



Land and Environment Court New South Wales

Medium Neutral Citation:	Ghamraoui v Tweed Shire Council [2022] NSWLEC 1612
Hearing dates:	7-9 September 2022
Date of orders:	04 November 2022
Decision date:	04 November 2022
Jurisdiction:	Class 1
Before:	Horton C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development application DA 21/0689 for the demolition of existing buildings and the construction of a 12 storey residential flat building containing 96 units and 3 levels of basement parking (in addition to 2 part levels), tree removal, site consolidation and strata subdivision is determined by the grant of consent, subject to conditions of consent at Annexure A.</p> <p>(3) All Exhibits are returned, but for Exhibits A, D and 9.</p>
Catchwords:	DEVELOPMENT APPLICATION – residential apartment development – residential flat building in R3 Medium Density Residential zone – view loss assessment – whether proposed development exhibits design excellence – consideration of public submissions
Legislation Cited:	<p>Architects Act 2003</p> <p>Environmental Planning and Assessment Act 1979, ss 4.16, 4.46, 7.11 8.7</p> <p>Environmental Planning and Assessment Regulation 2000, cl 3, 50, 55</p> <p>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</p> <p>State Environmental Planning Policy (Resilience and Hazards) 2021</p> <p>State Environmental Planning Policy No 55—Remediation of Land, cl 7</p> <p>State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development, cl 28, 30</p>

	State Environmental Planning Policy (Transport and Infrastructure) 2021, s 2.48 Tweed City Centre Local Environmental Plan 2012, cl 2.7 4.3, 4.4, 6.1, 6.10 Water Management Act 2000
Cases Cited:	Toga Penrith Developments Pty Limited v Penrith City Council [2022] NSWLEC 117
Texts Cited:	Apartment Design Guide Tweed Development Control Plan 2008
Category:	Principal judgment
Parties:	Harry Ghamraoui (Applicant) Tweed Shire Council (Respondent)
Representation:	Counsel: A Pickles SC (Applicant) N Eastman (Respondent) Solicitors: Conomos Legal (Applicant) Hall & Wilcox (Respondent)
File Number(s):	2021/ 333120
Publication restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** Residential apartment development is proposed on a site in Tweed Heads, close to the border of New South Wales and Queensland.
- 2 To this end, the Applicant in these proceedings lodged development application DA 21/0689 with the Tweed Shire Council (the Respondent) on 26 August 2021, seeking consent for the demolition of existing buildings and the construction of a 12 storey residential flat building containing 96 units and 3 levels of basement parking (in addition to 2 part levels), tree removal, site consolidation and strata subdivision.
- 3 The development application was advertised and notified for a period of 28 days from 29 September to 27 October 2021. Public submissions received in response are contained in the Respondent’s bundle (Exhibit 2, Tabs 10-38).
- 4 On 24 November 2022, the Applicant appealed the deemed refusal of the development application under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 5 The Applicant was granted leave to rely upon amended plans and other documents on three occasions prior to this hearing, the effect of which is that all contentions originally pressed by the Respondent are resolved.
- 6 The amended application was renotified by the Respondent to residents in the area between 27 July 2022 and 24 August 2022. Public submissions received in response are contained in the Respondent’s bundle (Exhibit 2, Tabs 39-43).

- 7 The Respondent advises of the resolution of the contentions by reference to the following joint expert reports:
- (1) In respect of Traffic and parking: Mr Craig McLaren for the Respondent, and Mr Thomas Yang for the Applicant. (Exhibit 3 and Exhibit 11)
 - (2) In respect of Geotechnical engineering: Dr Daniel Martens for the Respondent, and Mr Sam Haddad for the Applicant. (Exhibit 4)
 - (3) In respect of Stormwater: Dr Daniel Martens for the Respondent, and Mr Sam Haddad for the Applicant. (Exhibit 5).
 - (4) In respect of Waste: Mr Wesley Knight for the Respondent, and Mr Eddy Saidi for the Applicant. (Exhibit 6)
 - (5) In respect of Water and Sewer engineering: Mr Nicholas Darwin for the Respondent, and Mr Sam Haddad for the Applicant. (Exhibit 7)
 - (6) In respect of town planning, urban design and view sharing: Ms Gabrielle Morrish and Mr Jeff Mead for the Respondent, and Mr Ben Tesorieiro and Mr Alan Cadogan and Dr Richard Lamb for the Applicant. (Exhibit 8)
- 8 It is relevant to record here that the Applicant characterised the amendments contained in the Notice of Motion filed with the Court on 2 September 2022 as being responsive to those amendments agreed by the respective experts in the joint expert reports which, if adopted, would resolve the relevant issues in dispute.
- 9 However, in respect of traffic, Mr McLaren considered certain particulars unresolved, pending the provision of further detail. As the Court was uncertain as to whether additional detail now resolved the traffic contentions entirely, the experts were directed to confer and prepare a short supplementary report, tendered on the second day of the hearing (Exhibit 11), and which confirmed resolution of all matters in dispute.
- 10 While the contentions pressed by the Respondent in the Amended Statement of Facts and Contentions (Exhibit 1), are resolved, the proposed development is the subject of public submissions that I will address at [59]-[78].

