



New South Wales

Medium Neutral Citation:	Auspat International No.2 Pty Ltd v Randwick City Council [2022] NSWLEC 1567
Hearing dates:	10-12 May 2022 and 20-21 September 2022
Date of orders:	19 October 2022
Decision date:	19 October 2022
Jurisdiction:	Class 1
Before:	Bish C
Decision:	<p>The Court orders that:</p> <ol style="list-style-type: none">(1) The amended written request under clause 4.6 of the Randwick Local Environmental Plan 2012, prepared by Planning Ingenuity dated 1 June 2020 seeking a variation to the development standard for building height under clause 4.3, is upheld.(2) The appeal is upheld.(3) Development Application 698/2020, as amended, is a Stage 1 concept development application which seeks a part 3, part 4 storey residential flat building with parking, tree removal, landscaping and associated civil works on Lot 11 DP 1237484, also known as 11 Jennifer Street, Little Bay, is determined by the grant of consent, subject to conditions in Annexure A.(4) The applicant is to pay the respondents costs thrown away as a result of the amendments of the application for development consent, granted leave on 22 March 2022 and 16 June 2022, pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.(5) The exhibits are returned.
Catchwords:	DEVELOPMENT APPLICATION – concept development – residential flat building – biodiversity conservation – exceedance in height development standard – cl 4.6 written request to vary standard – heritage conservation
Legislation Cited:	<p>Biodiversity Conservation Act 2016, Sch 1, Pts 1, 2, 7, ss 4.5, 6.2, 6.4, 6.5, 7.2, 7.3, 7.16</p> <p>Biodiversity Conservation Regulation 2017, cl 6.7, 7.2, 7.3</p> <p>Environmental Planning and Assessment Act 1979, ss 4.14, 4.15, 4.16, 4.17, 4.22, 8.7, 8.15, 9.1</p> <p>Environmental Planning and Assessment Regulation 2000, cl 49, 55</p> <p>Environmental Protection and Biodiversity Conservation Act 1999</p>

	Randwick Local Environmental Plan 2012, Sch 5, cl 2.3, 4.3, 4.4, 4.6, 5.10, 5.11, 6.11 State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 4, cl 4.6 State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development, cl 4, 28
Cases Cited:	Auspat International No 2 Pty Ltd v Randwick City Council [2019] NSWLEC 176 Denoci Pty Ltd v Liverpool City Council [2020] NSWLEC 102 Toga Penrith Developments Pty Limited v Penrith City Council [2022] NSWLEC 117 The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council [2018] NSWLEC 158
Texts Cited:	Apartment Design Guide Randwick Comprehensive Development Control Plan 2013
Category:	Principal judgment
Parties:	Auspat International No.2 Pty Ltd (Applicant) Randwick City Council (Respondent)
Representation:	Counsel: M Staunton (Applicant) R Lancaster (Barrister) (Respondent) Solicitors: Mills Oakley (Applicant) Randwick City Council (Respondent)
File Number(s):	2021/238291
Publication restriction:	No

JUDGMENT

- COMMISSIONER:** This is an appeal against the deemed refusal of Development Application (DA) 698/2020 by Randwick City Council (the Council), which is an amended Stage 1 concept development application for a part 3, part 4 storey residential flat building (RFB) with basement parking, native habitat conservation and restoration, landscaping and associated civil works on Lot 11 DP 1237484, also known as 11 Jennifer Street, Little Bay (the site).
- For the reasons explained below, I am satisfied that the Development Application 698/2020 (hereafter the application), as amended, addresses the relevant jurisdictional and merit assessment requirements for the Court to determine to grant consent.

Background

The application, as a Stage 1 concept development, is made pursuant to s 4.22 of the *Environmental Planning and Assessment Act 1979* (EPA Act) submitted to Council on 21 November 2020. In addition to being internally reviewed, the original application was notified to residents between 4 February to 4 March 2021, and also referred to relevant authorities.

- 4 Council also referred the original application on 23 November 2020 to the South-Eastern City Local Planning Panel (the Panel), pursuant to s 9.1 of the EPA Act. In addition, Council referred the original application to the Randwick Design Excellence Panel in March 2021, whom after review, opposed the proposed development.
- 5 The applicant appealed against the deemed refusal of the application, pursuant to s 8.7 (1) of the EPA Act.
- 6 On 22 March 2022, the Court granted leave to the applicant's Notice of Motion (NoM) to amend the application, without objection of the respondent, with costs thrown away, pursuant to s 8.15(3) of the EPA Act.
- 7 The hearing commenced by request of the parties with a site view and then proceeded in person, although some experts appeared via audio-visual link.
- 8 At the commencement of the hearing, further NoM's filed by the applicant on 5 and 9 May 2022, seeking to further amend the application in response to expert conferencing, were granted leave by the Court on 16 June 2022 without opposition of the respondent.
- 9 During the hearing, the applicant sought an adjournment, granted with no objection of the respondent, to respond directly to the experts' agreed position to retain native vegetation on the site.
- 10 During the adjournment, the applicant filed a NoM to further amend plans and documents supporting the application on 3 June 2022. The Court granted leave on 16 June 2022 to rely on the amendments as sought, without opposition of the respondent, although the respondent again sought a costs order. It was agreed by the parties that the amendments give effect to evidence provided during the hearing by the relevant experts. These amended plans and documents were tendered in evidence at the recommencement of the hearing (as Exhibit H) and are relied on by the applicant for the Courts consideration of the application.
- 11 Also, during the hearing adjournment, the Council renotified the amended application and received 11 submissions in response.
- 12 At the resumption of the hearing, a NoM filed by the applicant on 13 September 2022 was heard and granted leave by the Court, without opposition of the respondent, as it was agreed that the amendments were minor. These amendments are tendered in evidence as Exhibit J.
- 13 After judgement was reserved, the applicant filed an amended Design Verification Statement on 7 October 2022, which relates to the amended design in Exhibit H. This document was tendered as Exhibit M without opposition of the respondent, on the proviso that the Statement relates to a conceptual design, and not approved for construction.

