



## Land and Environment Court New South Wales

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| <b>Medium Neutral Citation:</b> | <b>Restifa &amp; Partners Pty Ltd v Blacktown City Council [2021] NSWLEC 1592</b>  |
| <b>Hearing dates:</b>           | Conciliation conference on 30 March, 16 April, 7 and 25 May, 30 June, 29 July, 6 and 24 August, and 7 September 2021   |
| <b>Date of orders:</b>          | 8 October 2021   |
| <b>Decision date:</b>           | 08 October 2021  |
| <b>Jurisdiction:</b>            | Class 1  |
| <b>Before:</b>                  | Peatman AC   |
| <b>Decision:</b>                | See orders at <a href="#">[27]</a> below   |
| <b>Catchwords:</b>              | DEVELOPMENT APPLICATION – concept plan approval – stages 3 and 4 – amenity – access – traffic – streetscape – open space – conciliation conference – agreement between the parties – orders  |
| <b>Legislation Cited:</b>       | Environmental Planning and Assessment Act 1979 ss 4.2, 4.15, 4.16, 4.17, 8.7, 8.14<br>Environmental Planning and Assessment Regulation 2000 cl 49, 55, 77<br>Land and Environment Court Act 1979 ss 17, 34, 39<br>Sydney Environmental Planning Policy No 55—Remediation of Land cl 7<br>State Environmental Planning Policy No 64—Advertising and Signage cl 3(1)(a), 8, Schedule 1<br>State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development cl 30(2)(a) and Schedule 1<br>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004<br>State Environmental Planning Policy (Infrastructure) 2007 cl 45, 104<br>State Environmental Planning Policy (State and Regional Development) 2011<br>State Environmental Planning Policy (Sydney Region Growth Centres) 2006 cl 4.1A, 4.3, 4.4, 4.6, 6.5, Appendix 6<br>Rural Fire Act 1997 |
| <b>Cases Cited:</b>             | Restifa & Partners Pty Ltd v Blacktown City Council [2019] NSWLEC 1432   |
| <b>Texts Cited:</b>             | Blacktown City Council Growth Centre Precincts Development Control Plan 2018 cl 2.3.4<br>Greater Sydney Region Plan and Central City District Plan<br>NSW Department of Planning, Industry and Environment “Code of Practice for injured, sick and Orphaned Protected Fauna” 2011<br>Planning for Bushfire Protection 2006   |

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|---------------------------------|---|
|                                 | Apartment Design Guide  |
| <b>Category:</b>                | Principal judgment  |
| <b>Parties:</b>                 | Restifa & Partners Pty Ltd (Applicant)<br>Blacktown City Council (Respondent) |
| <b>Representation:</b>          | B Salon (Solicitor) (Applicant)<br>D Loether (Solicitor) (Respondent)         |
|                                 | Solicitors:<br>Mills Oakley (Applicant)<br>Bartier Perry Lawyers (Respondent) |
| <b>File Number(s):</b>          | 2020/341091   |
| <b>Publication restriction:</b> | No  |

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the deemed refusal of Development Application No. SPP-20-00001 (DA) pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act), lodged with Blacktown City Council (Council) on 28 April 2020, as amended on 3 August 2020, for the Cudgegong Town Centre Stage 2 development of Concept DA SPP-17-00039 for concept development of Cudgegong Town Centre at 43-53 Cudgegong Road, Rouse Hill NSW 2155 (granted by the Land and Environment Court on 18 September 2019 – [2019] NSWLEC 1432 (Concept Plan Approval)).
- 2 The Concept Plan Approval was for the concept of a town centre adjacent to the new railway Station of Tallawong at 43-53 Cudgegong Road, Rouse Hill – residential and retail uses with associated infrastructure and services, Torrens title subdivision (of 2 lots into 7 lots), and Stage 1 development being for the construction of residential flat buildings for 256 apartments with parking on Lots 72 and 73 in Deposited Plan 208203.
- 3 The DA is seeking approval for the Cudgegong Town Centre Stage 2 development of the Concept Plan Approval, including the construction, use and fit-out of a shop top housing development incorporating four separate buildings, each 9 storeys in height, 2 public plazas and associated road construction at 43-53 Cudgegong Road, Rouse Hill NSW 2155.
- 4 The Site comprises Lots 72 and 73 in Deposited Plan 208203 known as 43-53 Cudgegong Road, Rouse Hill NSW 2155. The Site is rectangular in shape having the following dimensions:
  - (1) Frontage to Cudgegong Road (eastern boundary): 144.125m
  - (2) Northern boundary to Lot 74 in DP 1265948: 280.915m
  - (3) Western boundary to lots 9 in DP 1249124 and 298 in DP 1213279: 144.125m
  - (4) Southern boundary to Lot 299 in DP 1213279: 280.915m

