



Land and Environment Court  
New South Wales

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Case Name: Castle Hill Panorama Pty Ltd v The Hills Shire Council

Medium Neutral Citation: [2023] NSWLEC 24

Hearing Date(s): 22, 23 and 27 February, 2 March 2023

Date of Orders: 3 and 17 March 2023

Decision Date: 17 March 2023

Jurisdiction: Class 1

Before: Moore J

Decision: See orders at [53] and in Annexure A

Catchwords: APPEAL - proposed amendment to concept development approval - Council raises jurisdictional and merit issues - Applicant and the Council reach agreement on merit issues - Applicant proposes method to resolve jurisdictional issue - Council accents jurisdictional issue resolved - application to dispense with compliance with maximum building height - consideration of tests set by the cl 4.6 of the Hills Local Environmental Plan 2012 (the LEP) - tests satisfied - dispensation from compliance with maximum building height granted - proposed consent orders - necessary satisfaction on Council's jurisdictional contention found - establishment of satisfaction with cl 4.6 tests - appropriate to give effect to proposed consent orders - orders made modifying concept development approval  
APPEAL - development application for construction of development to give effect to concept development approval - development application contingent on modification of concept approval - concept approval modified - certificate pursuant to cl 4(17)(5) of the Environmental Planning and Assessment Regulation

2000 provided - other necessary documents  
provided - cl 4.6 request granted - cl 9.5(4) matters  
considered - development consent granted subject to  
conditions

Legislation Cited: Environmental Planning and Assessment Act 1979  
Environmental Planning and Assessment Regulation  
2021  
Environmental Planning and Assessment Regulation  
2000  
The Hills Local Environmental Plan 2012

Cases Cited: RebelMH Neutral Bay Pty Limited v North Sydney  
Council [2019] NSWCA 130

Category: Principal judgment

Parties: Castle Hill Panorama Pty Ltd (Applicant)  
The Hills Shire Council (Respondent)

Representation: Counsel:  
Mr M Hall SC (Applicant)  
Mr A Seton, solicitor (Respondent)  
  
Solicitors:  
SWS Lawyers (Applicant)  
Marsdens Law Group (Respondent)

File Number(s): 174486 and 174536 of 2022

Publication Restriction: No

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## **JUDGMENT**

### **Introduction**

- 1 This decision addresses the resolution of two Class 1 proceedings concerning a large residential development in Castle Hill, some 600 metres or so from the Castle Hill Metro Station.
- 2 Castle Hill Panorama Pty Ltd (the Company) has assembled a development site comprising nearly all the allotments in a block bounded by Hughes Avenue and Cadman Crescent at Castle Hill (the site).
- 3 As a consequence of the Sydney Metro project, significant zoning changes have been effected to encourage higher density development in the general proximity of the metro station. Relevant to these two Class 1 appeals, the site is now zoned R4 - High Density Residential pursuant to The Hills Local Environmental Plan 2019 (the LEP).

### **Representation**

- 4 The Company was represented by Mr M Hall SC and The Hills Shire Council (the Council) by Mr A Seton, solicitor. Mr Hall provided succinct and helpful written submissions on the jurisdictional issue raised by the Council - one dealt with later in this decision.