- 14 With respect to amendments made to the application, the applicant agreed to upload on the NSW Planning Portal, pursuant to cl 55 of the Environmental Planning and Assessment Regulation 2000 (EPA Reg).

Proposed development

- 15 The application, as amended and before the Court under appeal, is described as a Stage 1 concept development, relating to:
- (a) The northern and southern portions of the site divided by a 2m wide, fenced (bushfire) defendable zone (equivalent to an asset protection zone, APZ, as described in the plans);
 - (b) Establishment of a biodiversity 'conservation area' with native vegetation of 5069.8m², located across the southern portion of the site;
 - (c) Conceptual design of a development footprint and building envelope for a part 3, part 4 storey RFB comprising of 83 apartments, including 23 one bedroom, 38 two bedrooms and 22 three bedrooms, with basement parking for 139 vehicle spaces, located across the northern portion of the site; and
 - (d) Tree removal, native vegetation maintenance, species relocation, landscaping and associated works through bushland management practice.

The contentions before the Court in consideration of the (amended) application

- 16 At the commencement of the hearing the respondent identified the primary contentions as being:
- unacceptable impact to biodiversity, because the development does not sufficiently protect threatened species,
 - significant heritage impact to the surrounding conservation areas and to heritage items based on proposed building envelope, and
 - not in the public interest.
- 17 Based on the amendments made to the application, agreed (draft) conditions of consent and expert evidence, the Council considers that the other contentions, as raised in the Statement of Facts and Contentions (SoFC, Exhibit 1), have now been resolved.
- 18 During the hearing the experts also addressed the contentions in the SoFC which relate to: the character of the local area; design excellence; as well as amenity impacts. Based on subsequent amendments made to the application, which responded to expert conferencing, the Council does not press these contentions. However, as these are jurisdictional considerations, the Court must form its own opinion of satisfaction based on the evidence, as explained by Preston CJ in *Toga Penrith Developments Pty Limited v Penrith City Council* [2022] NSWLEC 117 (Toga judgment), as addressed below.

An assessment of the merits and relevant jurisdictional requirements of the amended application is described below, also considering the issues raised by residents in objection.

The Site

- 20 The site is a regular rectangular shape, located adjacent (west) to existing single and two storey residential dwellings along Jennifer Street. To the south, north and east, the site is surrounded by extensive native vegetation/open space, and a single storey commercial building to the north.
- 21 The site fronts to Jennifer Street for a length of 110.75m, and which forms the western boundary. The total area of the site is 1.16 ha. The southern boundary adjoins the Kamay National Park, and the eastern boundary adjoins a recreation area.
- 22 The site is predominantly covered by dense (native) vegetation, although along the western, northern, and eastern boundaries are generally cleared patches of native vegetation, with sparse weedy cover.

Relevant Planning Controls

- 23 The requirements of s 4.15 of the EPA Act are relevant for the Court's consideration to grant consent to the application under appeal. It is noted that pursuant to s 4.22(5), the consent authority, being the Court for this appeal, when assessing the requirements of s 4.15, need only consider the likely impact of the application as a concept proposal and not the 'carrying out of development', which will be the subject of separate, future development applications. The assessment considers: the proposed development footprint and building envelope, including its design, location, height, relationship to surrounding areas, proximity and potential impact to significant heritage features and biodiversity; and the establishment of a biodiversity conservation area, including its size, location, orientation and management.
- 24 The site is covered by native vegetation belonging to the Eastern Suburbs Banksia Scrub (ESBS), a plant community species that is identified as part of a Critically Endangered Ecological Community (CEEC) in the Sydney Basin Bioregion, pursuant to the *Biodiversity Conservation Act 2016* (BC Act) and the *Environmental Protection and Biodiversity Conservation Act 1999*. The provisions of the BC Act are therefore relevant for the Courts consideration, particularly in relation to clearing within the development footprint and the establishment of the (biodiversity) conservation area. This is a jurisdictional issue that remains in contention between the experts.
- 25 The Biodiversity Conservation Regulation 2017 (BC Reg) supports the implementation of the BC Act. The site is mapped as having native vegetation with biodiversity values, pursuant to cl 7.3 of the BC Reg.
- 26 Pursuant to cl 49 of the EPA Reg, the applicant has satisfied the Court with the provision of written consent from all landowners relating to the amended application and the site.

27

Pursuant to cl 4.6(1) of the State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience), the site must be deemed capable of being made suitable for the proposed (residential) use, prior to a grant of consent. I am satisfied that the applicant has provided sufficient evidence, together with the agreed conditions of consent, to address the relevant requirements of Chapter 4 of the SEPP Resilience. Although the application is conceptual, the amended application relies on a contamination report prepared by SLR Consulting Australia Pty Ltd, dated 16 August 2012, which confirms that the site can be made suitable for residential use with the implementation of a remedial action plan.

28 Assessment of the amended application requires the provisions as set out in the State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development (SEPP 65) and the Apartment Design Guide (ADG) to be considered, pursuant to cl 4. It is recognised that the amended application is a concept only with respect to design, therefore the general satisfaction and capability of satisfaction of the relevant provisions is the focus of the assessment. Pursuant to cl 28, the application was referred to a design review panel, and the amended application is supported by a Design Verification Statement, prepared by Philip Thalys, dated 5 October 2022.

29 The site is situated over land zoned R3 Medium Density Residential, pursuant to cl 2.3 of the Randwick Local Environmental Plan 2012 (RLEP). The site adjoins lands zoned R2 Low Density Residential (to the west), RE1 Public Recreation (to the east), E1 National Parks/Nature Reserves (to the south) and SP2 Infrastructure (to the north). The amended application is permissible with consent (in the R3 zone), and the relevant objectives of the R3 zone are deemed as satisfied.

30 The site is surrounded to the south by the Kamay Botany Bay National Park (the NP) and to the north by (vegetation associated with) the former Prince Henry Hospital (the Hospital), which are both identified as being heritage conservation areas (and with heritage items). Therefore, the Court must consider the relevant provisions of cl 5.10 of the RLEP. This issue remains in contention between the experts.

