Form'. Front building setbacks are to be consistent with those shown on Map 2, re-produced below. The Map legend identifies the site is marked "Zero setback to street boundary for ground floor non residential uses. 6m for residential use. 4m to verandahs/balconies."



62 Section 6.08.03 deals with Public Domain. Objectives and controls for Open Space and Landscaping are set out in subsection (C).

63 Objectives relevantly provide:

...

2. Improve landscape amenity of the public realm through consistent theme of pavement, street furnishings and street trees.

3. Strengthen the inter-relationship between public and private space through activation of the street edge and quality of landscaping along the corridor.

...

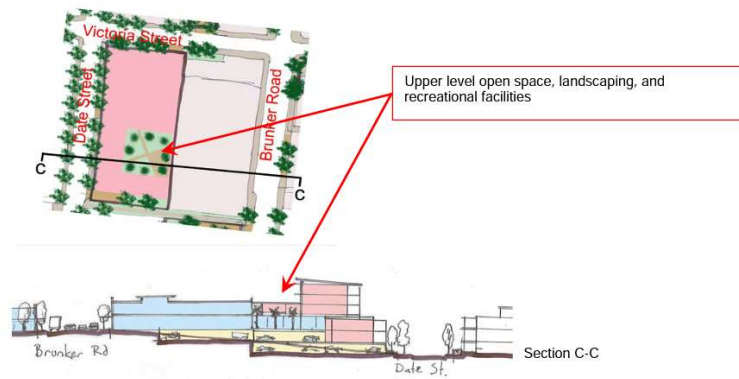
64 Two controls are of particular relevance.

14. Development along Date Street is setback a minimum of 4.5m for non residential uses to enable embellishment of the footpath and provision of street trees.

...

16. Redevelopment of the existing open air RSL car park to provide all on-site car parking at lower levels, whereas open space and landscaping should be provided at upper level setbacks and roof tops as shown in Figure 5.

Figure 5: Landscape at upper levels for redevelopment of RSL car park site



65 Relatedly, general controls in respect of Landscape Open Space are set out at Section 7.02.02 that relevantly provide:

1. Landscaping is in scale and context with the proposed development, street reserve width, other buildings and landscape elements within the streetscape, ie. it is not appropriate to plant a large tree in the front garden of a small terrace or to landscape a large industrial structure with ground covers.

...

4. Plant species are selected and located to avoid structures, services and paths. Undesirable species are not selected (See Appendix 1 of Urban Forest Technical Manual and Appendix B Landscape Technical Manual).

...

6. Deep soil zones are optimised within a site by:

(a) the design of basement and sub-basement car parking, so as not to fully cover the site and conflict with tree planting

(b) ensuring appropriate front and side setbacks are provided for tree planting

(c) that the soil profile is free draining

(d) works, excavations, infrastructure, services and drainage pipes are located away from the deep soil zone

(e) optimise the extent of deep soil zones beyond the site boundaries by locating them contiguous with the deep soil zones of adjacent properties.

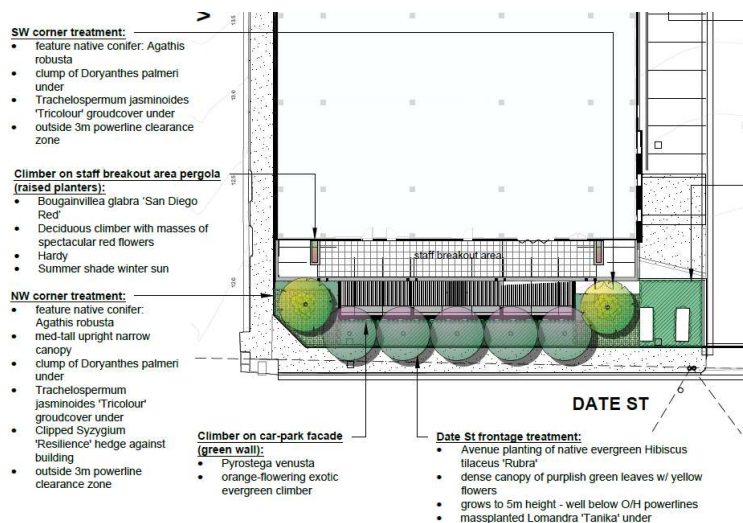
7. Landscape treatment within the front setback is substantial enough to enhance the appearance and integration of the development with the streetscape.