The Site has a total area of approximately 2.024ha. The Site has a fall of approximately 11.2m over a distance of 200m from the northern boundary.
- 5 The Site is located within the Tallawong Station (Area 20) Precinct of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Growth Centres SEPP). The surrounding land is in the process of being developed from rural to urban land. The land to the south of the Site includes Tallawong Metro Station at the intersection of Cudgegong Road and future Implexa Parade.
- 6 Owners' consent was granted:

- (1) By J Michael & Westgate Development Pty Ltd on 3 March 2020 (owners of 72 Cudgegong Road, Rouse Hill);
- (2) Westmill Corporate Partners Pty Ltd on 31 March 2020 (owners of 73 Cudgegong Road, Rouse Hill);
- (3) Sydney Metro on 8 April 2020 in relation to part of the future Implexa Parade as follows:

“The inclusion of the Sydney Metro owned land is on the basis that the land could be developed as part of 2 plazas and a road intersection in accordance with the plan shown on page 18 of the ‘Tallawong Town Centre Residential Stages 3 & 4 Landscape Concept Report’ prepared by Site Image and Zhinar Architects dated 3 April 2020.

These documents are included in the Class 1 Application under Tab 4, and were provided in accordance with cl 49 of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation).

- 7 The proceedings fall within Class 1 of the Court’s jurisdiction pursuant to s 17(d) of the *Land and Environment Court Act 1979* (LEC Act).
- 8 The statutory function to be exercised by the Court is ss 4.16 and 8.14 of the EPA Act, cl 4.6 variation pursuant to State Environmental Planning Policy (Sydney Region Growth Centres) (Growth Centres SEPP), and ss 34(3) and 39(2) of the LEC Act.
- 9 The Court arranged a conciliation conference under s 34(1) of the LEC Act between the parties, which was held on 30 March, 16 April, 7 and 25 May, 30 June, 29 July, 6 and 24 August, and 7 September 2021. I presided over the conciliation conference.

## Legislation

### *Environmental Planning and Assessment Act 1979*

#### **4.16 Determination** (cf previous s 80)

- (1) General A consent authority is to determine a development application by—
  - (a) granting consent to the application, either unconditionally or subject to conditions, or
  - (b) refusing consent to the application.
- (2) Despite subsection (1), the consent authority must refuse an application for development, being the subdivision of land, that would, if carried out, result in a contravention of this Act, an environmental planning instrument or the regulations, whether arising in relation to that or any other development.
- (3) “Deferred commencement” consent A development consent may be granted subject to a condition that the consent is not to operate until the applicant satisfies the consent authority, in accordance with the regulations, as to any matter specified in the condition. Nothing in this Act prevents a person from doing such things as may be necessary to comply with the condition.
- (4) Total or partial consent A development consent may be granted—
  - (a) for the development for which the consent is sought, or
  - (b) for that development, except for a specified part or aspect of that development, or
  - (c) for a specified part or aspect of that development.
- (5) The consent authority is not required to refuse consent to any specified part or aspect of development for which development consent is not initially granted under subsection (4), but development consent may subsequently be granted for that part or aspect of the development.

Note—

See also Division 4.4 for special procedures concerning concept development applications.

...

- (11) Other restrictions on determination of development applications The regulations may specify other matters of a procedural nature that are to be complied with before a development application may be determined.
- (12) Effect of issuing construction certificate If a consent authority or a registered certifier issues a construction certificate, the construction certificate and any approved plans and specifications issued with respect to that construction certificate, together with any variations to the construction certificate or plans and specifications that are effected in accordance with this Act or the regulations, are taken to form part of the relevant development consent (other than for the purposes of section 4.55).

(13), (14) (Repealed)

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

(1) 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.

(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.

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

Note—

See section 4.53(2) which prevents a reduction in the 5-year period of a development consent.

**8.7 Appeal by applicant—applications for development consent** (cf previous s 97)

(1) An applicant for development consent who is dissatisfied with the determination of the application by the consent authority may appeal to the Court against the determination.

(2) For the purposes of this section, the determination of an application by a consent authority includes—

(a) any decision subsequently made by the consent authority or other person about an aspect of the development that under the conditions of development consent was required to be carried out to the satisfaction of the consent authority or other person, or

(b) any decision subsequently made by the consent authority as to a matter of which the consent authority must be satisfied before a deferred commencement consent can operate.

