



Land and Environment Court
New South Wales

Case Name: Perpetual Corporate Trust Limited v Randwick City Council

Medium Neutral Citation: [2021] NSWLEC 1354

Hearing Date(s): Conciliation conference on 3, 15 and 19 March 2021

Date of Orders: 17 June 2021

Decision Date: 17 June 2021

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The Applicant is granted leave to amend Development Application No DA/373/2020 and rely upon the following amended plans and documents contained at Annexure 'B';
(2) The Applicant's written request to vary the height of building standard in Clause 6.17, floor space ratio standard in Clause 6.17 and non-residential floor space ratio standard in Clause 6.19 of the Randwick Local Environmental Plan 2012, prepared by Willowtree Planning dated March 2021, is upheld;
(3) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979;
(4) The appeal is upheld;
(5) The development application no DA/373/2020, as amended, for the demolition of existing structures and construction of a mixed use development comprising a 507 room boarding house and commercial premises and associated parking at 111-125 Anzac Parade and 112 Todman Avenue, Kensington, is approved subject

to the conditions contained at Annexure 'A'.

Catchwords:	DEVELOPMENT APPLICATION – mixed use development – affordable rental housing – community infrastructure contributions – conciliation conference – agreement between parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979 ss 4.16, 8.7 Environmental Planning and Assessment Regulation 2000 Land and Environment Court Act 1979 s 34 Randwick Local Environmental Plan 2012 cl 4.3, 4.4, 4.6, 6.2, 6.3, 6.4, 6.8, 6.10, 6.17, 6.19, 6.20, 6.21 State Environmental Planning Policy (Affordable Rental Housing) 2009 cl 29, 30, 30A State Environmental Planning Policy No 55— Remediation of Land cl 7 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
Cases Cited:	Mulpha Norwest Pty Ltd v The Hills Shire Council (No 2) [2020] NSWLEC 74 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118
Texts Cited:	Apartment Design Guide Randwick Comprehensive Development Control Plan 2013
Category:	Principal judgment
Parties:	Perpetual Corporate Trust Limited (Applicant) Randwick City Council (Respondent)
Representation:	Counsel: A Galasso SC (Applicant) N Eastman (Respondent) Solicitors: Mills Oakley (Applicant) Randwick City Council (Respondent)
File Number(s):	2020/288434
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** This class 1 appeal concerns a development application brought before the Court under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the deemed refusal by the Randwick City Council (the Respondent) of Development Application No DA/373/2020 for the demolition of the existing structures and construction of a mixed-use development up to nineteen storeys, comprising basement parking, ground and first floor level commercial/retail use and a boarding house to be used as student and key worker accommodation comprising 564 boarding rooms, a roof-top pool, signage, public plaza, earthworks, landscaping and associated works, car parking spaces, motorcycle and bicycle spaces at 111-125 Anzac Parade and 112 Todman Avenue, Kensington.
- 2 It is helpful at this point to describe that the site comprises seven lots of land, that are allocated to two sites, described as follows:
 - Site A
 - Lot A and B in DP 107256 (117-119 Anzac Parade)
 - Lot 1 in DP 956200 (121-125 Anzac Parade)
 - Site B
 - Lot 3 in DP 3897 (111 Anzac Parade)
 - Lot 1 in DP 938380 and Lot 4 in DP 655026 (113-115 Anzac Parade)
 - Lot 2 in DP 344524 (112 Todman Avenue)
- 3 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 3 March 2021, and at which I presided.
- 4 The proceedings commenced onsite, after which the parties continued conciliation discussions at which the parties reached in-principle agreement on the matters in contention, subject to the resolution of a number of matters which the parties' advised me were capable of resolution. I adjourned the conference to allow the parties to continue to resolve those matters.
- 5 I adjourned the conciliation conference on a number of occasions. On 16 April 2021 a signed agreement prepared in accordance with s 34(10) of the LEC Act

was filed with the Court. This decision involved the Court upholding the appeal and granting conditional development consent to the development application.