66 The building form controls in Map 2 and Open Space and Landscaping controls in Control 14 appear to directly contradict each other. A zero setback is shown in Map 2 to apply to building form on the site, along the Victoria Street and Date Street frontage, and yet Control 14, requires development along Date Street to be setback a minimum of 4.5m for non-residential uses to enable embellishment of the footpath and provision of street trees.

67 While the title of Map 2 is 'Front Building Setbacks', the legend on Map 2 describing the nature of the setback required on the site further stipulates that a zero setback applies to the street boundary, and not to a front boundary, as it does for properties closer to Glebe Road.

I cannot accept that Control 14 takes precedence by virtue of reference to Date Street, because Map 2 likewise makes specific reference not only to Date Street, but to the site itself, and confirms that reference by marking the site in a particular way, with stipulations in the legend as to the meaning to be derived from that marking.

- 69 I do not understand Figure 5, at Control 16, to direct anything in respect of the Date Street frontage. While street trees are depicted in the figure, the figure is titled, and deals with, "Landscape at upper levels for redevelopment of RSL car park site". The figure includes a plan and section, the subject of which is clearly through 282 Brunner Road in which no upper level development is proposed.
- 70 Given the conflict between built form and open space controls, the Court must consider the merits of the setback proposed by the Applicant. While I note the concerns expressed by Ausgrid, I accept the Landscape Architect's written statement at Ex B, Tab 4, that the Kauri Pines will grow to facilitate the 3m clearance zone adjacent to the powerlines.
- 71 I also consider the landscape design, re-produced in part below, comprising the two Kauri Pines in the 6.15m setback, the five native hibiscus in the 2.6m setback, and the orange-flowering exotic evergreen climber known as 'Pyrostegia venusta' to achieve the objectives at [63].



- 72 Additionally, on the basis of the evidence before the Court, including the written statement of the Applicant's Landscape architect at [70], I find the form of the proposed development to Date Street consistent with the Landscape Open Space Controls at [65].

The building envelope is breached

- 73 The Respondent identifies portions of the proposal that exceed the controls on upper building setbacks, on both Date Street and Victoria Street frontages.
- 74 The exceedances are perhaps best depicted on the architectural plans (ExB, Tab 8) at DA-29, reproduced in part below:



Corner Date & Victoria Street Aerial

- 75 In the joint report, Mr Jaeger regards the exceedances, together with the inadequate ground level setback, to combine to create unacceptable impacts in terms of urban design, character, streetscape, bulk, scale and visual appearance. The effect is greater due to the narrow width of Date Street, and the controls that apply to the western side of Date Street, to which a height of 14m and floor-space ratio (FSR) of 1.5:1 apply.
- 76 Section 6.08.02, subsection (D) deals with Upper building setbacks in the following relevant terms:

Objectives

1. Protect the 'village' scale and character of Adamstown commercial centre.
- ...
3. Address envisaged scale and character of areas adjoining the renewal corridor.
- ...

Controls

General controls applying to all development to which this section applies

1. Upper building setbacks are consistent with those in Figures 1 to 3.
2. Upper level setbacks are encouraged to be used for provision of open space and landscaping, provided privacy of adjoining uses are protected.
3. Emphasise street corners by permitting the maximum permissible height along each front setback for a maximum length of 12m from the corner.

- 77 Mr Jaeger's view is that the exceedance is unnecessary. The Applicant has amended the development application for the site to include both the land at 43 Date Street, and 282 Brunker Road, and so an alternative arrangement of built form partly on, or over, the existing carpark at 282 Brunker Road, would likely remove the exceedance.
- 78 Mr Wilson relies on Figure 9 in the joint report which effectively overlays the relevant envelope control (taken from Figure 1, Section 6.08.02) on a section through the proposal. The result is an exceedance caused by a portion of the pergola over the Level 3 terrace, and a portion of brick parapet at the corner adjoining Victoria Street.