## **The proposed development**

- 5 On 20 February 2020, the Company was granted a Concept Development Consent for five apartment blocks to be located on the site. A generous open space was approved in the centre of the site, with the five proposed apartment buildings being located around its perimeter. It is unnecessary to set out any image of the site or any numerical details of the proposed development. It is sufficient to note, for present purposes, that elements of the Company's approved concept development envisaged heights of the built form on the site that exceeded the relevant permitted maximum height (21 metres) applicable to the site by virtue of the operation of cl 4.3 of the LEP and the relevant sheet of the Height of Buildings Map.
- 6 On 25 January 2022, the Company applied to the Council seeking approval to amend the concept development approval for the site. It is appropriate to refer to this as the "first application". The first application sought to vary the concept to increase the density of the proposed development and to add further height to buildings approved as part of the concept plan.
- 7 On 25 January 2022, the Company also lodged a further development application with the Council, seeking development consent for the erection of five residential apartment buildings on the site, with those buildings proposed to be in conformity with the Company's proposed amendments to its concept plan. It is appropriate to refer to this as the "second application".
- 8 On 16 June 2022, the Company commenced Class 1 appeals against the deemed refusal of the first application (No 174486 of 2022) and of the second application (No 174536 of 2022).
- 9 The two proceedings have travelled together through the court process. They were subject to a conciliation conference before Chilcott C, a conciliation process which was unsuccessful. The matter was subsequently set down for a three-day contested hearing. The concurrent hearing of the two Class 1 appeals was assigned to me by the Chief Judge, primarily because the first contention raised by the Council in its Statements of Facts and Contentions for the two proceedings proposed that there was a jurisdictional impediment to the granting of approval to either the first or the second application.

- 10 It is also necessary to note that there were no public submissions in opposition to the Company's proposed development, this obviating the necessity for any consideration of any such submissions arising by virtue of s 4.15(1)(d) of the *Environmental Planning and Assessment Act 1979* (the EPA Act) or for the hearing to commence with a site inspection (as would otherwise have been conventional).
- 11 It is also to be noted that, in addition, the Council also raised a significant number of what it said were merit inadequacies of the proposed development. It also pleaded that there were a number of aspects of the proposed development where insufficient information had been provided by the Company.
- 12 How these matters were all resolved is later set out to the extent necessary.

### **The hearing**

- 13 The hearing of the matters commenced on 22 February 2023. At the commencement of the hearing, I was advised that the Company and the Council had resolved all the outstanding merit matters that had been raised by the Council in its Statements of Facts and Contentions.
- 14 Mr Seton also advised that the Council had now been satisfied that there was an appropriate, statutorily compliant pathway so that the jurisdictional barrier, which had been pleaded by the Council, could be overcome. The Company and the Council had, therefore, agreed that, subject to my satisfaction as to the resolution of the jurisdictional issue and the various mandatory matters of satisfaction or consideration needing to be addressed, I should make orders giving effect to approval of the Company's first application (being the proposal to amend the concept plan).
- 15 It was also agreed that there were several formal steps required before both matters could be finalised - including the giving of a certificate pursuant to cl 97 of the Environmental Planning and Assessment Regulation 2000 - the Regulation (this being the relevant regulation applicable to both of the Company's applications as the Environmental Planning and Assessment Regulation 2021 was not operative for these purposes). Other required documents (particularly a revised BASIX certificate) also needed to be

provided before I would be able to grant approval to the Company's second application.

- 16 The proceedings on 22 February 2023, commenced with the legal representatives of the Council and the Company tendering the significant volume of documentary material providing the necessary evidentiary underpinning of the matters which I was required to consider.
- 17 Mr Seton then took me through the relevant statutory provisions, including noting that a dispensation request had been made pursuant to cl 4.6 of the LEP because the Company was seeking to breach the maximum building height development standard set for the site by the operation of cl 4.3 Height of Buildings in the LEP. It is later necessary to explain what subsequently unfolded concerning the dispensation request as matters arising on the second day of the hearing (23 February 2023) and at a subsequent short hearing on 1 March 2023.
- 18 It is sufficient, for present purposes, to note that, at a further short hearing on 2 March 2023, I indicated that, on the basis of additional documentation tendered on that day, I was satisfied that each of these proceedings should be finalised by making orders having the effect of granting the Company the approval that it sought. The formal process to do so resulted in me making orders, on 3 March 2023, finalising Matter No 174486 of 2022. As there were some necessary steps consequent on the making of those orders requiring to be completed prior to making orders finalising Matter No 174536 of 2022, I did not make the finalising orders in those proceedings until delivery of this decision on 17 March 2023.
- 19 On 2 March 2023, I also indicated, in addition to my intention to make orders finalising each of the Class 1 proceedings here involved, it was necessary that I provide written reasons for doing so (with this decision including the finalising orders in Matter No 174536 of 2022).
- 20 These are my reasons for making the orders finalising each of the proceedings and granting approvals in the terms agreed between the Company and the Council.