- 6 The parties ask me to approve their decision as set out in the s 34 agreement before the Court. In general terms, the agreement approves the development subject to amended plans that were prepared by the Applicant, and noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s 34 agreement.
- 7 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 s 4.16 of the EPA Act to grant consent to the development application. There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 8 The parties identified the jurisdictional prerequisites of relevance in these proceedings including the provisions of the following environmental planning instruments:
 - Randwick Local Environmental Plan 2012 (RLEP),
 - State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH),
 - State Environmental Planning Policy No 55—Remediation of Land (SEPP 55),
 - State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- 9 I am satisfied that the jurisdictional preconditions identified by the parties have been achieved for the reasons that follow.
- 10 The site is located within the B2 Local Centre zone pursuant to the RLEP, in which the uses proposed by the development application are permitted with consent, and wherein the objectives of the zone are as follows:
 - To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
 - To encourage employment opportunities in accessible locations.
 - To maximise public transport patronage and encourage walking and cycling.
 - To enable residential development that is well-integrated with, and supports the primary business function of, the zone.

- To facilitate a high standard of urban design and pedestrian amenity that contributes to achieving a sense of place for the local community.
- To minimise the impact of development and protect the amenity of residents in the zone and in the adjoining and nearby residential zones.
- To facilitate a safe public domain.

11 The proposed development exceeds the height of buildings development standard shown on the Height of Buildings Map at cl 4.3(2) of the RLEP on the lots otherwise known as 111-115 Anzac Parade, and the floor space ratio (FSR) standard shown on the Alternative Building Heights Map at cl 6.17(4)(b) of the RLEP on the lots otherwise known as 117-125 Anzac Parade.

12 Relevantly, cl 6.17 of the RLEP also provides objectives and standards in respect of building height and FSR, in the following terms:

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

- (a) to allow greater building heights and densities at Kensington and Kingsford town centres where community infrastructure is also provided,
- (b) to ensure that those greater building heights and densities reflect the desired character of the localities in which they are allowed and minimise adverse impacts on the amenity of those localities,
- (c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure.

(2) Despite clauses 4.3 and 4.4, the consent authority may consent to development on a site that results in additional building height or additional floor space, or both, in accordance with subclause (4) if the development includes community infrastructure on the site.

(3) In deciding whether to grant development consent, the consent authority must—

- (a) be satisfied that the development is consistent with the objectives of this clause, and
- (b) be satisfied that the community infrastructure is reasonably necessary at Kensington and Kingsford town centres, and
- (c) take into account the nature of the community infrastructure and its value to the Kensington and Kingsford town centres community.

(4) Under subclause (2), a building on land in any of the areas identified on—

- (a) the Alternative Building Heights Map—is eligible for an amount of additional building height determined by the consent authority but no more than that which may be achieved by applying the maximum height specified in relation to that area, and
- (b) the Alternative Floor Space Ratio Map—is eligible for an amount of additional floor space determined by the consent authority but no more

than that which may be achieved by applying the maximum floor space ratio specified in relation to that area.

- 13 In addition to the alternative height and FSR provisions at cl 6.17 of the RLEP, additional height is also permitted where a development exhibits design excellence, pursuant to cl 6.21 of the RLEP, and certain provisions are made at subcl (8) for the accounting of gross floor area (GFA) where community infrastructure is provided.
- 14 A written request accompanying the application identifies three development standards that are sought to be varied:
 - (1) Firstly, the height of buildings identified at cl 6.17(2) of the RLEP, being a height of 31m applicable to 111 Anzac Parade, and the majority of the property at 113-115 Anzac Parade;
 - (2) Secondly, the community infrastructure FSR in accordance with cl 6.17(2) of the RLEP, and cl 6.17(4)(b) which is calculated in the written request as 6:1 on the site at 117-125 Anzac Parade; and
 - (3) Thirdly cl 6.19(2) of the RLEP requires a minimum non-residential FSR of 1:1 on the southern portion of the site at 117-125 Anzac Parade.
- 15 Relevantly to the written request is the proposal for community infrastructure in the development that is set out in a letter of offer for the purpose of a voluntary planning agreement dated 17 March 2021, including Annexures A and B (the proposed VPA), and which is consistent with the Kensington and Kingsford Town Centres Community Infrastructure Contributions that, in my view, satisfies cl 6.17(3) of the RLEP as to the necessity and value of the community infrastructure proposed by the development. The letter of offer has been accepted by the Respondent, deferred commencement conditions are proposed at Conditions A1 and A2 for the parties to enter into such an agreement prior to the operation of the consent, and Conditions 5 and 6 address terms and conditions of the proposed VPA.
- 16 As shown by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 (*Initial Action*), for the Court to have the power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court be satisfied that:

- (1) The proposed development will be consistent with the objectives of the particular standard in question (cl 4.6(4)(a)(ii)),
 - (2) The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)),
 - (3) The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)), and
 - (4) The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)).
- 17 The Court must form two positive opinions of satisfaction under cl 4.6(4)(a) to enliven the power of the Court to grant development consent (*Initial Action* at [14]). I must be satisfied that:
- (1) the Applicant's written request has adequately addressed the matters required to be demonstrated by subcl (3) and;
 - (2) that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objective of the zone in which the development is proposed to be carried out.
- 18 The Applicant relies upon a written request prepared in accordance with cl 4.6 of the RLEP to justify the contravention of each of the development standards that are sought to be varied (the written request).

The height standard is exceeded

- 19 The extent of the variation from the height standard is 2.4m, which is primarily due to the lift overrun and stairs that provide access to a rooftop pavilion, and which are not visible from the public domain.
- 20 The written request asserts that compliance with the development standard at subcll 6.17(2) and 6.17(4) is unreasonable or unnecessary because the objectives of the standard are achieved notwithstanding the non-compliance.
- 21 On the basis of the agreement of the urban design experts arising out of the amended plans at Condition 1 of the agreed conditions of consent, I record here that I accept that the objective at cl 6.21 of the RLEP is achieved. In particular, I accept that the proposed development exhibits design excellence that contributes to the cultural and built character value of the Kensington town centre because of the suitability of the land for the development as identified in

the Randwick Comprehensive Development Control Plan 2013 (the K2K DCP), the mix of uses proposed on the site, including the community infrastructure identified in the proposed VPA and the improvements to the public domain likely to result.

- 22 I accept the grounds on which the written request asserts the objectives are achieved, including consistency with the desired future character of the Kensington town centre which is demonstrated by substantial consistency with the 3-dimensional 'block control' contained in Part E of the K2K DCP, and comprises community infrastructure in the lower levels of the development without imposing adverse impacts on the amenity of the local area.
- 23 I also accept the proposed development is consistent with the objectives of the height standard at cl 4.3 of the RLEP which are as follows:
- (a) to ensure that the size and scale of development is compatible with the desired future character of the locality,
 - (b) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,
 - (c) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.
- 24 The written request identifies the aspects of the desired future character set out in the K2K DCP with which the proposed development is compatible, and the steps taken to avoid adverse impacts on the contributory heritage building located on the site known as "Phillips Corner", assisted by the Heritage Impact Statement prepared by Urbis dated 17 February 2021. I accept that the setback of the eastern elevation results in the exceedance itself not being visible from the public domain, that the landscaping of the rooftop communal areas will soften the visual bulk associated with the exceedance and that additional setbacks to the northern and western boundaries facilitate visual privacy and are consistent with the building separation distances set out in the Apartment Design Guide (ADG). Finally, I note the shadow diagrams demonstrate adequate solar access is provided to key areas of the public domain in conformity with the K2K DCP.
- 25 I also accept that the written request demonstrates there are sufficient environmental planning grounds to justify the contravention of the height

standards on a portion of the site. In particular I note the general consistency of the proposed development in the location of the exceedance with the 3-dimensional form of block control contained in Part E of the K2K DCP but for the portion of the exceedance in height that is otherwise available on the site, if differently located. Relatedly, the location of the exceedance does not impose a visual or overshadowing impact.

- 26 I am satisfied that the written request adequately addresses those matters required of it in accordance with cl 4.6(4)(a) of the RLEP, and I accept and am satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the height standard, and the objectives of the B2 zone. In arriving at this conclusion, I note the particular mix of uses proposed on the site reflects the range of uses nominated in the zone, associated with which is the potential for employment on a site adjoining the light rail, and where use of public transport, and cycling are encouraged by the provision of 122 motorcycle spaces, and 128 bicycle spaces. I also accept that the development well integrates residential uses with 1,599m² of non-residential space on the site, comprising retail and commercial uses, while providing adequate setbacks and building separation to adjoining sites.
- 27 On this basis, I am satisfied in respect of those matters required of the Court at cl 4.6(4)(a)(ii) of the RLEP and I consider the numerical height exceedance to be minor and within the terms of the Secretary's concurrence to satisfy cl 4.6(5) of the RLEP.