**ss 8.6, 8.7:** Ins 2017 No 60, Sch 8.1 [2].

**8.14 Powers of Court on appeals** (cf previous s 39(6A) Land and Environment Court Act)

(1) In addition to any other functions and discretions that the Court has apart from this subsection, the Court has, for the purposes of hearing and disposing of an appeal under this Division, all the functions and discretions which the consent authority whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

(2) The decision of the Court on an appeal under this Division is, for the purposes of this or any other Act or instrument, taken to be the final decision of that consent authority and is to be given effect to accordingly.

(3) If the consent authority was under this Act required to consult or obtain the concurrence of another person or body before making the decision the subject of an appeal under this Division—

(a) the Court may determine the appeal whether or not the consultation has taken place and whether or not the concurrence has been granted, and

(b) in a case where the concurrence has been granted—the Court may vary or revoke any conditions imposed by that person or body or may impose any conditions that could have been imposed by that person or body.

(4) If an appeal under this Division relates to integrated development—

(a) the Court may determine the appeal whether or not the consent authority has obtained general terms of approval from each relevant approval body, and

(b) the Court is not bound to refuse an application for development consent because a relevant approval body has decided that general terms of approval will not be determined or has decided not to grant a relevant approval, and

(c) the Court may determine an appeal even though a development consent granted as a result of the appeal is inconsistent with the general terms of approval of a relevant approval body.

**Environmental Planning and Assessment Regulation 2000**

**55 What is the procedure for amending a development application?** (cf clause 48A of EP&A Regulation 1994)

(1) A development application may be amended or varied by the applicant (but only with the agreement of the consent authority) at any time before the application is determined, by lodging the amendment or variation on the NSW planning portal.

(2) If an amendment or variation results in a change to the proposed development, the application to amend or vary the development application must include particulars sufficient to indicate the nature of the changed

development.

(3) If the development application is for—

(a) development for which concurrence is required, as referred to in section 4.13 of the Act, or

(b) integrated development,

the consent authority must immediately forward a copy of the amended or varied application to the concurrence authority or approval body

## **Land and Environment Court Act 1979**

### **17 Class 1—environmental planning and protection appeals**

The Court has jurisdiction (referred to in this Act as “Class 1” of its jurisdiction) to hear and dispose of the following—

...

(d) appeals, objections and applications under sections 4.55, 8.7, 8.8, 8.9, 8.16, 8.18, 8.21, 8.22, 8.23 and 8.25 of, and clause 35 of Schedule 5 to, the Environmental Planning and Assessment Act 1979,

### **39 Powers of Court on appeals**

(1) In this section, appeal means an appeal, objection, reference or other matter which may be disposed of by the Court in proceedings in Class 1, 2 or 3 of its jurisdiction.

(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

(3) An appeal in respect of such a decision shall be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal.

(4) In making its decision in respect of an appeal, the Court shall have regard to this or any other relevant Act, any instrument made under any such Act, the circumstances of the case and the public interest.

(5) The decision of the Court upon an appeal shall, for the purposes of this or any other Act or instrument, be deemed, where appropriate, to be the final decision of the person or body whose decision is the subject of the appeal and shall be given effect to accordingly.

(6) Notwithstanding any other provision of this section, if an appeal relates to an application made to a council within the meaning of the Local Government Act 1993 or a consent authority within the meaning of the Environmental Planning and Assessment Act 1979 and that council or consent authority may not approve of, consent to, or deal with, or grant a permission in respect of, the application except after consultation with, or with the concurrence or approval of, any person or body—

(a) the Court may determine the appeal whether or not the consultation has taken place and whether or not the concurrence or approval has been granted, and

(b) in a case where the concurrence or approval has been granted—the Court may vary or revoke any conditions imposed by that person or body or may impose any conditions that could have been imposed by that person or body.

(6A) (Repealed)

(7) The functions of the Court under this section are in addition to and not in derogation from any other functions of the Court.

## **Contentions**

10 Council raised the following contentions:

- (1) State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65): Development consent must not be granted to the DA as the proposed development does not demonstrate that adequate regard has been given to the design quality principles provided in Schedule 1 of SEPP 65 and the requirements of the Apartment Design Guide (ADG). The Council gave over 12 pages of particulars as to why the buildings did not comply with SEPP 65. Council set out the introduction to those particulars as follows:

- (a) “Clause 30(2)(a) of SEPP 65 provides the following:

‘Development consent must not be granted if, in the opinion of the consent authority, the development or modification does not demonstrate that adequate regard has been given to the design quality principles.’”

- (b) "The design quality principles are set out in Schedule 1 of SEPP 65. The ADG provides detail as to how the design quality principles are to be implemented in residential developments such as that proposed at the Site (Stage 3 & 4)."
- (c) The Applicant has failed to adequately demonstrate that the non-compliance with the controls in the ADG (and particularised by Council) achieves the objectives of the design quality principles.