- 21 The orders in Matter No 174486 of 2022 are reproduced at Annexure A to this decision and the orders in Matter No 174536 of 2022 are reproduced at the conclusion of this decision. The conditions of consent attaching to the orders in Annexure A are reproduced as Annexure B and the conditions of consent attaching to the orders in Matter No 174536 of 2022 are reproduced as Annexure C.

## **Relevant statutory and planning provisions**

### *Introduction*

- 22 Elements of the EPA Act, the Regulation and the LEP are engaged for my determination of these two Class 1 appeals. The relevant provisions are addressed below.

### *The EPA Act and the Regulation*

- 23 The relevant provisions of the EPA Act and the Regulation (together with an explanation of how they work in combination) are set out in the extract from Mr Hall's written submissions that address the Council's jurisdictional contention. The extract is set out at [34] below. It is unnecessary to reproduce, here, all the provisions of the EPA Act or Regulation which are addressed by and, relevantly, set out in Mr Hall's jurisdictional discussion.

### *The LEP*

- 24 A combination of cl 4.3 - Height of Buildings of the LEP and the relevant sheet of the Height of Buildings Map sets height limits for buildings on sites within the Council's local government area. Such height limits are development standards. It is sufficient here to note this without setting out the LEP clause.
- 25 The LEP also provides, by cl 4.6, a process by which dispensation from compliance with a development standard can be sought. It is the existence of this process, and that the clause sets tests requiring satisfaction before dispensation can be granted, that is critical in these matters here dealt with rather than the details of those tests. This clause is in the following terms:

#### **4.6 Exceptions to development standards**

- (1) The objectives of this clause are as follows—

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

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

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

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

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

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

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

(a) the consent authority is satisfied that—

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

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

(b) ...

(5)-(8) ...

26 As can be seen from the above elements of cl 4.6 of the LEP, the consent authority (here me, standing in the shoes of the Council) is required to be satisfied with respect to matters set out in cl 4.6(3) and (4). How my state of satisfaction was subsequently achieved, based on cl 4.6; the Company's initial dispensation requests; and several subsequent revisions of them, is later set out in some detail.

27 The LEP also contains special provisions in Part 9 Showground Station Precinct. It is to be noted that the site is within this precinct.

28 First, Part 9 requires the preparation of a specific development control plan for the precinct. It is not in dispute that such a plan has been prepared for, and adopted by, the Council.



- 29 Part 9 also includes a special provision setting out the need for new buildings within the Showground Station precinct to demonstrate that they exhibit design excellence. The relevant matters which I must have regard, in my assessment as to whether the Company's proposed development exhibits design excellence, are set out in cl 9.5(4) of the LEP. The relevant matters to which I must have regard in doing so are set out below:

#### **9.5 Design excellence**

(1) ...

(2) ...

(3) ...

(4) 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, arrangement 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) whether the development detrimentally impacts on any land protected by solar access controls established in the development control plan referred to in clause 9.4,

(e) the requirements of the development control plan referred to in clause 9.4,

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

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

- (ix) pedestrian, cycle, vehicular and service access, circulation and requirements,
- (x) the impact on, and any proposed improvements to, the public domain,
- (xi) the impact on any special character area,
- (xii) achieving appropriate interfaces at ground level between the building and the public domain,
- (xiii) excellence and integration of landscape design.

(5) In addition, development consent must not be granted to development to which this clause applies unless—

(a) if the development is in respect of a building that is, or will be, higher than 21 metres or 6 storeys (or both) but not higher than 66 metres or 20 storeys (or both)—

(i) a design review panel reviews the development, and

(ii) the consent authority takes into account the findings of the design review panel, or

(b) ...