The FSR standard is exceeded

- 28 The site is subject to the following FSR development standards, pursuant to cl 6.17 of the RLEP, and cl 29(1)(c) of the SEPP ARH:
- 111-115 Anzac Parade – an FSR of 4.8:1.
 - 117-125 Anzac Parade – an FSR of 6:1.
- 29 The written request seeks to vary the FSR of 6:1 that is applicable to 117-125 Anzac Parade and proposes an FSR of 7.54:1.
- 30 The written request determines the maximum permissible GFA applicable to the site is 15,911m². The total proposed GFA is 15,504m², which is below that

permitted by cl 6.17 of the RLEP and cl 29 of the SEPP ARH if a 'blended' approach is taken across the site area.

- 31 However, the written request sets out the relevant finding in *Mulpha Norwest Pty Ltd v The Hills Shire Council (No 2)* [2020] NSWLEC 74 that "site area" is defined as that land to which the FSR standard is directed, and accordingly the GFA is apportioned across the site in Table 3 of the written request.
- 32 The written request asserts that the objectives of the FSR standard at cl 6.17 of the RLEP are achieved, and so compliance with the numerical standards is unreasonable or unnecessary, on the basis of the grounds that follow:
- Greater density is achieved in the town centre, where community infrastructure, in the form of an 'innovation space' is provided.
 - The density of the proposed development is generally consistent with the block controls for the site found in the K2K DCP, and the locating of a lower built form to the north is both in accordance with the block control and, together with the setbacks, serves to minimise adverse impacts on the existing residential amenity of adjoining properties.
 - The mix of uses, and arrangement of built form on the site is consistent with transit-oriented development suited to the public transport modes in the vicinity of the site.
- 33 Additionally, the written request considers consistency of the proposed development with the objectives of the FSR standard at cl 4.4 of the RLEP which are in the following terms:
- (a) to ensure that the size and scale of development is compatible with the desired future character of the locality,
 - (b) to ensure that buildings are well articulated and respond to environmental and energy needs,
 - (c) to ensure that development is compatible with the scale and character of contributory buildings in a conservation area or near a heritage item,
 - (d) to ensure that development does not adversely impact on the amenity of adjoining and neighbouring land in terms of visual bulk, loss of privacy, overshadowing and views.
- 34 Consistency with these objectives as set out in the written request may be summarised below:
- The size and scale of the proposed development is compatible with the desired future character of the locality;

- The proposed development presents a well-articulated built form, and includes an environmentally sustainable development (ESD) strategy that includes a commitment to 5-star Green Star as-designed, and 6-star Green Star in performance;
- The proposed development takes steps to avoid adverse impacts on the contributory heritage building located on the site known as “Phillips Corner”, as detailed in the Heritage Impact Statement cited at [24];
- The arrangement of FSR on the site includes additional setbacks to the northern and western boundaries which minimise visual bulk and which promotes visual privacy through building separation distances that are consistent with the ADG, and the shadow diagrams demonstrate that the exceedance of the FSR does not prevent adequate solar access to key areas of the public domain in conformity with the K2K DCP.

- 35 I accept the reasons set out in the written request at [32]-[34], and I am satisfied that the objectives of the FSR standard are achieved, notwithstanding the variation evident in the proposal.
- 36 The written request also asserts that the underlying objective of the FSR standard would be defeated or thwarted if compliance with the FSR standard was required, however as I am satisfied that the objectives of the FSR standard are achieved by the proposed development, it is not necessary to consider this.
- 37 I am further satisfied that the written request demonstrates there are sufficient environmental planning grounds to justify the contravention of the FSR standards on a portion of the site because of the general consistency of the proposed development with the 3-dimensional form of block control contained in Part E of the K2K DCP, the allocation of GFA on the site does not result in an unsympathetic relationship with the contributory heritage building, and the exceedance does not impose a visual or overshadowing impact.
- 38 I am therefore also satisfied that the written request adequately addresses those matters required of it in accordance with cl 4.6(4)(a) of the RLEP, and I accept and am satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the height standard, and the objectives of the B2 zone. In arriving at this conclusion, and for reasons that are similar to those at [25], I note the particular mix of uses proposed on the site reflects the range of uses nominated in the zone, associated with which is the potential for employment on a site adjoining the light rail, and where use

of public transport, and cycling are encouraged by the provision of 122 motorcycle spaces, and 128 bicycle spaces. I also accept that the development well integrates residential uses with 1,599m² of non-residential space on the site, comprising retail and commercial uses, while providing adequate setbacks and building separation to adjoining sites. Finally, when considered as a whole, I accept that the GFA on the total site area is around 407m² less than that permitted on the site and so generates an FSR that is less than the maximum FSR allowed for the site.