Additionally, Mr Wilson acknowledges the exceedance at Victoria Street, which he supports as a means of reducing the bulk and scale of the proposal fronting Date Street, and the properties to the west, zoned R3 Medium density residential but currently low scale single storey residential dwellings. Instead, the bulk is located to Victoria Street where residential flat buildings to the north present blank face brick facades.

- 80 So arranged, the built form is generally not visible from the Adamstown commercial centre, but for one location at the corner of Victoria Street and Brunner Road, and addresses the envisaged scale and character of areas adjoining the renewal corridor, consistent with the objectives at Section 6.08.02, subsection (D).
- 81 Accordingly, Mr Wilson considers there to be grounds for the flexible application of the controls in accordance with s 4.15(3A) of the EPA Act.
- 82 The experts agree that no adverse impact arises from the exceedance on the properties to the west of Date Street, nor the residential flat buildings to the north of the site.
- 83 In my view, the building envelope analysis (DA29), and the visual impact assessment (DA22-DA27) support Mr Wilson's evidence. In particular, I note the height and form of the proposal appears compatible with the existing 'village' scale and character of Adamstown commercial centre when viewed from Brunner Road, as depicted in DA22, re-produced below:



- 84 Likewise, the proposal addresses the envisaged scale and character of areas adjoining the renewal corridor when viewed in context from the south of Date Street, as depicted on DA25, re-produced below:



- 85 The exceedance at the upper levels of the frontage to Date Street and Victoria Street are within the height standard at cl 4.3 of the NLEP, are minor and impose no adverse impact on surrounding properties, views, character or scale.
- 86 The issues in dispute are therefore resolved in favour of the grant of consent in accordance with s 4.16 of the EPA Act, subject to conditions of consent. However, before the Court can grant consent, certain jurisdictional issues must be addressed. For the reasons that follow, I am so satisfied.

Jurisdictional issues

- 87 The town planning experts agree the proposed development complies with the height standard applicable to the site at cl 4.3 of the NLEP, being 20m in height for 43 Date Street, and the western portion of 282 Brunner Road, and 11m in height for the eastern portion of 282 Brunner Road.
- 88 Likewise, the experts agree the proposal complies with the FSR applicable to the site in accordance with cl 4.4 of the NLEP, being 2:1 for 43 Date Street and the western portion of 282 Brunner Road, and 1.5:1 for the eastern portion of 282 Brunner Road.
- 89 While the site is not an item of heritage significance, and is not located within a Heritage Conservation Area, it is in the vicinity of two items of heritage significance, listed in Schedule 5 of the NLEP. I accept the assessment of the heritage items at pp26-30 of the Statement of Environmental Effects prepared by Wilson Planning dated November 2021, and agree that no impact arises within the terms of cl 5.10 of the NLEP, given the distance and lack of visible connection between the proposal and those items of heritage significance.
- 90 On the basis of the Civil Engineering and Stormwater Management Plan prepared by Northrop Engineers (Ex B, Tab 1), and the Letter for Amended Civil Engineering and Stormwater Plans of the same author dated 22 July 2022 (Ex B, Tab 2), I am satisfied that the proposal is compatible with the flood function and behaviour on the land, will not adversely affect flood behaviour in a way that results in detrimental increases in the

potential flood affectation of other properties, does not affect the safe occupation or evacuation of the area in event of a flood, and incorporates appropriate measures to manage risk to life in the event of a flood, consistent with cl 5.21(2) of the NLEP.

91 In arriving at this state of satisfaction, I note the generator room is located above the Probable Maximum Flood (PMF) level of 11.8m AHD, on Level 2 of the proposed development (DA07).