The site and its context

- 11 The site is on the western side of Pearl Street, on land that rises steeply to the rear, where it adjoins lots fronting Thomson Street further to the west.
- 12 The site is commonly known as No 7-13 Pearl Street, Tweed Heads, comprising four lots legally described as Lots 4, 5, 6 and 7 in DP 23888 that, together, total a site area of 2,832m².
- 13 The western side of Pearl Street is predominantly single storey dwellings, while the eastern side is a mix of multi-dwelling development, residential flat buildings and single and two-storey dwellings.
- 14 St Joseph's Catholic Church (the Church) is located at the northern end of Pearl Street, at the intersection with Frances Street. A car park belonging to the Church uses Pearl Street as its sole access.

The site, and surrounding land to the north, south, east and west, is located within the R3 Medium Density Residential zone, according to the Tweed City Centre Local Environmental Plan 2012 (TCCLEP).

16 Residential flat buildings are a form of development permitted with consent by virtue of not being otherwise specified in item 2 or 4 of the relevant Land Use Table at cl 2.7 of the TCCLEP.

17 The objectives for development in the R3 zone are:

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

18 The proceedings commenced with an onsite view at which the Court, in the company of the legal representatives, and some of the experts, heard oral submissions from residents objecting to the proposal.

19 Oral submissions were heard from residents of Nos 40-42 Thomson Street, No 6 Pearl Street and No 18 Pearl Street, dealing, broadly, with the following:

- Traffic, parking and pedestrian safety
- View loss
- Waste collection
- Construction impacts
- Flooding
- Utilities

20 Written public submissions received by the Respondent in respect of the development application, and the amendments made to it, are contained at Tabs 10-43 of Exhibit 2.

21 While the issues raised by residents are, in essence, about the impact of the proposal on their amenity, none are jurisdictional impediments in their own right, and so it is appropriate for the Court to first consider those issues that are jurisdictional pre-requisites to the grant of consent.

Tweed City Centre Local Environmental Plan 2012

22 The height of buildings development standard at cl 4.3 of the TCCLEP provides for a maximum height of 49.5m on the site.

23 However, the provisions of cl 6.10(4) of the TCCLEP modify the terms by which the height of buildings standard can be enlivened, by operation of the following:

(4) Development consent must not be granted to the following development on land to which this Plan applies unless an architectural design competition that is consistent with the Design Excellence Guidelines has been held in relation to the proposed development—

- (a) development having a capital value of more than \$2,000,000 on land identified as “Key Sites” on the Key Sites Map,
- (b) development in respect of a building that is, or will be, higher than 35 metres,

(c) development for which the applicant has chosen to have such a competition.

- 24 The proposal is not identified on the Key Sites Map (subcl (4)(a)), and the Applicant has chosen not to have a design competition (subcl (4)(c)). Instead, the proposal is less than 35m in height which has the effect of removing the prohibition on the grant of consent in accordance with subcl (4)(b) of the TCCLEP.
- 25 The experts agree, as I do, that the proposed development does not exceed 35m in height. In arriving at this agreement, the experts have identified the particular location through which the Section drawing at A300 (Exhibit A) is taken, the fall of the land, and the fact that the lift overrun is depicted in elevation and not in section. Accordingly, no part of the proposal exceeds 35m in height.
- 26 Likewise, there is no dispute that the floor space ratio (FSR) of the proposal is less than the development standard of 4.5:1 permitted by cl 4.4 of the TCCLEP. At the commencement of the hearing, the FSR was expressed as 3.32:1. However, due to amendments made late in the proceedings, and described at [64]-[69], the FSR at the close of proceedings is expressed as 3.35:1.
- 27 The site is identified as Class 5 on the Acid Sulfate Soils Map at cl 6.1 of the TCCLEP, and is located within 500m of adjacent Class 2, that is below 5 metres Australian Height Datum, according to the site survey (Exhibit L). I accept the conclusions of the Acid Sulfate Soils Assessment, prepared by EI Australia dated 16 June 2022 (Exhibit U) that confirms laboratory testing of samples taken from the site did not identify actual or potential Acid Sulfate Soils, that are underlain by weathered silt and sandstone.