31 The conceptualised (RFB) building envelope, as conceptually designed, exceeds the height standard (of 9.5m) described in cl 4.3 of the RLEP. The amended application relies on a cl 4.6 written request to vary the height development standard. The request to vary the height standard is assessed below and, although originally a contention of Council, is now considered resolved between the experts. The Court must however form its own level of satisfaction to vary the development standard as sought by the applicant.

32 I have formed the opinion, after consideration of the evidence before me, that all other relevant standards and objectives of the RLEP are satisfied by the amended application. My opinion of satisfaction of the requirements for design excellence, pursuant to cl 5.11 of the RLEP, are explained in the judgment below.

33

The Randwick Comprehensive Development Control Plan 2013 (RCDCP) is relevant for consideration of the Court, and the experts specifically refer to Part C4 (medium density residential). Based on the evidence relating to the amended application, I am satisfied that the requirements of the RCDCP are sufficiently addressed.

- 34 I address below those matters that remain in contention between the experts, as well as those that require further detailed assessment by the Court.

Experts

- 35 The Court was provided with written evidence from the following experts:

- (1) Planning and urban design – Messrs Jeff Mead, Stuart McDonald and Michael Harrison, and Ms Gabrielle Morrish.
- (2) Traffic – Messrs Richard Vaughan Jones and Jason Rider.
- (3) Ecology – Dr Stephen Phillips and Ms Elizabeth Ashby.
- (4) Heritage – Mr Phillip North and Dr Sue Rosen.
- (5) Landscape – Messrs David Meredith and Matt Coggan.

- 36 Oral expert evidence was provided by the heritage, ecology, planning and urban design experts.

- 37 By agreement of the parties and concurrence of the Court, the other listed experts were not called to give oral evidence because the Court sought no further evidence based on their evidence in the joint expert reports, supporting documents to the amended application and agreed draft conditions of consent.

Resident submissions

- 38 In response to notification of the original application, made consistent with the requirements of the RCDCP, the Council received 54 submissions in objection. The key issues raised by residents in objection included: view loss, adverse impact to sensitive ecological habitats, increased parking and traffic, uncharacteristic with local area.

- 39 The amended application was renotified on 7 April 2022, and five submissions were received in response. It is noted that National Parks and Wildlife Service provided a submission in response to this notification.

- 40 The written submission of all objectors following (re)notification are tendered in evidence (Exhibit 4) and have been considered by the Court.

- 41 At the start of the hearing, six residents provided oral submission to the Court whilst onsite, which are summarised in Exhibit 4, and have also been considered by the Court.

- 42 The further amended application was renotified, with eleven submissions in objection received by Council. It is advised to the Court that issues raised in these submissions are consistent with previous submissions.

Issues remaining requiring the Courts consideration to grant consent

Are there serious and irreversible impacts to biodiversity values, and/or impacts to threatened species resulting from the (amended) application?

- 43 The site is to be divided into two parts for future development: with the northern portion, being for the building envelope and development footprint; and the southern portion, being for the conservation area. The northern and southern portions of the site are separated by a 2m 'defendable area' and a fence.
- 44 It is understood that the conceptual design described in the amended application relies on clearing of native vegetation, including habitat identified as belonging to the ESBS, within the northern portion of the site, being within the (future) development footprint; and the establishment of a biodiversity conservation area, to retain/protect/preserve native and threatened species of the ESBS, being located in the southern portion of the site.
- 45 Pursuant to s 4.5 of the BC Act, the ESBS is listed in Sch 1, Pt 1 as a CEEC in the Sydney Basin Bioregion. The ESBS habitat is also located within the Kamay National Park and associated with the Hospital conservation area.
- 46 The habitat on the site is also assessed as being suitable for the *Meridolum maryae* (Maroubra Woodland Snail), which is an Endangered Ecological Community, described in Sch 1, Pt 2.
- 47 The primary contention of Council, and which remains in dispute between the (ecology) experts, is that the future, proposed development footprint will cause serious and irreversible impacts (SAII) to biodiversity values, specifically associated with the ESBS, and that appropriate measures have not been taken to assess and address impact on biodiversity values, pursuant to ss 6.5 and 7.16 of the BC Act, described below:

6.5 Serious and irreversible impacts on biodiversity values

- (1) The determination of serious and irreversible impacts on biodiversity values for the purposes of the biodiversity offsets scheme is to be made in accordance with principles prescribed by the regulations.
- (2) The Environment Agency Head may provide guidance on the determination of any such serious and irreversible impacts, and for that purpose may publish, from time to time, criteria to assist in the application of those principles and lists of potential serious and irreversible impacts.

7.16 Proposed development or activity that has serious and irreversible impacts on biodiversity values

- (1) In this section, serious and irreversible impacts on biodiversity values of proposed development or activity means serious and irreversible impacts on biodiversity values as determined under section 6.5 that would remain after the measures proposed to be taken to avoid or minimise the impact on biodiversity values of the proposed development or activity.
- (2) The consent authority must refuse to grant consent under Part 4 of the Environmental Planning and Assessment Act 1979, in the case of an application for development consent to which this Division applies (other than for State significant development), if it is of the opinion that the proposed development is likely to have serious and irreversible impacts on biodiversity values.
- (3) If the Minister for Planning is of the opinion that proposed State significant development or State significant infrastructure that is the subject of an application to which this Division applies is likely to have serious and irreversible impacts on biodiversity values, the Minister—

- (a) is required to take those impacts into consideration, and

(b) is required to determine whether there are any additional and appropriate measures that will minimise those impacts if consent or approval is to be granted.

(4) If the determining authority is of the opinion that the proposed activity to which this Division applies is likely to have serious and irreversible impacts on biodiversity values, the determining authority—

(a) is required to take those impacts into consideration, and

(b) is required to determine whether there are any additional and appropriate measures that will minimise those impacts if the activity is to be carried out or approved.

- 48 The ‘principles’ referenced in s 6.5 of the BC Act, are described in cl 6.7 of the BC Reg, as follows:

6.7 Principles applicable to determination of “serious and irreversible impacts on biodiversity values” (section 6.5(1))

(1) This clause applies for the purposes of determining whether an impact on diversity values is a serious and irreversible impact for the purposes of the biodiversity offsets scheme.