- (2) Waste: Insufficient information has been provided for proper assessment.
- (3) Landscaping: Insufficient information has been provided for proper assessment.
- (4) Social Impact: Insufficient information has been provided to enable social impact assessment.
- (5) Engineering: Insufficient information has been provided to enable a proper engineering assessment. The engineering contention related to:
  - (a) Stormwater connections to Cudgegong Road.
  - (b) Overland flow of stormwater to downstream catchment.
  - (c) Temporary stormwater treatment measures.
  - (d) 2 Town Plazas.
  - (e) The design and verge layout for the Main Street road reserve.
  - (f) Interface with Cudgegong Road including sight lines.
  - (g) Swept path analysis from Cudgegong Road.
  - (h) Siting of light poles on Cudgegong Road.
  - (i) DA to demonstrate smooth compatibility with all road, drainage and site levels.
  - (j) Intersection detail between New North South Street with future Implexa Parade.
  - (k) Intersection detail between Main Street and future Implexa Parade.
- (6) Drainage: Insufficient information has been provided to enable proper assessment of drainage for the Site.
- (7) Endeavour Energy: Inadequate information has been provided to enable a proper assessment of the impact of any works on the transmission easement at the Site.

11 At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. This decision involved the Court agreeing to amended plans and conditions of consent, reports as listed below being provided to Council to satisfy Council's contentions, Council uploading the amended plans on the NSW Planning Portal, and the Applicant filing the amended DA including the updated reports in the Court. The Section 34 Agreement was filed by the parties on 20 September 2020. The decision requires the Court to uphold the appeal, and grant consent to the DA subject to conditions.

12 The amended DA now seeks consent for:

- (1) Stage 3 construction of 2 shop top housing buildings numbered 3A and 3B over proposed Lot 3, comprising 9 storeys, 3 levels of basement car parking containing 301 residential car spaces (including 1 car wash bay and 45 visitor car parking spaces), 310 commercial spaces and 122 bicycle spaces, 1

supermarket & 23 retail speciality shops at the lower ground and ground levels, 65 x 1 bedroom apartments, 134 x 2 bedroom apartments and 26 x 3 bedroom apartments above.

- (2) Stage 4 construction of 2 shop top housing buildings 4A and 4B over proposed Lot 4 comprising of 3 levels of basement car parking containing 307 residential car spaces (including 1 car wash bay and 47 visitor car parking spaces), 293 commercial spaces and 124 bicycle spaces, 2 supermarkets & 16 retail speciality shops at the ground and upper ground levels, and 43 x 1 bedroom, 160 x 2 bedroom, and 28 x 3 bedroom apartments above.
- (3) Fit-out of the Supermarket within Buildings 3A/3B.
- (4) Associated signage.
- (5) Landscaping of public and private domain works including the construction of part of the 2 public squares.
- (6) Construction of public roads and associated civil works.

13 A detailed description of amendments to the plans was provided by Zhinar Architects in their Schedule of Amendments to DA SPP-20-00001 dated 12 August 2021.

14 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if the parties' decision is a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising the function under cl 4.6 of the Growth Centres SEPP, ss 4.16 and 8.14 of the EPA Act, and ss 34 (3) and 39(2) of the LEC Act to uphold the appeal and grant consent to the DA. There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The Council's Statement of Facts and Contentions filed 9 February 2021, and the parties identified the jurisdictional prerequisites of relevance in these proceedings to be:

- (1) Development of the Site is controlled by the Growth Centres SEPP.
- (2) The Site is situated within the Tallawong Station (Area 20) Precinct and the provisions of Appendix 6 of the Growth Centres SEPP Blacktown Growth Centres Precinct Plan apply.
- (3) Under the Growth Centres SEPP, the Site is zoned B2 Local Centre and B4 Mixed Use.
- (4) The DA was lodged with Blacktown City Council on 28 April 2020 seeking consent for the Cudgegong Town Centre Stage 2 development of the Concept Plan Approval. The proposed development is permissible with consent.
- (5) The DA was advertised, notified and exhibited from 26 August 2020 to 8 September 2020 in accordance with cl 77 of the EPA Regulation. No submissions were received in response to the notification. The amendments made during the s 34 process were such that Council exercised its discretion not to re-notify the plans. I agree with Council's decision as there was no objectors to the DA, and the amendments were of a nature to improve the planning outcome without external amenity impacts.
- (6) The DA is consistent with the Concept Plan Approval as required by s 4.24(2) of the EPA Act.
- (7) The details of Council's external referrals are as follows:
  - (a) Rural Fire Service which recommended conditions of consent on 15 July 2020.
  - (b)

Sydney Metro which granted concurrence subject to conditions of consent on 28 September 2020.