- 39 Clause 4.6(4)(b) of the RLEP requires that the concurrence of the Planning Secretary be obtained for development consent to be granted to development that contravenes a development standard.
- 40 The Secretary has given written notice dated 5 May 2020, attached to the Planning Circular PS 20-002 that the Secretary's concurrence may be assumed for exceptions to development standards, subject to certain conditions contained in the notice.
- 41 That said, s 39(6) of the LEC Act gives the Court the power to grant development consent without obtaining the concurrence of the Secretary, although consideration ought be given to the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard.
- 42 I have considered whether the contravention of the FSR standard raises any matter of significance for State or regional environmental planning, and whether there is a public benefit of maintaining the development standard. I conclude that no matter of significance arises, and I consider there to be a public benefit served by upholding the written request for the reasons set out above.

The non-residential FSR standard is varied

- 43 As stated at [28], the FSR standard varies across the site and the proposed development fails to achieve the minimum non-residential FSR of 1:1 on 117-125 Anzac Parade as required by cl 6.19 of the RLEP.

- 44 Instead, the proposed development includes non-residential FSR of 0.27:1 on the site at 117-125 Anzac Parade. In summary, the written request identifies that when the site is considered as a whole, the quantum of non-residential FSR exceeds the minimum required by cl 6.19 of the RLEP and so a suitable level of non-residential floor space is provided to promote commercial and retail activity within the Kensington and Kingsford town centres, which is the objective of the standard.
- 45 While the written request also asserts grounds on which the underlying objective or purpose of the standard would be defeated or thwarted if compliance was required, I am satisfied that the objective is achieved, notwithstanding the non-compliance with the numerical standard on a portion of the site.
- 46 I am also satisfied that the written request demonstrates that there are sufficient environmental planning grounds to justify the contravention for the reasons that are similar or identical those at [37], and for the reasons set out at [38], I accept that because the proposed development is consistent with the zone objectives and with the objective of the non-residential FSR standard, it is therefore in the public interest in accordance with cl 4.6(4)(a)(ii) of the RLEP. In forming this opinion of satisfaction I accept that when the site is considered as a whole, and the complementarity and interdependency of the non-residential FSR is understood, the overall provision of commercial and retail activity is consistent with the outcome desired for the development.
- 47 In respect of the Planning Secretary's concurrence required at cl 4.6(4)(b) of the RLEP, I record here my conclusion that the contravention of the non-residential FSR standard does not raise any matter of significance for State or regional environmental planning. Neither do I consider there to be a public benefit in maintaining the development standard, and I consider there to be a public benefit served by upholding the written request for the reasons set out above.

Randwick Local Environmental Plan 2013

- 48 On the basis of the Preliminary Geotechnical Investigation prepared by JK Geotechnics dated 24 July 2020, and the terms of Conditions 12, 44 and 57 of

the agreed conditions of consent, I am satisfied that the proposed earthworks and excavation will not have a detrimental impact on the soil stability of the amenity of the neighbouring uses or the adjacent light rail infrastructure, and I consider those matters at cl 6.2(3) of the RLEP to be appropriately addressed.

- 49 Clause 6.3(3) of the RLEP requires the consent authority, or the Court on appeal, to be satisfied that the development is compatible with the flood hazard of the land, will not significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, incorporates appropriate measures to manage risk to life from flood, will not significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding. I have read the Stormwater and Floodplain Management report prepared by Northrop dated 24 July 2020 and I note the conclusions which record substantial conformity with Council's requirements. I also note the proposed conditions of consent at Conditions 51-54 which are directly relevant and I am satisfied of those matters at subcl (3)(a)-(e) of the RLEP.
- 50 For similar reasons, and having regard to the Civil Engineering plans prepared by Northrop dated 16 July 2020 and the conditions of consent at Conditions 55 and 56, I am also satisfied that the proposed development will incorporate appropriate measures to manage stormwater in accordance with cl 6.4 of the RLEP.
- 51 I consider the conditions of consent at Condition 14, being conditions advised by Sydney Airport, to satisfy the requirements of cl 6.8 of the RLEP in respect of airspace operations.
- 52 On the basis of conditions of consent and general terms of approval from authorities in respect of public utilities (Condition 67), water (Conditions 12 and 37), electricity (Condition 36), sewage (Condition 125), stormwater drainage (Conditions 51 and 127), and suitable vehicular access (Conditions 45 and 122), I am satisfied that adequate arrangements have been made to make

essential services available for the site when required in accordance with cl 6.10 of the RLEP.