(2) An impact is to be regarded as serious and irreversible if it is likely to contribute significantly to the risk of a threatened species or ecological community becoming extinct because—

(a) it will cause a further decline of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to be in a rapid rate of decline, or

(b) it will further reduce the population size of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to have a very small population size, or

(c) it is an impact on the habitat of the species or ecological community that is currently observed, estimated, inferred or reasonably suspected to have a very limited geographic distribution, or

(d) the impacted species or ecological community is unlikely to respond to measures to improve its habitat and vegetation integrity and therefore its members are not replaceable.

(3) For the purpose of this clause, a decline of a species or ecological community is a continuing or projected decline in—

(a) an index of abundance appropriate to the taxon, or

(b) the geographic distribution and habitat quality of the species or ecological community.

(4) If the guidance published by the Environment Agency Head under section 6.5(2) of the Act is changed, a biodiversity assessment report may, during the period of 90 days after the guidance was changed, be prepared on the basis of the guidance in force before the change, but only if the report states that it has been prepared on that basis.

- 49 The ‘Biodiversity Values Map’ (BV Map) identifies land with high biodiversity value that is potentially sensitive to impacts from development and clearing, pursuant to s 7.3 of the BC Reg. The BV Map shows land that is highly valued for its native vegetation, threatened species and habitats, and is prepared by the Department of Planning and Environment, under Pt 7 of the BC Act.

- 50 The site is mapped on the BV Map with biodiversity values associated with the ESBS habitat. The conceptual development footprint as described in the amended application relies on the clearing of native vegetation in the northern portion of the site, which includes the ESBS habitat. Pursuant to cl 7.2(1)(b) of the BC Reg, the (extent of) clearing relied on by the amended application exceeds the Biodiversity Offsets Scheme threshold, and therefore (future) development ‘is likely to significantly affect threatened species.

Evidence

- 51 Any development or activity which triggers Pt 7 of the BC Act and is 'likely to significantly affect threatened species', must be accompanied by a Biodiversity Development Assessment Report (BDAR). The BDAR is to be prepared pursuant to the regulations in the BC Reg.
- 52 The amended application relies on an amended BDAR, dated 3 June 2022 (tendered as Exhibit H), which assesses the potential for 'likely' impact to threatened species and biodiversity values on the site, and also proposes mitigation options to address any potential SAIL.
- 53 The amended application is also supported by an amended Bushland Management Plan, dated 26 May 2022 (BMP, also in Exhibit H) which seeks to: address the (future) native habitat clearing proposed in the north of the site; relocation of species, where required; and manage (to preserve) endangered fauna/flora in the south of the site.
- 54 The parties agree that a previous decision by Justice Moore in *Auspat International No 2 Pty Ltd v Randwick City Council* [2019] NSWLEC 176 (Auspat judgment), which also relates to concept design for an RFB on the site and assessed the need to establish a biodiversity conservation area on the site to protect and preserve the ESBS habitat.
- 55 The concept for a 'site-based' biodiversity conservation area is agreed as appropriate by the experts, however the dimensions of the area proposed in the amended application are not agreed, with respect to its areal extent, orientation and location. The dispute between the experts relates to whether the proposed biodiversity conservation area is sufficient in size and orientation to protect and preserve the ESBS having considered the actual area of ESBS to be cleared in the north of the site, and functional in its location/orientation to ensure fauna 'connectivity' with the surrounding areas of ESBS habitat.
- 56 The experts, in evidence to the Court, agree that there is a 'wealth' of floristic data available for analysis on this site, and that the southern portion of the site is extensively covered by generally 'good condition' habitat species of the ESBS. They also agree that it is preferable that the ESBS habitat be protected on the site, due to the limited geographic extent/suitable environmental conditions, including soil, for the ESBS community species to flourish beyond the site and surrounding area (in the NP and the Hospital).
- 57 They however do not agree whether the extent and/or potential loss of ESBS habitat in the north of the site has been properly assessed and consequently if any impact to threatened species has been appropriately mitigated to prevent SAIL (of the ESBS), as described in the BDAR and BMP.
- 58 The experts agree that there is not an extensive database available on threatened fauna species on the site, specifically relating to the Maroubra Woodland Snail. They however do not agree on the applicant's assessment of the areal extent/population size of the ESBS or the population extent of the Maroubra Woodland Snail, across the northern portion of the site, as described in the BDAR. Another issue that remains in

- dispute between the experts is whether the reliance on the BMP to relocate this fauna (snail) species without a detailed assessment is sufficient and appropriate to prevent SAIL.
- 59 Fundamentally, the experts do not agree on the (areal) quantification of the potential 'loss' by clearing of the ESBS habitat within the development footprint in the northern portion of the site.
- 60 The ecology experts disagree whether the proposed biodiversity conservation area plus the offset credits (for flora and fauna) to be retired, as described in the BDAR, is sufficient to prevent a SAIL to the species associated with the ESBS and the Maroubra Woodland Snail species.
- 61 It is posed by Dr Phillips that the application does not properly assess, avoid/minimise impact to the ESBS, and therefore the Court cannot be satisfied that there is not a SAIL to species of the ESBS habitat and Maroubra Woodland Snail, pursuant to ss 6.2 and 7.16 of the BC Act.
- 62 Dr Phillips considers that the ecological information on the ESBS habitat in the northern portion of the site that informs the BDAR is insufficient, ill-informed and that any loss is not sufficiently mitigated. He assesses that up to 0.12ha of ESBS habitat is currently located in the northern portion of the site and would likely be cleared within (the conceptual) development footprint, as relied on by the amended application. He suggests that the actual size and location of the ESBS habitat in the northern portion of the site has not been properly mapped, and that an 'equivalent area' of ESBS habitat 'lost' by clearing cannot be confirmed as being sufficiently provided onsite.
- 63 Based on this inaccurate mapping of the ESBS habitat in the north of the site, Dr Phillips states that there is therefore potential for the net loss of ESBS habitat and associated species, thereby pushing this already CEEC to the point of extinction and resulting in a SAIL.
- 64 Dr Phillips is concerned that the BDAR does not accurately assess the actual geographic extent and population size of the Maroubra Woodland Snail. He considers that the proposed relocation of this species, as described in the BMP, is not reliable to ensure this species is sufficiently protected, potentially resulting in a SAIL.
- 65 Ms Ashby, however, does not accept that the assessment of the endangered communities on the site is inaccurate or that there is a 'significant' in ESBS habitat across the northern portion of the site. Therefore, there will not be a (significant) net loss of the ESBS or Maroubra Snail as result of (future) clearing within the development footprint. She relies on the amended BDAR to describe and appropriately size the biodiversity conservation area, as well as accurately calculated offset species credits. She is confident that the amended BDAR sufficiently addresses the relevant jurisdictional requirements relating to protecting biodiversity values and threatened species on the site, as described in the BC Act and BC Reg.
- 66 To inform her assessment, Ms Ashby relies on a (3) quadrant method plus modelling and a soil assessment, which identifies up to 0.03ha of ESBS habitat as being potentially located in the north of the site, and therefore subject to future clearing.