(6) ...

(7) In this clause—

....

....

***design review panel*** means a panel of 3 or more persons established by the consent authority for the purposes of this clause and approved by the NSW Government Architect.

30 It is to be noted that the Company's proposed development had been appropriately assessed by a design review panel as required by cl 9.5(5) of the LEP as four of the proposed buildings are intended to be higher than 21 metres (but not higher than 66 metres or 20 storeys). I have read the report of the design review panel and taken it into account in concluding that the Company's proposed development, in its now amended form, should be granted development consent. I note that the amendments to Building C are ameliorative and responsive to the panel's comments.

31 Part 9 also includes a special provision setting the maximum number of dwellings permitted in the precinct.

## 9.8 Maximum number of dwellings

- (1) The consent authority must not grant development consent to development that results in more than 5,000 dwellings on land within the Showground Station Precinct.
- (2) A dwelling that existed before 15 December 2017 is not to be counted for the purposes of subclause (1).
- (3) This clause does not apply to a concept development application, within the meaning of the Act, section 4.22, unless the concept development application—
  - (a) is for staged development, and
  - (b) sets out detailed proposals for the first stage of development.

32 With respect to this provision, the Council read an affidavit from Ms Cynthia Dugan, the Council's Principal Coordinator Development Assessment, which deposed to the fact that granting the Company's applications would not cause the limit in cl 9.8 of the LEP to be breached.

### **The jurisdictional issue**

33 The jurisdictional contention raised by the Council proposing that there was no proper basis upon which either the first or the second application could be approved was set out in the Statements of Facts and Contentions which had been filed for the Council in each matter. Those Statements of Facts and Contentions were tendered as part of the evidence in each of these proceedings. The jurisdictional contention was in slightly different terms, depending on the matter in which it was pleaded, but they were to the same effect in terms. The contentions and their supporting particularisations are set out below, with the contention and its particulars in Matter No 174486 of 2022 reproduced first:

#### **INCONSISTENCY WITH CONCEPT DEVELOPMENT APPLICATION**

The development application must be refused because there is no power to approve a development application that is inconsistent with a consent for the concept proposal for the development of the site.

Particulars

(a) Section 4.24 of the EPA Act states:

*"4.24 Status of concept development applications and consents (cf previous s 83D)*

*The provisions of or made under this or any other Act relating to development applications and development consents apply, except as otherwise provided by or under this or any other Act, to a concept*

*development application and a development consent granted on the determination of any such application.*

*While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.*

*Subsection (2) does not prevent the modification in accordance with this Act of a consent granted on the determination of a concept development application.”*

(b) Concept Development Consent No. 1262/2019/JP as approved by the Sydney Central City Planning Panel on 20 February 2020 relevantly included:

- (i) A dwelling cap of 228 apartments, with a set unit mix;
- (ii) A maximum of 4 storeys for Building C;
- (iii) Heights of Buildings A, B, D and E as set out in paragraph 21 of the Facts;
- (iv) A total of 310 car parking spaces;
- (v) 4,469m<sup>2</sup> (36%) communal open space; and
- (vi) Did not include a neighbourhood shop.

(c) The development application proposed changes to the number of dwellings and the dwelling mix, the number of storeys of Building C, the building envelopes for Buildings A, B, D and E, the number of car parking spaces, communal open space, and proposed provision of a neighbourhood shop, each of which is inconsistent with Concept Development Consent No.1262/2019/JP.

(d) The development application must be refused because the proposed development is inconsistent with Concept Development Consent No.1262/2019/JP, which is contrary to section 4.24(2) of the EPA Act.

with the contention and its particulars in Matter No 174536 of 2022 being:

## **B1 - CONTENTIONS THAT THE APPLICATION BE REFUSED**

### **INCONSISTENCY WITH CONCEPT DEVELOPMENT APPLICATION**

1 The development application must be refused because the application is inconsistent with Concept Development Consent 1262/2019/JP.