- (c) Transport for NSW (Roads and Maritime Services) provided comments on 29 June 2020.
  - (d) Sydney Water Corporation provided comments on 9 July 2020.
  - (e) Endeavour Energy responded on 23 August 2020 and required amendments to the plans.
  - (f) NSW Police responded with comments on 5 October 2020.
- (8) On 1 December 2020 the Applicant appealed Council's deemed refusal of the DA pursuant to s 8.7 of the EPA Act. The appeal was made in accordance with the time provisions of s 8.10 of the EPA Act.
- (9) The relevant clauses in Appendix 6 of the Growth Centres SEPP that apply to the determination of the DA are considered below:

| Clause                      | Requirement   | Proposal   |
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| Minimum Lot Size            |   |  |
| 4.1A(2)<br>Minimum lot size | The minimum lot size for development for the purpose of residential flat buildings is 2,000m <sup>2</sup> . | The proposed development complies with clause 4.1A(2). |
| Height of Buildings         |   |  |



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| 4.3 Height of Buildings            | <p>The permitted maximum height of the proposed development is 26m.</p> <p>Clause 4.6 Variation</p>   | <p><u>DA (LEC Proceedings 2020/341091).</u></p> <p>A breakdown of the proposed maximum building heights and variations to the maximum building height standard is below:</p> <p>Building 3A: 31.50m</p> <p>Building 3B: 32.2m</p> <p>Building 4A: 31.10m</p> <p>Building 4B: 28.9m</p> <p>The maximum building height proposed for buildings 3A, 3B, 4A and 4B is 32.20m, which equates to a variation of 6.2m. The Applicant submitted with its DA a clause 4.6 variation request prepared by City Plan dated 2 September 2021 (uploaded to the planning portal on 7 September 2021) The clause 4.6 request adequately justifies the exceedance to the height of buildings control. See further discussion at para [10] below.</p> <p><u>Modification Application (LEC Proceedings 2020/341094).</u></p> <p>The s 4.6 variation of building heights also applies to the Modification of the Concept Plan Approval.</p> |
| Floor space ratio                  |   |   |
| 4.4 – Floor Space Ratio            | <p>The floor space ratio for a building on any land is not to exceed the maximum floor space ratio shown for the land on the <u>Floor Space Ratio Map</u>. The maximum floor space ratio is 2.75:1.</p> | <p>The FSR has been adjusted to 2.22:1 for Stage 3 and 2.17:1 for Stage 4.</p> <p>The total FSR is 2.19:1 which complies with the FSR control.</p>  |
| Part 6 Additional Local Provisions |   |   |

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| 6.5 Active Street Frontages | Development consent must not be granted to the erection of a building, or a change of use of a building, on land to which this clause applies unless the consent authority is satisfied that the building will have an active street frontage after its erection or change of use. | Active street frontages are proposed along the eastern frontage and southern of building 4A and 4B and the western and southern frontage of building 3A and 3B in satisfaction of this requirement. |
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- (10) The cl 4.6 Variation Request Report by City Plan dated 2 September 2021 (City Plan Report) gave background to the request and concluded as follows:
- (a) The exception is sought pursuant to cl 4.6 in relation to cl 4.3 of the Growth Centres SEPP to the strict application of the height of building development standard prescribed cl 4.3. Clause 4.3 prescribes a maximum building height of 26m for the Site, whereas the DA includes heights up to 32.2m from the existing ground level.
  - (b) A cl 4.6 exception was granted in the Concept Plan Approval where a maximum height of RL 84.90 was allowed for at the highest habitable level of Building 3A. The Modification seeks consent for a maximum height of RL 89.40 (an increase of 500mm from the Concept Plan Approval).
  - (c) In the Concept Plan Approval, a maximum height of RL 84.90 was allowed for the top of the lift over-run of Building 3B. The Modification seeks approval for a maximum height of RL 86.20 (or an increase of 1.3m).
  - (d) However, the lift over-run in Building 4A at RL 90.80 has been reduced from RL 91.80 (a decrease of 1m in height).
  - (e) In both instances of the height increase in Buildings 3A/3B the area of vertical and horizontal variances are minor in comparison to the Concept Plan Approval area. The building mass associated with the variances are located somewhat internally, or completely internally in the case of the mass associated with Building 3A. As such, the mass would not be readily visible from the public domain. Similarly, the limited mass ensures that there are no unreasonable shadow impacts. Despite the variances, the Modification does not breach the overall maximum height allowed for by the Concept Plan Approval. For these reasons, the objectives of, and tests related to cl 4.6 are satisfied by the Modification.
  - (f) The City Plan Report submits in par 9 on p 17:
    - (i) Compliance with the development standard is unreasonable and unnecessary in the circumstances of the DA;
    - (ii) The Modification achieves the objectives of the development standard and is consistent with the objective of the B2 and B4 zones, and is therefore in the public interest;
    - (iii) There are sufficient environmental planning grounds to justify the contravention;