- 67 Ms Ashby confirms that the amended BDAR, has adopted sufficient measures to avoid and/or minimise impact to the ESBS, by protecting native vegetation having biodiversity values and associated fauna species on the site. She considers that any assessed (or unforeseen) impact to the ESBS habitat and Maroubra Woodland Snail species has been sufficiently mitigated through the following actions: establishment and management of a sufficiently sized/located and oriented biodiversity conservation area, preserving the existing good condition ESBS habitat across the southern portion of the site; (re)establishment of an equivalent area of any potentially cleared habitat of the ESBS in the conservation area, with appropriate management actions; relocation of any identified Maroubra Woodland Snails to the conservation area; and the retirement of appropriately calculated biodiversity offset species credits to account for any unforeseen loss of ESBS habitat and the Maroubra Woodland Snail, which is equivalent to any discrepancy between the experts.

Assessment

- 68 The BC Act establishes the regulatory framework to ensure development applications assess and, where necessary, address impacts to biodiversity values and threatened species. The Court must assess and to grant consent, be satisfied that there is no SAIL to the (mapped) biodiversity values resulting from the amended application and that any likely impact/affect to threatened species has been sufficiently mitigated, pursuant to ss 6.5, 7.2 and 7.16 of the BC Act, and cl 6.7 of the BC Reg.
- 69 In assessment of the potential for a SAIL and impact to threatened species, the amended application should adopt a 'mitigation hierarchy', whereby the evidence has demonstrated the application has sought to first avoid and minimise impact, and then as required, mitigate (offset) any 'loss', as articulated by Preston CJ in *Denoci Pty Ltd v Liverpool City Council* [2020] NSWLEC 102 (Denoci judgment) at [27].
- 70 Also, described by Preston CJ in the Denoci judgment, there is the requirement for the Court to consider the requirements of s 4.15(1)(b) of the EPA Act, considering any likely environmental impacts on the natural environment.
- 71 I recognise that the amended application now before the Court in this appeal is significantly different from that assessed and determined in the Auspat judgment, specifically in terms of dimensions and location of the proposed development footprint/building envelope and conservation area. In the Auspat judgment, Moore J recognised the importance of protecting and preserving the sensitive ecological habitat of the ESBS on the site. This concept of onsite habitat protection is also adopted in the amended application before the Court, although with adjustments made to the area of conservation, development footprint and the conceptual RFB design/location on the site.
- 72 It is accepted that any future building works associated with an RFB on the site would be the subject of separate development applications. The amended application under appeal is a conceptual design, describing a building envelope/development footprint, which seeks to demonstrate that an RFB can be constructed on the site without significant adverse impact to biodiversity values and threatened species.

- 73 Based on the evidence before me, I am satisfied that the amended BDAR, dated 3 June 2022 is accurate and sufficient. The amended BDAR describes the native vegetation on the site as belonging to: 0.21ha of Plant Community (PCT) 664 Coastal Sand Mantle Heath, the ESBS, a threatened Ecological Community (TEC); and 0.61ha of PCT 1882 Coastal Headland Banksia Heath (the Heath), which is not a TEC.
- 74 I am satisfied that the amended BDAR relied on by the application is informed by the numerous studies and floristic data previously obtained on the site. I find that the amended BDAR calculates sufficient offset credits for both flora and fauna species potentially impacted, using the Biodiversity Assessment Method 2020 (BAM).
- 75 The amended application, as described in the amended BDAR and BMP, seeks to (re) establish, protect and preserve 0.45ha of native vegetation in a biodiversity conservation area with active management (through the BMP), and which includes 0.21ha of PCT 664 and 0.24ha PCT 1882. I agree with this assessment.
- 76 I adopt the ecology expert's explanation that the ESBS habitat has very limited geographic extent across the Sydney Basin, and therefore it is appropriate that site focused conservation measures be prioritised, as relied on by this amended application, to negate any SAIL.
- 77 I prefer the assessment approach adopted by Ms Ashby to define the areal extent of ESBS habitat and Maroubra Woodland Snail on the site, which I find is reasonable. I am satisfied that up to 0.03ha of the ESBS habitat could be lost by future clearing (of the development footprint) in the northern portion of the site, as relied on by the amended application. I am satisfied that her assessment approach informs and is described in the BDAR. Her method of (3) quadrant mapping, soil analysis and species modelling is sufficiently accurate to assess the potential impact from clearing and the likelihood of significant affect to threatened species, endangered ecological communities, and their habitats, pursuant to s 7.3 of the BC Act.
- 78 I find that the amended BMP sufficiently and reasonably describes appropriate management practices that seek to maintain, preserve and protect the threatened and endangered species found on the site. The amended BMP explains that the site will be separated into five management areas, based on the management practice, type of species, level of protection and existing habitat condition. Management Units (MU) 1 and 2, within the conservation area, preserve/protect habitats belonging to the ESBS and the Heath, respectively. MU 3 seeks re-establishment of the ESBS habitat (lost due to clearing) and is also within the conservation area. MUs 4 and 5 are within the future development footprint and habitat will be cleared. MU 4 requires mapping, removal/relocation onsite within the conservation area of any identified Maroubra Woodland Snail species, and also any soils associated with the ESBS to MU 3, before weeding and clearing. MU 5 also requires mapping and removal to the conservation area of any Maroubra Woodland Snails, before clearing and weeding.
- 79 I am satisfied that the area proposed for re-establishment of the ESBS in MU 3, with management described in the amended BMP sufficiently addresses the area of 'disputed loss' of the ESBS habitat and will also address any 'edge effects'. I find that

the proposed location of re-established ESBS habitat in the southwest/southeast portions of the site, together with the relocation of ESBS suitable soils is suitable to support the reestablishment of any ESBS habitat lost due to clearing, and that any potential 'edge effects' from adjoining residential development have been considered in the amended BMP.