Particulars

(a) Section 4.24 of the EPA Act, relevantly states:

*“4.24 Status of concept development applications and consents (cf previous s 83D)*

*(2) While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.”*

(b) The development application is based upon amendments proposed pursuant to Development Application No. 1110/2022/JP (the subject of Land and Environment Court Proceedings No. 2022/00174486).

(c) Until such time as Development Application No. 1110/2022/JP is approved, the development application is inconsistent with the existing stage 1 concept approval, which is contrary to section 4.2.4(2) of the EP&A Act, and cannot be approved.

- 34 I have earlier noted that Mr Hall had provided succinct and helpful written submissions. Those submissions set out the basis upon which it was advanced for the Company that the jurisdictional impediment raised by the Council was one which was capable of resolution. It is sufficient, for present purposes, to set out the relevant extract from Mr Hall's written submissions addressing this point. The submissions said:

**Jurisdiction**

4. The Respondent had raised the following matters relevant to the permissibility of the development and therefore the jurisdiction of the Court.

4.1 Inconsistency with the approved concept plan.

4.2 Height exceedance.

4.3 Floor Space Ratio

5. All other contentions raised by the Respondent went to merits issues. The consent authority and the Respondent now accept that the amended plan satisfying those contentions.

**(A) Consistency with Concept Plan**

6. A Concept Plan DA 1262/2019/JP for the subject site was approved by the Sydney Central City Planning Panel on 20 February 2020.

7. Section 4.24(2) of the EP&A Act, relevantly states that:

*While any consent granted on the determination of a concept development application for a site remains in force, the determination of any further development application in respect of the site cannot be inconsistent with the consent for the concept proposals for the development of the site.*

8. The Stage 2 development application 1112/2022/JP (in proceeding 536) is not consistent with the approved concept plan for this site.

9. The following procedure to amend the concept plan approval, so that the prohibition against that inconsistency is cured, allows the Court to approve the Stage 2 development application in the exercise of its discretion.

10. A subsequent development consent can modify an earlier development consent [*Waverley Council & Hairis Architects* (2002) 123 LGERA 100; and *Progress and Securities v North Sydney Council* (1988) 96 LGERA 236].

11. There is no jurisdictional bar to the Court approving DA 1110/2022/JP (in proceeding 486) subject to a condition that the existing concept approval 1262/2019/JP is either surrendered or modified. That is proposed condition 1 of that approval. The proposed modifications will make the amended concept plan consistent with DA 1112/2022/JP.

12. Section 4.17(5) of the EP&A Act provides that if a consent authority imposes a condition requiring the modification or surrender of a consent granted under that Act, the consent may be modified or surrendered subject to and in accordance with the Regulations.

13. Under the savings provisions set out in Schedule 6 of the *Environmental Planning and Assessment Regulation 2021*, the *Environmental Planning and Assessment Regulation 2000* continues to apply instead of the 2021 regulation to a development application made but not finally determined before 1 March 2022. The subject development application was lodged on 25 January 2022 and not determined before 1 March 2022. Therefore, the EP&A Regulation 2000 continues to apply to this application.

14. Clause 97 of the EP&A Regulation 2000 makes provision with respect to the modification or surrender of development consent and the content of the "Notice" under s4.17(5) of the EP&A Act that is required to be served on the consent authority. Clause 97(2) and provides that: "*A duly signed and delivered notice of modification ...of a development consent...*

*(a) takes effect when it is received by the consent authority, and*

*(b) operates, according to its terms, to modify ...the development consent to which it relates".*

15. There is therefore no response required from the consent authority and the notice duly served has the immediate effect of automatically amending the earlier concept plan consent.

16. The consent authority in this case is the Sydney Central City Planning Panel.

17. Therefore, once the notice is given, any inconsistency between the Stage 2 development application and the concept approval is removed and the Stage 2 development application can be approved.

35 It is to be noted that, during the course of the hearing on 22 February 2023, Mr Hall, in his oral submissions, took me through the matters outlined above.