- 53 In accordance with cl 6.18 of the RLEP, Condition 109 of the agreed conditions of consent require a contribution equivalent to the affordable housing levy contribution is imposed, and I am satisfied that the monetary contribution is for the purposes of boarding houses (subcl (4)(b)), and is calculated in accordance with the Kensington and Kingsford Town Centres Affordable Housing Plan (subcl (5)).
- 54 Consent for the erection of a building on land to which the Active Frontages provision at cl 6.20 of the RLEP applies must not be granted unless the consent authority is satisfied that all premises on the ground floor of the building facing the street are to be used for the purposes of commercial premises after the erection of the building. On the basis of Drawing DA-210 (Rev 12) prepared by SJB, I am satisfied that the overwhelming proportion of the street frontage is active, and that the frontage otherwise allocated to building services and fire egress should not preclude the grant of consent.

State Environmental Planning Policy (Affordable Rental Housing) 2009

- 55 As the development the subject of the development application is for boarding house development, the provisions of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) apply.
- 56 Clause 29 of the SEPP ARH contains standards that, if met, cannot be used to refuse consent and I am satisfied that the standards are met, except for building height and FSR that are the subject of written requests considered at [14]-[47], and for car parking which seeks consent on the grounds of consistency with the K2K DCP.
- 57 Clause 30 of the SEPP ARH contains standards that must be achieved as a prerequisite to the grant of consent. After careful consideration of the architectural drawings, and the planning summary prepared by Willow Tree Planning dated 10 March 2021, I am satisfied that the standards at subcl (1) have been achieved.

58 Clause 30A of the SEPP ARH requires the character of the local area to be taken into consideration prior to the grant of consent. The Kensington and Kingsford Town Centres are clearly the focus of significant change intended to be delivered through planning amendments adopted in 2020 and reflected in development standards at cl 6.17-6.21 of the RLEP, and Part E of the K2K DCP. On the basis of the transition in character for which provision is made in the planning framework, I am satisfied that the proposed development is, or will be, consistent with the future character that is distinct from the existing character evident in the local area today.

State Environmental Planning Policy No 55—Remediation of land

59 Clause 7 of the State Environmental Planning Policy No 55—Remediation of Land requires a consent authority to consider whether the land is contaminated and requires remediation. On the basis of the Preliminary Site Investigation and Contamination Assessment dated 23 July 2020, and conclusions reached in the letter prepared by JK Environments dated 30 March 2021, I am satisfied that the site can be made suitable for the proposed development, subject to implementing a Remediation Action Plan.

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

60 I am satisfied that the application is accompanied by a BASIX Certificate (Cert No 1115745M_02), prepared by Integral Group Consulting Engineers Pty Ltd dated 1 April 2021 in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the Environmental Planning and Assessment Regulation 2000.

Conclusion

61 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.

62 In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.

Orders

63 The Court orders that:

- (1) The Applicant is granted leave to amend Development Application No DA/373/2020 and rely upon the following amended plans and documents contained at Annexure 'B';
- (2) The Applicant's written request to vary the height of building standard in Clause 6.17, floor space ratio standard in Clause 6.17 and non-residential floor space ratio standard in Clause 6.19 of the Randwick Local Environmental Plan 2012, prepared by Willowtree Planning dated March 2021, is upheld;
- (3) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*;
- (4) The appeal is upheld;
- (5) The development application no DA/373/2020, as amended, for the demolition of existing structures and construction of a mixed use development comprising a 507 room boarding house and commercial premises and associated parking at 111-125 Anzac Parade and 112 Todman Avenue, Kensington, is approved subject to the conditions contained at Annexure 'A'.

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T Horton

Commissioner of the Court

Annexure A (2237578, pdf)

Annexure B (19766072, pdf)

Amendments

17 June 2021 - Replaced incorrect Annexure B with correct Annexure.

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