- 80 I also am satisfied that the biodiversity conservation area will not be adversely overshadowed by its relationship with conceptual design of the RFB to affect its future condition.
- 81 I am satisfied that the orientation and positioning on site of the conservation area will not result in a loss of 'connection' for (endangered) flora and fauna species. The amended application has demonstrated a sufficient direct habitat connection between the biodiversity conservation area on the site and the Kamay National Park, and I find that the distance between site's conservation area and the northern (Hospital conservation area) ESBS habitats is such that the species can remain 'connected'.
- 82 I understand that the amended application relies on (future) clearing of habitat that is suitable for the Maroubra Snail. I am satisfied that the amended BMP has demonstrated sufficient strategies to identify and relocate any snail species found within the development footprint. The amended BMP therefore sufficiently addresses the relocation of any identified Maroubra Woodland Snail to protect the species.
- 83 As described in the amended BDAR, the amended application also relies on the retirement of nine ecosystem credits for impact to PCT 1822 and ten species credits (for potential impact to the Maroubra Snail). The approach adopted is to retire these species credits to account for any discrepancies (of loss) in assessment of species on the site that could potentially result in an unforeseen 'net loss' of threatened species and biodiversity values.
- 84 I am satisfied that the BAM calculation of biodiversity credits, as described in the amended BDAR, are accurate and sufficient to properly account for any unforeseen 'loss' of threatened species on the site. I am satisfied that the proposed (offset) credit obligations adopted consider and adjust for any deficiencies between the ecology experts in the assessment of flora and fauna species across the site, due to the lack of data.
- 85 Based on the evidence before me, I am satisfied that the biodiversity conservation measures adopted by the amended application, that relies on a sufficiently sized biodiversity conservation area on the site and offset of any unforeseen impacts on biodiversity values, does appropriately avoid and minimise impact on biodiversity values, specifically to endangered communities relating to the ESBS habitat and Maroubra Woodland Snail. The reliance on an appropriately sized and located biodiversity conservation area together with a BMP, and the biodiversity offset scheme, sufficiently addresses the requirements of s 6.4 of the BC Act.
- 86 I am satisfied that the amended application has considered any likelihood to affect threatened species and/or endangered ecological communities and has mitigated sufficiently any potential impact, pursuant to ss 7.2 and 7.3 of the BC Act.

- 87 I also find that the amended application considers and reasonably satisfies the principles relating to SAIL on biodiversity values, pursuant to cl 6.7 of the BC Reg. Based on the evidence, I am satisfied that there will be no serious and irreversible impacts on biodiversity values relating to conceptual development described in the amended application, pursuant to ss 6.5 and 7.16 of the BC Act, because of: a sufficient amended BDAR and BMP that describes an adequately dimensioned/positioned/managed biodiversity conservation area on the site; and the retirement of appropriately calculated biodiversity species credit offsets. Therefore, the endangered and threatened species associated with the ESBS habitat and Maroubra Woodland Snail are sufficiently protected.
- 88 I also find that the amended application satisfies the requirements of s 4.15(1)(b) of the EPA Act because, as assessed, there are unlikely to be any significant environmental impacts on the natural environment resulting from the conceptualised development footprint/building envelope.

Is a variation of the height development standard satisfied?

- 89 It is accepted that a cl 4.6 written request seeking a variation of the height standard (cl 4.3) is required to grant consent to the amended application, pursuant to cl 4.6 of the RLEP, and that the Court must be satisfied of the request to vary the height standard, to grant consent.
- 90 The applicant relies on an amended cl 4.6 written request, dated 1 June 2022, prepared by Planning Ingenuity, and tendered as Exhibit H.
- 91 The written request for (height) variation of the development standard explains that the conceptualised maximum height for the (RFB) building envelope exceeds the 9.5m (cl 4.3) height standard of the RLEP. Based on the amended plans, the designed height exceedance is primarily limited to the four-storey building, including its roof form, terrace pergolas and lift overruns (required to give access to the terrace as communal open space). The amended application relies on a conceptual design has a maximum height of 14.85m, a breach of 5.35m or 56.3%.
- 92 The cl 4.6 (height) written request explains that the height breach considers the relocation of the (outdoor) communal space to the roof terrace, whereby the development footprint is minimised to maximise the biodiversity conservation land area and preserve more ESBS habitat onsite. There are therefore sufficient environmental planning grounds to vary the height standard. The height breaching elements are described as not resulting in a development that would be out of character with the local area, and not perceived adversely from the streetscape of either Jennifer Street or 'Crown Road'. Further to this, the non-compliant height elements would not impact adversely on the amenity of adjoining residents.
- 93 According to the (cl 4.6) written request, the conceptual building envelope is consistent with the zone objectives (cl 2.3 of the RLEP) and the height development standard (cl 4.3), as described below:

Zone R3 Medium Density Residential

1 Objectives of zone

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To recognise the desirable elements of the existing streetscape and built form or, in precincts undergoing transition, that contribute to the desired future character of the area.
- To protect the amenity of residents.
- To encourage housing affordability.
- To enable small-scale business uses in existing commercial buildings.

4.3 Height of buildings

(1) The objectives of this clause 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.