36 It is also to be noted that Mr Seton indicated that the Council accepted that the path to resolution proposed on behalf of the Company was an appropriate and sufficient basis upon which the Council's concerns set out in the jurisdictional contention reproduced above were satisfactorily resolved.

37 Independently, I have considered Mr Hall's written submissions on this point. I am satisfied that they identify a proper basis by which the Council's jurisdictional concerns are able to be resolved.

- 38 I am satisfied that the jurisdictional contention originally pressed by the Council, with respect to both the first and second applications, no longer stands as an impediment to their approval.

**Dispensation from compliance with the requirements of cl 4.3 of the LEP**

- 39 The combination of cl 4.3 - Height of Buildings of the LEP and the relevant sheet of the Height of Buildings Map set a height limit for buildings on the site of 21 metres. Such a height limit is a development standard. Dispensation from compliance with a development standard can be granted in response to a request being made by a development applicant pursuant to cl 4.6 of the LEP, provided that that request satisfies the relevant tests mandated by that clause.
- 40 I must be independently satisfied, standing in the shoes of the Council as the consent authority, that the dispensation request made by the Company in support of each of the applications satisfies those tests (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [51]).
- 41 As part of the documentation tendered on 22 February 2023, copies of a cl 4.6 dispensation request were provided for each of the Company's applications. These dispensation requests were in identical terms. I indicated to Mr Hall that, as I was taken to the terms of these documents late in the hearing on that day, I would examine the cl 4.6 requests overnight.
- 42 The following day, having carefully read the document, I outlined to Mr Hall my reasons for concluding that I was not able to be satisfied that relevant matters required by the clause had been addressed in a fashion which would permit me to grant dispensation from compliance with the height of buildings development standard for each of the Company's applications. I indicated that I was prepared to provide, under the circumstances where the Council no longer objected to either of the Company's applications, an opportunity for the Company to tender, and seek to rely upon, a revised cl 4.6 request in each of the proceedings. Such a revised cl 4.6 request in support of each of the Company's applications was provided to me the following morning.
- 43 When the hearing resumed later on 23 February 2023, I explained to Mr Hall the reasons why I was not satisfied that the revised cl 4.6 requests satisfied the tests requiring to be addressed by the clause. I indicated to Mr Hall that I was

prepared to provide a further opportunity for revision of the cl 4.6 requests to address the matters I had outlined to him as residual deficiencies remaining unresolved in the revised cl 4.6 requests. I adjourned the matters until 2 March 2023 to permit this to be done.

- 44 At the further hearing of the matter on the afternoon of 2 March 2023, Mr Hall tendered copies of an addendum document proposed to be added to each of the revised cl 4.6 requests which had been tendered at the hearing on 23 February 2023. The addendum document had been provided to me earlier that day. Having read that document, I was able to indicate to Mr Hall that, on the basis of the revised cl 4.6 request tendered on 23 February 2023 and the addendum document added to it on 2 March 2023, I was now satisfied that the mandatory tests set by cl 4.6 of the LEP had been satisfied, and that the Company's dispensation requests to be permitted to breach the development standard set by cl 4.3 of the LEP warranted being granted.

**Matters in cl 9.5 of the LEP required to be considered.**

- 45 I have earlier set out the terms of cl 9.5(4) of the LEP. This provision lists the matters to which I am required to give consideration before I can approve the Company's second application.
- 46 At the time of being taken to the document prepared by the Company's town planner addressing each of these issues, I indicated that I did not consider that that document was adequate in a number of respects and that it could not provide a basis to enable me to be satisfied I had considered, adequately, the matters set out in the provision.
- 47 On 2 March 2023, a revised document was tendered which addressed, in more detail (and in a now satisfactory fashion), the matters listed in cl 9.5(4) of the LEP. That document was tendered as a substitute for the original, unsatisfactory document.
- 48 On the basis of the tendering of this revised document, I was satisfied that I then had material which permitted me to conclude that I had met the requirements of this clause.