Whether the proposed development exhibits design excellence

- 28 Clause 6.10 of the TCCLEP applies to development involving the erection of a new building for which consent must not be granted unless the consent authority considers that the development exhibits design excellence.
- 29 The operative provision at cl 6.10 of the TCCLEP is found at subcl (2), in the following terms:
- (2) Development consent must not be granted to development to which this clause applies unless, in the opinion of the consent authority, the proposed development exhibits design excellence.
- 30 The means by which the opinion at subcl (2) is to be formed, is after consideration of those matters at subcl (3).
- 31 Clause 6.10(3) of the TCCLEP is in the following terms:
- (3) In considering whether the development exhibits design excellence, the consent authority must have regard to the following matters—
- (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,
- (b) whether the form and external appearance of the development will improve the quality and amenity of the public domain,
- (c) whether the development detrimentally impacts on view corridors,
- (d) the requirements of the Tweed City Centre DCP,
- (e) how the development addresses the following matters—
- (i) the suitability of the land for development,
- (ii) existing and proposed uses and use mix,

(iii) heritage issues and streetscape constraints,

(iv) the relationship of the development with other development (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,

(v) bulk, massing and modulation of buildings,

(vi) street frontage heights,

(vii) solar access controls,

(viii) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,

(ix) the achievement of the principles of ecologically sustainable development,

(x) pedestrian, cycle, vehicular and service access, circulation and requirements,

(xi) the impact on, and any proposed improvements to, the public domain.

32 The planning and urban design experts set out their agreement in Section 2(g) of the joint expert report (Exhibit 8).

33 However, as shown by Preston CJ in *Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 117 (Toga), it is not sufficient for the Court to form an opinion as to whether the proposed development does or does not exhibit design excellence by having regard to the evidence of the urban design experts alone. Instead, cl 6.10 prescribes a framework for deciding whether a development exhibits design excellence (Toga, at [70]) and the Court must have regard to the particular terms of, and answer the particular questions raised by, the matters in the design excellence provisions (Toga, at [75]).

34 That said, those issues set out at cl 6.10(3)(a), (b) and (c) are, in my view, somewhat contingent upon findings with respect to the issues within subcl 6.10(3)(e). For instance, whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved (subcl (3)(a)), must be considered by reference to the bulk, massing, and modulation of buildings at subcl (3)(e)(v) which are all aspects of architectural design.

35 Likewise, whether the form and external appearance of the proposed development will improve the quality and amenity of the public domain, being a consideration required by subcl 6.10(3)(b) of the TCCLEP, is informed, in my view, by considering the impact on, and any proposed improvements to, the public domain (subcl (3)(e)(xi)).

36 This is made clear by those matters set out at subcl (3)(a)-(c) being posed in terms of 'whether' the development the subject of the development application achieves certain things whereas those matters set out at subcl (3)(e) are posed in terms of 'how' the proposal addresses certain matters.

37 For completeness, subcl (3)(d) requires that I have regard to the Tweed City Centre DCP. The Respondent's bundle contains the Tweed Development Control Plan 2008 (TDCP), and a search of the Council's website reveals no Tweed City Centre Development Control Plan, but instead Section B2 relates to the Tweed City Centre.

38 At the outset, I record here that I am of the opinion that the land is suitable in accordance with subcl(3)(e)(i), by virtue of the site being located in the R3 zone, and the development proposed being a permissible use as noted at [16].

39 Furthermore, I consider the proposed use compatible with the existing uses in Pearl Street which include other residential flat buildings and multi dwelling housing development, and with uses proposed by reference to the land use table, height and FSR controls which permit apartment buildings from 11 to 16 storeys and an FSR of 4.5:1. Furthermore, on the basis of the unit schedule (Exhibit A, Drawing A801), the apartment mix is consistent with Section B2 of the TDCP, Control (a). Accordingly, I find the proposed use mix appropriate in accordance with subcl (3)(e)(ii).