- 94 The (cl 4.6) written request further explains that the non-compliant portions of the conceptual building envelope are consistent with the envisaged character of an R3 zone, result in no adverse amenity impacts to surrounding conservation areas or residents, and the relevant height objectives are satisfied. Therefore, compliance with the height standard is both unreasonable and unnecessary.
- 95 The (cl 4.6) written request surmises that a variation of the height development standard, pursuant to cl 4.3 of the RLEP, is appropriate, and that flexibility of the standard is justified. Also, it is explained that there is no public benefit in maintaining the height standard on the site.
- 96 Having reviewed the (cl 4.6) written request and evidence before me, I am satisfied that the written request seeking variation of the height development standard, as described in cl 4.3, sufficiently addresses the requirements of cl 4.6(3) of the RLEP, by describing sufficient environmental planning grounds to justify the development standard exceedance and that strict compliance would be both unreasonable and unnecessary. The additional building height supports a greater area of biodiversity conservation to be maintained on the site. Therefore, cl 4.6(4)(a)(i) of the RLEP is satisfied.
- 97 The conceptual building envelope, as amended, presents a reasonable bulk and scale, including the fourth storey, when viewed from the streetscape (both Jennifer Street and 'Crown Road'), which I find is a better outcome than what was originally proposed and approved in the Auspat judgment.
- 98 I find that the amended conceptual building envelope is consistent with the objectives of the zone (R3) and the height (cl 4.3) standard, as established in the RLEP. I am satisfied, based on the evidence before me, that the amended application, including the portions of the building envelope that result in a breach in height will: unlikely cause adverse amenity impact to surrounding residents and vegetation in the conservation

zone; and responds to key elements in the streetscape, including the water tower and hospital conservation area buildings. The height non-compliance, as conceptualised, is not inconsistent with what is envisaged in an R3 zone and I assess that the breach is not incompatible with the character of the local area, whilst acknowledging that the immediate surrounding area is predominantly low-density residential development with substantial areas of native vegetation.

- 99 I am satisfied that the amended building envelope, as conceptualised, is in the public interest. The requirements of cl 4.6(4)(a)(ii) are satisfied.
- 100 I am satisfied there is no significant consequence to State or Regional environmental planning matters due to the conceptual height breach, and that there is no public benefit to maintaining the (height) standard for the amended application relating to the site. Therefore, the variation of the height development standard, as sought, is not inconsistent with cl 4.6(4)(b) or (5) of the EPA Act.
- 101 Based on the evidence before me, I am satisfied that the requirements of cl 4.6 of the RLEP have been considered and are addressed, and that the requested variation to the height development standard, as established in cl 4.3, should be upheld.

Are there unacceptable impacts to (the significance of) surrounding heritage items and conservation areas?

- 102 The contention as raised by Council, and which remains in dispute between the heritage experts, relates to a perceived insufficiency in response by the amended application to potential impacts on the surrounding heritage conservation areas, namely the Kamay Botany Bay National Park Conservation Area (listed C5 in Schedule 5 of the RLEP) and Prince Henry Hospital Conservation Area (listed C6 in Schedule 5 of the RLEP).
- 103 The amended application relies on an Aboriginal Heritage Assessment, dated 27 October 2021, prepared by the La Perouse Local Aboriginal Land Council. I find, consistent with the expert agreement that the Aboriginal Heritage Assessment does not identify any known Aboriginal objects or heritage significance on the site and is sufficient to address the relevant requirements of cl 5.10 of the RLEP.
- 104 The site itself is not listed as a heritage conservation area. However, based on the site's proximity to the National Park and Hospital conservation areas, the Court is required to consider the requirements of cl 5.10 of RLEP.
- 105 During the site view, the Court was taken to several sightlines looking from within the National Park and Hospital Conservation Areas, as viewed towards the site.
- 106 I assess that, when observed from various points within the National Park, the upper levels (third and fourth stories) of the conceptual building envelope would likely be visible above the trees, albeit at a reasonable distance, and that the only other structure on the horizon from this view, of equivalent height, is the water tower located on a nearby property in the R2 zone. From further away within the National Park, I viewed that the upper levels of (residential) buildings in the former Hospital Conservation Area are also visible.

- 107 Based on my observations, as viewed from the relevant vantage points within the National Park, I did not perceive that the visibility of the upper levels of the future RFB, as positioned on the site, would likely have an adverse impact to the view or setting. This is due to the significant separation of the building envelope from the National Park across the proposed biodiversity conservation area, and its positioning on the site. There is an extensive and expansive depth/height of native vegetation between the conceptual building and within the National Park. I also consider that the view (northward) from the National Park is generally towards an existing urban streetscape. A person standing in the National Park would unlikely find the screened view of the upper stories of a future building on the site as unexpected or out of visual place. I am satisfied there is no adverse impact to the setting, view or fabric of the National Park Conservation Area.
- 108 Also, based on my observations from the site view and evidence before me, I am satisfied that the conceptualised building envelope will not be adversely visible from within the Hospital Conservation Area or its conservation items, due to the extent of intervening vegetation, topographic changes and existing multilevel building structures. I observed that the Hospital Conservation Area has numerous existing buildings of variable and comparable height/scale as proposed on the site, which are considered appropriate and in character for this area. Therefore, I do not find that the conceptualised building envelope on the site would detract from the setting, view or fabric of the Hospital Conservation Area or Items.
- 109 I prefer the evidence of Mr North that the heritage assessment is sufficient and that there are likely no adverse effects to the significance of the surrounding conservation areas or items, consistent with the provisions/objectives in cl 5.10(4) of the RLEP.
- 110 I am satisfied that the requirements of cl 5.10 of the RLEP are sufficiently satisfied by the amended application, particularly having regard to the amendments resulting in the reduction and limiting of height to the centre of the site.

Does the proposed design achieve design excellence?

- 111 To grant consent, the Court must be satisfied that the application exhibits design excellence, pursuant to the requirements established in cl 6.11 of the RLEP. Specifically with regards to this amended application, the Court must form an opinion on whether the architectural design of the future RFB is to the highest standard, with respect to its appearance and providing residential amenity, in addition to an appropriate response to its environmental context.
- 112 The requirements of cl 6.11 of the RLEP are as follows:

6.11 Design excellence

(1) The objective of this clause is to deliver the highest standard of architectural and urban design.