- (iv) There is no public benefit in maintaining the standard;
  - (v) The proposal is consistent with the building height strategy approved as part of the Concept Plan Approval. That is, height of Gross Floor Area lost from the building envelope immediately adjacent to the town squares, but offset with additional height elsewhere throughout the Concept Plan, is a suitable response to the Site as it improves solar access to the squares, and is without unreasonable amenity impacts elsewhere; and
  - (vi) The contravention does not raise any matter of State or Regional significance.
- (g) Pursuant to s 39(2) of the LEC Act, I accept that the cl 4.6 variation to the height control is reasonable in the circumstances of the DA. For the reasons given in the City Plan Report, the variation gives a superior planning outcome as it increases solar access to the town squares and has minimal, if any, detrimental impact.
- (11) State Environmental Planning Policy No 55—Remediation of Land (SEPP 55) cl 7(1) requires a consent authority to consider the contamination and remediation of land prior to determining the DA.
- (a) On 2 November 2015 a contamination site investigation was undertaken by Douglas Partners to investigate the likelihood of the presence of contamination on the site (Site Investigation Report). The Site Investigation Report is found behind Tab 13 of the Class 1 Application filed in Court.
  - (b) The Site Investigation Report concluded that the Site can be made suitable for the proposed mixed use development subject to:
    - (i) Completion of a detailed site investigation for contamination;
    - (ii) Remediation and/or management of any contamination issued identified by the Detailed Site Investigation; and
    - (iii) Additional investigations being undertaken should excavations exceeding 2.8m be conducted.
  - (c) Council has proposed conditions of consent in relation to the DA to address SEPP 55 being Condition 7.1.2 in the Concept Plan Approval.
  - (d) The conditions require implementation of the recommendations provided in the Site Investigation Report prior to the issue of a construction certificate.
  - (e) Clause 7 of SEPP 55 was considered prior to consent being granted to the Concept Plan Approval, and resulted in condition of consent no 7.1.2 requiring implementation of the recommendation provided in the Site Investigation Report prior to the issue of a construction certificate. The recommended conditions are included in Annexure B at conditions 7.1.3 to 7.1.6.
- (12) In relation to the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, the BASIX Certificate 1090616M\_03 (Stage 3) was issued by Vipac on 2 September 2019; and the BASIX Certificate No. 1090989M\_03 (Stage 4) was issued by Vipac on 3 September 2021, and is referenced in the conditions of consent.
- (13) In relation to State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP):

- (a) Pursuant to cl 45 of the Infrastructure SEPP, before determining an application that requires penetration of ground within 2m of an underground electricity power line, distribution pole or within 10m of an electricity power line, the consent authority must give written notice of the application to the relevant supply authority. The DA was referred to Endeavour Energy, and as a result of that consultation relevant design changes have been made to the plans.
  - (b) Pursuant to cl 104 of the Infrastructure SEPP, before determining an application, the consent authority must give written notice of the application to Transport for NSW (that part which was formerly RMS). Council referred the DA to Transport for NSW, and as a result of the recommendations received design changes have been made and conditions of consent imposed to address Transport for NSW's recommendations.
- (14) Pursuant to s 7.23 of the EPA Act, a condition of consent is proposed that requires the payment of a Special Infrastructure Contribution – and included as condition 4.2 of the conditions of consent in Annexure B.
- (15) SEPP 65:
- (a) Clause 20(2)(a) of SEPP 65 require that development consent must not be granted if an application does not demonstrate that adequate regard has been given to the design quality principles.
  - (b) The DA has been amended and complies with SEPP 65 as set out in the SEPP 65 Design Verification Statement for 43-53 Cudgegong Road Rouse Hill NSW 2155 by Zhinar Architects dated 24 August 2021 and filed in Court on 7 September 2021.
  - (c) I accept the report by Zhinar Architects dated 24 August 2021 that the DA design complies with the 9 design principles set out in Schedule 1 of SEPP 65.
- (16) The DA was notified between 2 October 2020 and 16 October 2020 in accordance with cl 77 of the EPA Regulation. No submissions were received in response to the notification.