## Conclusion

- 49 I have addressed the cl 4.6 of the LEP matter and the provision of the revised document for satisfaction of cl 9.5(4) of the LEP which permitted me to be satisfied that making orders in the second application proceedings to grant development consent that would enable construction of the Company's proposed development. I set out those matters of detail because that documentation was, as earlier explained, unsatisfactory its originally provided form. As a consequence, taking the curative steps described (ones which have, as explained, been taken) were necessary prerequisites to me being satisfied that I could grant consent to the Company's second application, as these two matters were legal prerequisites where the documentation at the commencement of the hearing did not provide an adequate foundation for approval.
- 50 It is also appropriate to note that other mandatory documentation required as prerequisites to the granting of development consent through the second application were provided in a form where no controversy as to their adequacy arose or substantive issues were now advanced by the Council. As a consequence, it is not necessary to list this documentation.
- 51 On the basis of the now satisfactory material addressing the tests in the cl 4.6 dispensation request and the matters listed in cl 9.5(4) of the LEP (where deficiencies arose in the documents originally tendered for the purposes of these two clauses) and the remainder of the documentary material addressing matters necessary to be dealt with (and in the absence of any merit contentions raised by the Council), I am satisfied that I should make orders in the terms agreed between the parties granting the Company development consent for what was sought in the application subject of the Company's Class 1 appeal in Matter No 174536 of 2022.
- 52 As a result of the provision of the certificate pursuant to cl 97 of the Regulation that provided the resolution of the jurisdictional contention raised by the Council and the provision of the revised BASIX certificate together with the settled terms of the orders to grant development consent to the second application (incorporating the imposition of the necessary conditions

attaching to the development consent), I make the orders which appear below and which incorporate by reference the conditions of development consent contained in Annexure C to this decision.

### Orders in Matter No 174536 of 2022

53 The orders of the Court therefore are:

- (1) Leave is granted to the Applicant to rely on the amended plans and documents contained in Exhibit C;
- (2) Leave is granted to the Applicant to rely on the following documents:
  - (a) BASIX Certificate No. E21074, prepared by Credwell Energy, dated 15/03/2023;
  - (b) NatHERS Certificate No. 6872190, prepared by Credwell Energy, dated 15/03/2023; and
  - (c) BASIX Certificate Summary Report, prepared by Credwell Energy, dated 15/03/2023;
- (3) The appeal is upheld;
- (4) Development consent is granted to Development Application 1112/2022/JP for the demolition of existing structures, removal of trees, and construction of 5x residential flat buildings varying between 4 and 7 storeys in height, containing a total of 242 apartments (54 x 1 bedroom, 128 x 2 bedroom and 60 x 3 bedroom) and one neighbourhood shop with four levels of basement car parking for 356 cars, 12 motorcycles and 107 bicycles, with communal open space and landscaping on the land at 7, 9, 11, 13, 15, 17, 19, 21 and 23 Cadman Crescent and 18, 20, 1/22, 2/22 and 24 Hughes Avenue, Castle Hill, subject to the conditions set out in Annexure "A";
- (5) Pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is to pay the Respondent's costs thrown away as a result of the amendment of the application for development consent, as agreed or assessed;
- (6) Exhibits 3, 4, 5, 6, 7, 8, A, B, D, E, F, G, H, J and K are returned;
- (7) **The Court NOTES that** the following Order was made on 23 February 2023, in relation to these proceedings:
  - (1) Additional costs of the Respondent as a consequence of the vacated Hearing date are payable by the Applicant".

\*\*\*\*\*

**Annexure A**

Annexure A - 174486 of 2022 - Castle Hill Panorama v The Hills Shire - SMO -  
3 Mar 23 (429672, pdf)

**Annexure B**

Annexure B - Annexure A to Annexure A Orders 3 Mar 23 (1021105, pdf)

**Annexure C**

Annexure C - Annexure A to 174536 of 2022 Orders 17 Mar 23 (327485, pdf)

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