92 The site is located within an area identified on the Acid Sulphate Soils (ASS) Map at cl 6.1(2) of the NLEP as Class 5 soil, within 500m of Class 4 soil, but which is not below 5m AHD. Furthermore, the Geotechnical and Preliminary Waste Classification Report prepared by Douglas Partners dated September 2021 (Ex A, Tab 13) concludes that the site is not within an area of known ASS, and material did not exhibit signs of ASS.

93 The proposed development provides for excavation of the site. The Geotechnical and Preliminary Waste Classification Report prepared by Douglas Partners dated September 2021 (Douglas Partners Report) assists the Court in considering those matters at cl 6.2(3) of the NLEP as follows:

- (1) Existing fill material is classified as General Solid Waste, and is suitable for direct disposal to landfill.
- (2) Given the site is bounded by open at-grade car parking and a paved right of way, I accept the proposal results in no adverse effect on the existing and likely amenity of adjoining properties arising from earthworks.
- (3) A search of the Aboriginal Heritage Information Management System does not identify the potential for relics.

94 Relatedly, on the basis of the Douglas Partners Report, I accept that the site is considered suitable for the purpose for which the development is proposed to be carried out in accordance with s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021.

State Environmental Planning Policy (Transport and Infrastructure) 2021

95 Section 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport Infrastructure SEPP) provides that development comprising excavation within 2m of an underground electricity power line or an electricity distribution pole (subs (1)(a)), or within 5m of an exposed overhead electricity power line (subs (1)(b) (iii)), must be notified to the relevant electricity supply authority, and any response be considered. As stated at [70], I have considered the concerns expressed by Ausgrid, which I consider to be general in nature, and subject to clearances to be achieved, that are able to be achieved, according to the Applicant's Landscape Architect.

96 As the proposed development comprises a car park for more than 50 vehicles, Column 3, Table 1, Sch 3 of the Transport Infrastructure SEPP identifies the development to be traffic-generating development to be referred to Transport for NSW (TfNSW). No objections are raised by TfNSW.

Conditions of consent are disputed

- 97 The Respondent's without prejudice Conditions of consent (Exhibit 5), propose to remedy the deficiencies it sees in the proposal by deferring the operation of the conditions of consent until changes are made to the proposal.
- 98 Those deferred commencement conditions relate, broadly, to the setback of the proposal to Date Street, setbacks at the upper level, and landscaping to Date Street. Given the Court's findings on these matter in the judgment above, those conditions are not relevant and so are struck from the conditions.
- 99 A further condition is sought to be imposed by the Respondent in respect of a large artwork proposed to be integrated in the northern elevation of the proposal, depicted, but not annotated as such, on the Northern elevation (DA13), re-produced in part below:



- 100 The Respondent proposes a deferred commencement condition in the following terms:

The public art feature as detailed in the plans by Archadia (Proj No A116 Dwg No DA13 & DA19, dated July 2022 Ver3.2) is to be further developed and designed by a local Aboriginal artist engaged by the applicant, in consultation with Newcastle City Council and Council's Public Art Reference Group. The public artwork is to have a minimum value of 1% of the capital cost of the development and is to provide visual interest for pedestrians and interpret or reflect the local setting, landscape setting and/or cultural setting of the Newcastle area. The feature is to be designed to ensure long-term durability and be resistant to vandalism. The details of all artworks within the site and associated costings are to be submitted to Council's Public Art Reference Group for written approval prior to Schedule 1 being satisfied.

- 101 The Applicant submits that arrangements for the artwork are provided for elsewhere in the conditions, and that imposing a requirement for a quantum of 1% of the capital cost of the development is contrary to the contributions regime and does not apply to the site or the development.
- 102 Instead, Condition 22, as proposed by the Applicant, provides:

The final details of all artworks within the site and associated costings are to be submitted to Council's Public Art Reference Group for written approval prior to the issue of a Construction Certificate, the written approval be obtained prior to the issue of any Construction Certificate. The public artwork is to provide visual interest for pedestrians and interpret or reflect the local setting, landscape setting and/or cultural setting of the Newcastle area. The feature is to be designed to ensure long-term durability and be resistant to vandalism.