40 I have also formed an opinion that the proposal achieves a high standard of architectural design, materials and detailing appropriate to the building type and location, in accordance with cl 6.10(3)(a) for the reasons that follow:

- (1) In respect of subcl (3)(e)(iii), while there are no heritage issues identified by the parties, I am assisted by the evidence of the planning and urban design experts in their assessment of the controls supporting a street wall height of 3 storeys, with which the proposal largely conforms, and so achieves an appropriate street frontage height in accordance with subcl (3)(e)(vi).
- (2) The proposal achieves the setbacks to boundaries required by the Objective 3F-1 of the Apartment Design Guide (ADG), with the exceptions to the southern boundary which I consider an acceptable departure when the areas of more generous setbacks are also considered.
- (3) The Applicant has also demonstrated that sites to the south are capable of accommodating residential flat buildings with separation distances and setbacks in accordance with the ADG. For these reasons, I consider the relationship of the proposed development with other development on neighbouring sites in terms of separation, setbacks, amenity and urban form, being the subject of subcl (3)(e)(iv), appropriate.
- (4) I also accept the design statement provided by the architect (Exhibit Y) that the podium, at 4 storeys, seeks to respond to the existing lower scale streetscape, with towers set back above this level. The 'two tower' scheme also results in towers of similar bulk and scale to those existing in the local area, including that at 42-44 Thomson Street and so the bulk, massing and modulation have precedence in the local area (subcl (3)(e)(v)).
- (5) On the basis of the experts agreement, contained at par 6 of the joint expert report (Exhibit 8), I accept that at least 70% of apartments in the proposal receive a minimum of 3 hours solar access between 9 am and 3 pm at mid winter, achieving the relevant solar access controls (subcl (3)(e)(vii)), and that only 5% of apartments receive no sunlight during those hours, which is an improved outcome from the 15% permitted by design criteria 3, Objective 4A-1 of the ADG.
- (6) The proposal is accompanied by a Natural Ventilation Statement prepared by Windtech dated 17 June 2022 (Exhibit S) that concludes 71.7% apartments will achieve natural ventilation, exceeding the requirement of 60% at Objective 4B-3 of the ADG, and demonstrates compliance or exceeds compliance with Objective 4A-1 of the ADG in respect of sunlight (subcl (3)(e)(viii), and (ix)).

I have considered whether the form and external appearance of the development will improve the quality and amenity of the public domain (subcl (3)(e)(b)). Having regard to the following, I find that the public domain will be improved:

- (1) The proposal includes a 1200mm wide footpath that will provide an alternative path for pedestrians, albeit limited to the site frontage. It is the oral evidence of the school principal, Mr Boyle, that children riding and walking to school currently walk on the roadway of Pearl Street. I consider the provision of a footpath, that the traffic experts agree is documented with a 2.5% crossfall (Exhibit 11, par 10), to be an improvement to the amenity of the public domain in Pearl Street (subcl (3)(e)(xi)).
- (2) On the basis of the Landscape Plans (Exhibit B), I find the proposal generally consistent with Design Control 1 – Public Domain Amenity, Part C of the TDCP, demonstrating all of the aspects of development that are said to help create quality streetscapes (Exhibit 2, folio 177), including; front and side boundary landscaping including boundary fences and walls; access and driveway design; widths, materials and location; the building's size and shape as seen from the street, front elevation and roof form.
- (3) With respect to pedestrian, cycle, vehicular and service access, circulation and requirements (subcl (3)(e)(x)), I note that concern at the adverse impact on traffic flow and on-street parking is a common thread that runs through many of the public submissions.
- (4) The concern is put by one resident of the street in the following terms:

“(a) The Road is not wide enough already, parking already is constricted.
 (b) The school and church create traffic congestion already
 (c) the number of proposed units and car numbers are grossly over the ability of the street to manage.
 (d) construction noise, cement dust, cement trucks and so on
 (e) garbage skip bins to be located on kerb as in Bay St development
 ...”