15 The parties agree that the DA can be approved taking into consideration the matters in s 4.15(1)(b)-(e) of the EPA Act.

16 Council's contentions referred to in [10] have been resolved as follows:

|              |                                       |   |
|--------------|---------------------------------------|---|
| Contention 1 | SEPP 65 – Apartment Design Guidelines | The DA has been updated with amended plans and additional information to address Council's SEPP65/ADG contentions – as agreed during the s 34 process. The SEPP 65 Design Verification Statement by Zhinar Architects dated 24 August 2021 was filed in Court on 7 September 2021, and the Report demonstrates the development complies with SEPP 65. |
| Contention 2 | Waste                                 | Council's waste contentions have been addressed by relevant amendments to the plans, and further information from Pitt & Sherry (Operations) Pty Ltd dated 16 April 2021, and the amended Waste Management Plan by Pitt & Sherry (Operations) Pty Ltd dated 16 April 2021.  |

|              |                               |  |
|--------------|-------------------------------|--|
| Contention 3 | Landscaping                   | Addressed with amended landscape plans by Site Image (NSW) Pty Ltd, Landscape Architects, Revision M dated 13 July 2021, and an amended Landscape Concept Report by Site Image (NSW) Pty Limited, also dated 13 July 2021, and by conditions of consent. The key amendments include: the trees will move to footpath edge from currently being in blisters between parking bays; tree planter details will be to suit Council's public domain details; hedge planting along the footpath edge will be removed; tree sizes and spacing has been amended; and Cudgegong street trees have been amended to suit Council's preference to increase the number and to suit traffic sightlines.   |
| Contention 4 | Social Impact                 | This contention has been met by the provision of further information by way of a Social Impact Comment – Tallawong Town Centre by City Plan dated 19 April 2021.   |
| Contention 5 | Engineering (Civil & Traffic) | The Engineering contentions have been addressed through the provision of information, conferring of experts, amending plans and by conditions of consent with particular reference to swept paths, sight line assessment and stormwater. Key amendments include: longitudinal grades of Main Street's pedestrian footpaths to be a consistent grade; threshold areas to building entrances changed to accommodate the consistent grade of the footpaths; temporary cul-de-sac option at the southern end of Main Street showing retaining walls to meet existing levels along the boundary as well as required services required to traverse the Sydney Metro land; 5m x 5m splay applied to the site boundary at the S-W corner of Lot 4; road reserve verge width along the western side of Cudgegong Road increased to 4.5m with relevant site sections updated to reflect this dimension increase; various sections around the site updated to show the road reserve boundary; and Cudgegong Road median strip design and jersey kerb adjustments. Amendments are detailed in the updated Civil Engineering Works' survey plans by Usher & Co. dated 12 July 2021. |
| Contention 6 | Drainage                      | This contention was met with the provision of additional information and amendments including: water quality modelling updated to ensure that the minimum hardstand fraction of roof and other exposed area is 85%; modelling and calculations updated to have Lot 3 and Lot 4's stream erosion index calculated separately and as individual lots; and minor changes to various components (such as weirs, inlet pipe levels, chamber size etc), and also to the internal configuration of the storm filter/rainwater tank.   |
| Contention 7 | Endeavour Energy              | This contention has been addressed by amending relevant plans to show the high voltage power line easement.  |