The Court was not assisted by detailed submissions from the parties on this condition, or on what was referred to generally as a “1% for public art policy”. Instead, brief submissions from the Applicant were repeated in margin notes contained in the Applicant’s preferred conditions of consent.

104 The relevant Contributions plan was also not tendered in evidence, however the Court notes Condition 2 of the Respondent’s without prejudice conditions of consent provides for a monetary contribution of \$125,540.03 to be paid to the Respondent in accordance with s 7.12 of the EPA Act.

105 The “Section 7.12 Development Contributions Plan” (Contributions Plan), found on the Respondent’s website, applies a fixed development consent levy of 1% to all developments outside the Newcastle City Centre of greater than \$200,00 in value, according to Table E1.

106 Section 2.2 of the Contributions Plan Council states development contributions provided for include transport and social infrastructure, including public domain improvements including public art.

107 Section 7.12(3) of the EPA Act provides that monetary contributions are to be applied towards the provision, extension or augmentation of public amenities or public services, and that the application of the money is subject to any relevant provisions of the contributions plan.

108 As such, I understand that the monetary contribution in Condition 2 is calculated to include a contribution for transport and social infrastructure, including public art.

109 On one view, the Applicant disposes of an obligation to contribute to public art by payment of the monetary contribution calculated in Condition 2.

110 On another view, the Applicant’s decision to integrate artwork as an inseparable element of the façade of the proposed development is distinct from any contributions calculated in accordance with the Contributions Plan, pursuant to s 7.12 of the EPA Act. I hold this view.

111 The Applicant’s preferred wording of the relevant condition is distinct from that proposed by the Respondent in three material respects; that the author of the artwork be a local artist identified as of aboriginal descent, the quantum of cost to be dedicated to the work be at least 1% of the capital cost of the development, and that consent be deferred until the Public Art Reference Group provides its written approval.

112 I consider the artwork ancillary to the core purpose of the proposed development, and so a condition with respect to the final form of the work is appropriate, pursuant to s 4.17(2) of the EPA Act. Relatedly, as the location and size of the proposed artwork is depicted on the northern elevation of the drawings prepared by the Applicant, I do not consider the condition as proposed by the Respondent modifies details of the development the subject of the development application, as provided for in s 4.17(1)(g) of the EPA Act.

Further, I do not understand that s 4.17 of the EPA Act permits a condition of consent to prescribe a monetary amount to be reserved or dedicated to a particular aspect of the development the subject of the development application, absent a provision in the NLEP or NDCP that would provide for the same under s 4.17(1)(a) or (f).

- 114 The Court was not provided with such a provision, and so declines to uphold the Respondent's preferred form of the condition. Furthermore, I accept the terms of Condition 22 as proposed by the Applicant to provide for the artwork to be developed in consultation with the Public Art Reference Group, during which a range of issues related to the artwork, its authorship and content are likely to be canvassed.
- 115 Finally, given the respective timeframes in which the documentation required for the issue of construction certificate, and for the artwork, is likely to be prepared, there is no reason for the condition to defer commencement of the grant of consent.
- 116 The Applicant's preferred wording is adopted, and all deferred commencement conditions are deleted.
- 117 Additionally, I note here agreement of the parties that conditions 7(c), 8 and 9 are not required and may be deleted.
- 118 Condition 64 applies limitations on the times during which deliveries, servicing and waste collection may occur on the site. Given the specialist function of the facility, and the adoption of a Plan of Management that, in my view, facilitates greater precision of car park movements, and the use by the Applicant of private contractors that are more able to undertake movements at prescribed times, I accept the Respondent's more limited window of between 7am-8am.

Orders

- 119 The Court orders that:
- (1) The appeal is upheld
 - (2) Development consent is granted to development application DA2021/01754 for development described as construction of a new 5 storey health services facility and office premises, car parking, related landscaping and signage at 43 Date Street, Adamstown, subject to conditions of consent at Annexure A.
 - (3) All exhibits are returned, except for Exhibits A and B

.....

T Horton

Commissioner of the Court

105457.22 Annexure A (230010,.pdf)

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Decision last updated: 20 October 2022