(Ex 2, folios 144-145)
- (5) Pearl Street is described in the Supplementary Traffic Impact Assessment (Exhibit Q) as follows:

“A local road that traverses north-south between Frances Street in the north and Florence Street in the south. It is subject to a 50km/h speed zoning and carries a single lane of traffic in each direction, permitting kerbside parking along either side of the road.”
- (6) Traffic generated by the proposal is assessed as 51 vehicle trips per hour in the morning peak period, and 31 vehicle trips in the evening peak period. 75% of traffic likely to enter and exit Pearl Street from Frances Street to the north.
- (7) Traffic surveys were undertaken on Wednesday 27 April 2022. While public submissions state the period in which the survey was undertaken did not provide for events at the Church, I note the surveys were conducted during what is identified as the morning peak period (7am-9am), and the evening peak

period (3pm-6pm), which I regard as appropriate, and which found peak period for on-street parking was between 3.45pm-4pm, presumably related to school pick up.

- (8) The parties agree that the number of parking spaces provided on site for residents and visitors conforms to the requirements of Section A2 of the TDCP that deals with Site Access and Parking.
- (9) The resident at No 6 Pearl Street noted that the traffic impacts worsen during garbage collection times, and provides photographic evidence (Exhibit 7) of bins located on Pearl Street, and those on Enid Street, which is a wider street.
- (10) The Operational Waste Management Plan prepared by Elephants Foot dated 13 June 2022 (Exhibit N) identifies that waste collection is to occur onsite, with all waste bins to be located in the bin holding room.
- (11) Likewise, the Amended Traffic Impact Assessment (Exhibit Q) prepared by Traffix dated June 2022 confirms, at Section 5.5, provision of a servicing bay sized to accommodate a 9.5m waste collection vehicle, and larger vehicles such as removalist vans and the like.
- (12) Relevantly, the supplementary traffic joint expert report (Exhibit 11) provides, at Annexure F, swept path analysis of a 9.5m Council waste vehicle and, at Annexure H, sectional drawings to demonstrate sufficient vertical clearance for a 12.5m Heavy Rigid Vehicle.

- (13) The experts, at par 31 of Exhibit 11 agree:

Both experts agree the vertical clearance tests (including undercarriage) undertaken for a 12.5m long Heavy Rigid Vehicle (HRV) provided in **Annexure H** demonstrates compliant headroom and satisfactory undercarriage clearance. Accordingly, a Typical Side Lift Council Garbage Truck being 9.5m long would readily be accommodated and will operate satisfactorily with sufficient headroom.

- (14) Additionally, I note Condition 41 of the agreed conditions of consent requires further verification of traffic movement prior to the issue of the Construction Certificate as follows:

Prior to the issue of a construction certificate, the Applicant shall submit and obtain approval from Councils General Manager or delegate, a detailed "Design" certificate from an experienced and qualified traffic engineer with tertiary qualifications. The certification shall certify that the design of the following matters comply with relevant clauses of AS2890.1-2004 (cars and motorcycles), AS2890.2:2018 (commercial vehicles, restricted in length to Council's 9.5m long Waste Collection Vehicle), AS2890.6-2009 (disabled parking) and AS2890.3-2015 (bicycles):

- (a) The vehicular access to and from the site.
- (b) Internal vehicular circulation ramps.
- (c) Off-street commercial vehicle loading area / bay and associated access / manoeuvring area, limited to a maximum rigid truck length of 9.5m.
- (d) Off-street parking provision and compliant access / manoeuvring for cars, motorcycles and bicycles.
- (e) That the above listed matters have been designed in accordance with the approved plans and specifications.
- (f) That all vehicles outlined above can enter and leave the site in a forward direction.
- (g) The sight line for drivers of vehicles leaving the Site complies with *Clause 3.2.4* and *Figure 3.3* of AS2890.1-2004 with design certification of that aspect included.

- (15)

I accept the conclusion of the Amended Traffic Impact Assessment that as a result of the proposed development, some increase in delay at intersections of Pearl Street with Frances and Florence Street, and at the intersection of Frances and Wharf Street will be experienced, but that the Level of Service (LoS) remains at the highest level of LoS.