- 17 I am satisfied that the proposed conditions of consent in Annexure B comply with the requirements of s 4.17 of the EPA Act. The parties spent a considerable amount of time settling the conditions in the s 34 conciliation conference, and I agree with the final set of conditions.
- 18 I am satisfied that:
- (1) The Modification Application MOD-20/00357 in proceedings no 2020/341094 is able to modify the Concept Plan Approval pursuant to s 4.24(3) of the EPA Act; and
  - (2) The DA is consistent with the Concept Plan Approval in accordance with s 4.24(2) of the EPA Act.
- 19 The development was nominated as 'integrated development' as authorisation pursuant to s 100B of the *Rural Fire Act 1997* is required. A Bushfire Protection Assessment was provided at Appendix 17 of the Statement of Environmental Effect by City Plan dated August 2020. The Assessment concluded that "the proposed development complies with the aim and objectives of Planning for Bushfire Protection 2006 – Building of Class 5 and 8 and Class 10 of the Building Code of Australia". The DA was referred to the Rural Fire Service which recommended conditions of consent on 15 July 2020. Those conditions as recommended by the Rural Fire Services are included in condition 2.11 of Annexure B.
- 20 Condition 3.9 in Annexure B mandates a Biodiversity Management Plan (BMP). The BMP is to be consistent with the NSW Department of Planning, Industry and Environment "Code of Practice for injured, sick and orphaned protected fauna" 2011 and cover controls included in Section 2.3.4 of the Blacktown City Council Growth Centres Precinct Development Control Plan 2018.
- 21 The aim of the State Environmental Planning Policy No 64—Advertising and Signage (SEPP 64) is to improve the amenity of urban and natural setting by managing the impact of signage and advertising. Clause 8 of the SEPP 64 outlines that a consent authority must not grant development consent to an application to display signage unless the consent authority is satisfied:
- (1) That the signage is consistent with the objectives of this Policy as set out in clause 3(1)(a); and
  - (2) That the signage the subject of the application satisfied the assessment criteria specified in Schedule 1.
- 22 The signage proposal includes typical awning, below awning and above awning signage, for the purpose of business and building identification. In addition to awning related signage, one free standing sign is proposed within the street verge to identify the entrance to the main basement and loading dock. All signage, except for signage for the purposes of Woolworths and BWS tenancies, will be generic at this stage, and is also illuminated internally. The maximum dimensions for the Woolworths and BWS signs are 2m in width (horizontal) and 600mm in height (vertical). The free-standing sign is 8m in height (vertical) and 2.14m in width (horizontal). Council is satisfied that the proposed signage complies with the aims of SEPP 64 as follows:
- (1) To ensure that signage (including advertising) is:
    - (a) Is compatible with the desired amenity and visual character of an area,
    - (b) Provides effective communication in suitable locations, and
    - (c) Is of high-quality design and finish.

The Greater Sydney Region Plan and Central City District Plan encompasses a global metropolis of 3 cities where it is envisioned that people of Greater Sydney will live within 30 minutes of their jobs, education and health facilities, services. These three cities include the Western Parkland City, the Central River City and the Eastern Harbour City. The proposal is consistent with the Central City District Plan as it achieves and enhances Planning Priority 5 – providing housing supply, choice and affordability, with access to jobs, services and public transport. The Cudgegong Road precinct is transitioning from rural to a major urban centre. This site is identified as the key local business centre and a place of high density living adjacent to the Tallawong Metro Station.

- 24 For the reasons set out above, I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by ss 34(3) and 39(2) of the LEC Act, and ss 4.16 and 8.14 of the EPA Act, together with cl 4.6 of the Growth Centres SEPP.
- 25 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 26 The Court notes that:
- (1) Blacktown City Council, as the relevant consent authority has agreed, pursuant to cl 55 of the Environment Planning and Assessment Regulation 2000, to amend Development Application SPP-20-00001.
  - (2) The respondent has uploaded the amended application for Development Application SPP-20-00001 to the NSW Planning Portal on 19 August and 7 September 2021.
  - (3) The applicant has subsequently filed the amended Development Application SPP-20-00001 with the Court on 23 August and 7 September 2021, as described in Annexure A.
- 27 The Court Orders:
- (1) The Applicant's written request by City Plan dated 2 September 2021 to vary the height of building standard at clause 4.3 of Appendix 6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (Growth Centres SEPP) pursuant to clause 4.6 of the Growth Centres SEPP is upheld.
  - (2) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979.
  - (3) The appeal is upheld.
  - (4) Development Application No. SPP-20-00001 for the Stage 2 development of Concept DA SPP-17-00039 (as modified through LEC Proceedings Number 2020/341094), including:
    - (a) Stage 3 construction of 2 shop top housing buildings 3A & 3B over proposed lot 3 comprising 9 storeys, 3 levels of basement car parking, 23 retail speciality shops and 225 apartments above.
    - (b) Stage 4 construction of 2 shop top housing buildings 4A & 4B over proposed lot 4 comprising of 3 levels of basement car parking, 16 retail speciality shops and 231 apartments above.
    - (c) Fit-out of the Supermarket within Buildings 3A/3B.
    - (d) Associated signage.
    - (e)

Landscaping of public and private domain works including the construction of part of the 2 public squares.

- (f) Construction of public roads and associated civil works.
- (g) Removal of trees throughout the site.

on land legally described as Lot 72 and 73 in Deposited Plan 208203, known as 43-53 Cudgegong Road, Rouse Hill, is approved subject to the conditions at Annexure B.

- (5) The Respondent is directed to register the development consent on the NSW planning portal in accordance with s 8.13(3) of *the Environmental Planning and Assessment Act 1979* within 14 days.

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**M Peatman**

**Acting Commissioner of the Court**

[Annexure A \(171830,.pdf\)](#)

[Annexure B \(592034,.pdf\)](#)

[Stage 3 Plans \(19233204,.pdf\)](#)

[Stage 4 Plans \(19158557,.pdf\)](#)

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Decision last updated: 08 October 2021