- (16) With respect to the concern for student safety expressed by the Principal of St Joseph's School, I note the Supplementary Traffic joint expert records the agreement of the experts that pedestrian sight triangles are clear of vertical obstructions and are noted on the amended plans, that the sight distance diagram provided in Annexure E demonstrates that the minimum stopping sight distance for a 50km/h frontage road is achieved along Pearl Street in both directions and swept path tests confirm that large vehicles can enter and exit the site.
- (17) In considering whether the development detrimentally impacts on view corridors (subcl (3)(c)), I note the objection of the resident of 42-44 Thomson Street to the view assessment prepared by in support of the development application by Dr Richard Lamb dated 19 July 2022 (Exhibit O) (View Assessment).
- (18) In the View Assessment, Dr Lamb acknowledges that while there is a substantial gap between the 2 towers of the proposed development, the orientation of 42-44 Thomson Street relative to the view, is such that "there would not be a substantial view corridor retained between the proposed towers" (par 60).
- (19) Furthermore, Dr Lamb summarises the extent of views currently enjoyed from Unit 11, and concludes that views directly north-east to east would be lost (par 64). The view loss is depicted in photomontages on p49 of the View Assessment.
- (20) I accept that the views north east to the horizon formed by the ocean are of high value to the residents of Unit 11, and similarly to other units in 42-44 Thomson Street.
- (21) I am also assisted by the agreement of the town planning, urban design and view experts, at pp3-4 of the joint expert report, expressed as follows:
- "The experts agreed the View Sharing Report prepared by Richard Lamb and Associates satisfactorily demonstrates the view impacts on public domain views and view sharing with private dwellings are acceptable, and as such this contention has been resolved and is no longer pressed. This conclusion has been reached with consideration of the principles set out in Tenacity. In essence, whilst the proposal will result in varying degrees of view loss, the degree of view loss is a product of development undertaken in accordance with the planning controls. The "two tower" scheme now before the Court has benefits in terms of protecting additional views from some properties compared with a single tower scheme. While it may be that a scheme that took advantage of "bonus height" provisions may result in reduced tower footprints and further view benefits that is not the application before the Court. The tower footprints proposed are acceptable in light of the LEP and DCP controls and the ADG and it is agreed that there is not a more skilful design available that would achieve the same amenity for the development. The impacts are acceptable and all experts agree with the methodology and conclusions set out in Dr Lamb's report."
- (22) I agree that the view loss results from a building that conforms to the relevant planning controls, and in the case of height, substantially below the maximum height of 49.5m.
- (23)

I am also assisted by the illustration of four strategies titled 'site utilisation options', contained in the architectural plans A012-A015 inclusive which support the conclusions of the experts, to the effect that a 'two tower' scheme has benefits in terms of view sharing from certain properties on Thomson Street.

(24) There is no doubt that the views from 42-44 Thomson Street are impacted by the proposed development. However, I have formed an opinion the development takes steps to limit the impact it has on the views from Thomson Street to the ocean beyond.

42 Accordingly, for the reasons set out above at [38]-[41(24)], I consider the proposed development exhibits design excellence.

State environmental planning policy No 65 – Design quality of residential apartment development (SEPP65)

43 As the proposal is for residential apartment development, the provisions of SEPP 65 apply.

44 Clause 28 of SEPP 65 requires a consent authority to take into consideration, in addition to any other matters that are required to be, or may be, taken into consideration, the following:

- (a) the advice (if any) obtained from the design review panel, and
- (b) the design quality of the development when evaluated in accordance with the design quality principles, and
- (c) the Apartment Design Guide.

45 Where an application relates to residential apartment development, cl 50(1A) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation) requires a development application to 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.

46 The statement must conform to the provisions of cl 50(1AB) of the EPA Regulation, which include attestations in relation to cl 28(2)(b) and (c) of SEPP 65, and assists the Court's consideration of cl 30(2) as to whether adequate regard has been given to the design quality principles, and the objectives specified in the ADG for the relevant design criteria.

47 The statement prepared in support of the development application did not conform to the requirements of cl 50(1AB) of the EPA Regulation. The Applicant was directed to provide a statement in the required form, later marked Exhibit Y.

48 I am satisfied that the statement provided by Mr Tony Owen (Reg No.4907) is in a complying form and adequately demonstrates that the development is largely consistent with the design quality principles, and achieves the objectives and design criteria of the ADG.

49 I am also of the opinion that the proposal is consistent with those standards at cl 30(1) of SEPP 65 that cannot be used as grounds to refuse development consent.

50 That said, I note the proposal encroaches by 150mm on the setback of 6m required by design criteria 1, under Objective 3F-1, to the south of the site. The statement asserts the encroachment is caused by the large vertical fins and windows that are angled to

aid privacy, which is the objective of 3F-1. On this basis I consider the non-conformance acceptable.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

- 51 The application is accompanied by a BASIX certificate (Cert No. 1210514M_03, dated 31 August 2022) prepared by ESD Synergy Pty Ltd (Exhibit C, Tab 5) in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the EPA Regulation.

State Environmental Planning Policy (Infrastructure) 2007

- 52 Essential Energy, under s 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP), provided a response to the development application dated 29 September 2021 (Exhibit 2, folio 44).
- 53 Conditions of consent provided by Essential Energy are contained at Condition 20-22 of the agreed conditions of consent.

Water Management Act 2000

- 54 The proposal is integrated development, pursuant to s 4.46 of the EPA Act and by virtue of s 90(2) of the *Water Management Act 2000*.
- 55 On 18 December 2021, Water NSW issued general terms of approval, noting that the Applicant must obtain approval from Water Supply Work after any consent is granted and before the commencement of any work or activity.
- 56 The terms provided by Water NSW are incorporated into the agreed conditions of consent.

Contamination

- 57 Consistent with the terms of cl 7 of State Environmental Planning Policy No 55—Remediation of Land, the requirements of which were transferred to State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazard SEPP) on 1 March 2022, I have given consideration to the potential contamination of the site.
- 58 The Applicant relies upon a Preliminary Site Investigation report (PSI Report), prepared dated 16 July 2021 (Exhibit J), and a Detailed Site Investigation prepared by EI Australia dated 16 June 2022 (Exhibit U). The conclusions of those reports are that the site is suitable for the development proposed, subject to recommendations that are incorporated in the agreed conditions of consent.

Public submissions

Traffic, parking and pedestrian safety

- 59 In response to the school principal's concerns at the lack of pedestrian crossings, the Court sought assistance from the Respondent as to whether works to upgrade footpaths, cycleways, intersections or the like are incorporated in the Respondent's

Contributions Plan, and to which contributions imposed by the conditions of consent are directed, pursuant to s 7.11 of the EPA Act.

60 The Respondent confirmed that the Contributions Plan does not provide for any upgrades to the intersections adjacent to St Joseph's Primary, and no other Strategic plans for footpath / cycle ways are endorsed in this vicinity.

Wind study

61 The resident of 11/42-44 Thomson Street identified strong winds as feature of the area.

62 The Applicant relies upon a Pedestrian Wind Environment Study (Wind Study) (Exhibit R), prepared by Windtech dated 15 June 2022.

63 The Executive Summary notes:

The results of this assessment indicate that the development has incorporated several design features and wind mitigating strategies and is expected to be suitable for the intended use for the majority of the outdoor trafficable areas.

64 However, a number of recommendations contained at Section 5.3 of the Wind Study were not evident on the architectural plans at Exhibit A, including, relevantly:

- Ground floor: Inclusion of a 1.2m tall impermeable fencing along the eastern terraces, a change in intertenancy screens to the southern side of the site, and new impermeable awnings to the communal open space to the west of the site.
- Levels 2-10: Inclusion of 2m tall impermeable balustrades along the eastern edges of the eastern balconies.
- Level 11: Inclusion of 3m tall intertenancy screens along the eastern and western aspect terraces for both towers, and inclusion of 2m tall impermeable balustrades along the perimeter of the terraces for both towers.

65 As the Wind Study pre-dates the architectural plans at Exhibit A, the Applicant was directed to advise on whether the development the subject of the development application was intended to incorporate the recommendations at [64].

66 On the final day of the hearing, the Applicant provided a Pedestrian Wind Environment Statement letter prepared by Windtech, dated 9 September 2022 (Exhibit Z) reaffirming the recommendations in the Wind Study.

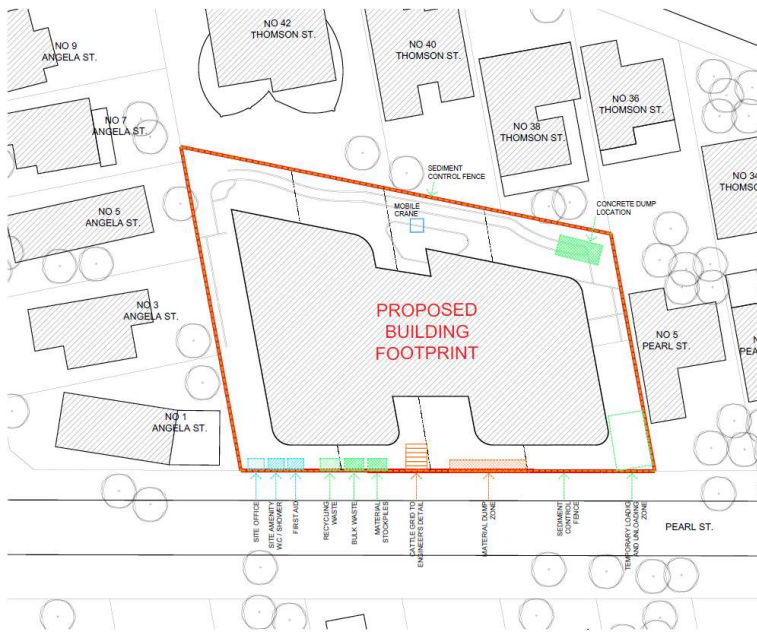
67 The Court granted an adjournment and directed that planning and urban design experts confer on the impact of the recommendations on the proposal. A supplementary joint report was provided to the Court late in the day, absent sketches referred to in the joint expert report.

68 To assist the Court, the experts were called to provide oral evidence in respect of the supplementary report. The experts agreed the extent and nature of additional screening required by the Wind Study, and agreed the visual impact on the proposal was acceptable, and did not disturb the consensus of the experts that the development as proposed achieves design excellence.

69 A condition of consent is proposed to require the recommendations so agreed to be incorporated into the plans for the Construction Certificate.

Construction impacts

70 A resident expressed concern at the obstacle posed by skip bins to traffic during construction. I note architectural drawing A431 depicts the Construction Waste Management Plan (CWMP), re-produced in part below.



71 The CWMP shows all amenities relied on during construction are located within the site, including Material stockpiles, bulk waste and the like.

72 The written submission of Mr Stevenson dated 24 August 2022 (Ex 2, folios 147-148) identifies a depth and volume of excavated material required to be removed from the site, leading to the possible dewatering of the site during construction that could destabilise adjoining properties, and uncertainty about the level of detail contained in the geotechnical investigation completed by the Applicant.

73 The Geotechnical Investigation prepared by EI Australia dated 13 September 2021 (Exhibit H) recommended additional investigation be undertaken in respect of site conditions, and proposed construction methods.

74 The joint expert report prepared by the Geotechnical experts (Exhibit 4) agreed that further information was required in respect of geotechnical and groundwater issues.

75 A Structural Design Review, undertaken by ACSES Engineers (Exhibit C, tab 2) considers a laterally braced Secant Pile Wall as the appropriate method of shoring during excavation, comprising 600mm diameter piles.

76 A Hydrogeological assessment, prepared by EI Australia, dated 31 August 2022 (Exhibit C, Tab 3) assessed subsurface conditions, permeability of residual soil, groundwater and the proposed method of shoring on the site during excavation. The predicted groundwater drawdown and settlement during dewatering is between 1.7mm and 3.6mm, which is considered negligible and will not adversely affect neighbouring properties (p 8).

77 The Dewatering Management Plan prepared by EI Australia dated 16 June 2022 (Exhibit V) states the basement will be fully tanked and permanent dewatering will not be required; that groundwater should be discharged into a vessel, and that any water

discharged into the local stormwater system must be monitored by flow meter.
Groundwater dewatering is to be undertaken consistent with the Dewatering Management Plan, by operation of Condition 112 of the conditions of consent.

Flooding

- 78 A resident of No 18 Pearl Street referred to past flooding events as the basis of concern for flooding in the vicinity. The site is not located on a flood control map, and the proposed development incorporates onsite detention of water. A condition of consent limits the peak stormwater flow rate that may be discharged from the site to the public realm, in events of intensity up to the ARI 100 year design storm.

Conclusion

- 79 For the reasons I have already stated, I find the development application, as amended, warrants the grant of consent, pursuant to s 4.16 of the EPA Act, and subject to conditions that are agreed between the parties.
- 80 I note the Respondent has agreed under cl 55 of the EPA Regulation, as the relevant consent authority, to the Applicant amending the development application. I also note that evidence of the amended application being lodged on the NSW Planning Portal was provided to the Court on 13 September 2022.

Orders

- 81 The Court orders that:
- (1) The appeal is upheld.
 - (2) Development application DA 21/0689 for the demolition of existing buildings and the construction of a 12 storey residential flat building containing 96 units and 3 levels of basement parking (in addition to 2 part levels), tree removal, site consolidation and strata subdivision is determined by the grant of consent, subject to conditions of consent at Annexure A.
 - (3) All Exhibits are returned, but for Exhibits A, D and 9.

.....

T Horton

Commissioner of the Court

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Decision last updated: 04 November 2022