(2) This clause applies to development involving the construction of a new building or external alterations to an existing building—

(a) on a site that has an area of 10,000 square metres or greater, or

(b) on land for which a development control plan is required to be prepared under clause 6.12, or

(c) that is, or will be, at least 15 metres in height.

(3) Development consent must not be granted to development to which this clause applies unless the consent authority is satisfied that the proposed development exhibits design excellence.

(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 and external appearance of the development will improve the quality and amenity of the public domain,

(c) how the proposed development responds to the environmental and built characteristics of the site and whether it achieves an acceptable relationship with other buildings on the same site and on neighbouring sites,

(d) whether the building meets sustainable design principles in terms of sunlight, natural ventilation, wind, reflectivity, visual and acoustic privacy, safety and security and resource, energy and water efficiency,

(e) whether the proposed development detrimentally impacts on view corridors and landmarks.

113 Clause 6.11 of the RLEP is engaged because the amended application relates to the (conceptualised) development of an RFB that is 11,000m² and requires a site specific DCP, pursuant to cl 6.11(2)(b) and 6.12(2)(a). Although the amended application is conceptual in design, cl 6.11 is still a requirement for consideration based on the decision of Preston CJ in *The Uniting Church in Australia Property Trust (NSW) v Parramatta City Council* [2018] NSWLEC 158 at [35-57].

114 I am satisfied that the amended application delivers the highest standards of architectural and urban design, pursuant to subcl 6.11(1) and (3), and has had regard to the relevant requirements of cl 6.11(4) of the RLEP, as described below:

- The proposed building design and materials respond to the natural bushland setting and prominence in the topography, with well separated buildings, of muted tones and colours, that are surrounded by (native species) landscaped areas for communal open space and biodiversity conservation.
- Conceptual buildings are well set back in the streetscape, both in horizontal and vertical dimension, with front and side setbacks landscaped with native species.
- The design of buildings does not cause adverse impact on views, public domain or landmarks, including heritage conservation areas.
- The design of the conceptualised buildings has considered and adopted the relevant sustainable design principles, as described in the ADG, specifically Part 4.

115 The amended application relies on a Design Verification Statement, prepared by Philip Thalys, dated 5 October 2022. I am satisfied that this document has considered and appropriately assesses the design of the amended conceptual RFB in context with its relationship to the urban streetscape and natural environment.

Have the resident objections been considered?

116

The residents were given the opportunity during three periods of notification of the application, including original and amended, to provide written submissions. These submissions have been provided in evidence.

117 In addition, six residents provided oral submissions at the start of the hearing. These oral submissions are summarised and submitted in evidence for assessment by the Court.

118 I am satisfied that the residents had sufficient opportunity to assess the amended application and address the Court, pursuant to s 4.14(1)(a)(ii) of the EPA Act. Also, I am satisfied that the issues raised by objectors have been considered and where appropriate, are addressed by amendments made to the application, pursuant to s 4.15(1)(d). Specifically, the amendments made to the design of the conceptual RFB seek to provide view corridors and sightlines through the site, sufficient setbacks of the upper levels, and (native species) landscaping with a biodiversity conservation area, which address a number of residents' concerns.

Is the (amended) application in the public interest?

119 After consideration of the evidence before the Court, and matters of relevance to this amended application, as described above, I find that the amended application is in the public interest, satisfying s 4.15(1)(e) of the EPA Act. The amended application: does not pose adverse amenity impacts to residents or the surrounding area; it complements the existing natural habitat and character of the local area; and it protects/supports the sensitive surrounding natural habitat, specifically ecologically endangered communities.

Costs

120 The respondent seeks for the Court address its costs associated with amendments made to the application during the proceedings, pursuant to s 8.15(3) of the EPA Act, below:

(3) If the Court on an appeal by an applicant under this Division allows the applicant to file an amended application for development consent (other than to make a minor amendment), the Court must make an order for the payment by the applicant of those costs of the consent authority that have been thrown away as a result of the amendment of the application for development consent. This subsection does not apply to proceedings to which section 34AA of the Land and Environment Court Act 1979 applies.

121 In response to the amendments made to plans and documents supporting the application, the respondent agreed that some issues in contention were addressed. However, these amendments that were made to the application and granted leave to rely on in 22 March 2022 and 16 June 2022 required further and unexpected assessment cost associated with Council's experts.

122 The changes to plans and documents granted leave before and during the hearing were generally positive in resolving key contentions, and it is my opinion resulted in a better design outcome that was generally agreed by the planning experts.

123

I however consider that the amendments granted to the application on 22 March 2022 and 16 June 2022, were not 'minor' and substantially changed the application, and which caused the respondent's experts to spend additional, unexpected time in review and reporting.

- 124 I am assess that an order for costs thrown away, based on the amendments relied granted on 22 March 2022 and 16 June 2022 is consistent with s 8.15(3) of the EPA Act.

Conditions

- 125 Based on the findings described above, I determine to grant conditional consent to the application as amended, pursuant to s 4.16(1)(a) of the EPA Act, and impose conditions as described in Annexure A, pursuant to s 4.17(1).
- 126 I adopt the draft conditions of consent as agreed by the parties, which were filed on 6 October 2022. I address below, the conditions (specifically 2b, c, d and f) that remain in dispute between the parties.
- 127 With regards to condition 2, I find the following:
- (i) Condition 2b is deleted, and the application should rely on the articulation zones, as shown in the amended plans. I reason that the articulation zones, as designed and shown in the amended plans, have considered the relevant design principles and respond to architectural features. The designed articulation zones provide a compliant floor space ratio (cl 4.4 of the RLEP) and achieve relevant ADG requirements, including for amenity.
 - (ii) Condition 2c is deleted, and the application should rely on the wall heights, as shown in the amended plans. I reason that the wall heights, as designed and shown in the amended plans, have considered the relevant design principles and respond to relevant architectural features. The conceptual wall heights do not impact the character or amenity of surrounding areas.
 - (iii) Condition 2d is deleted, and the application should rely on the setbacks for level 3, as shown in the amended plans. I reason that the setbacks, as designed and shown in the amended plans, have considered the relevant design principles and respond to relevant architectural features. The conceptualised building setbacks do not impact the character or amenity of surrounding areas.
 - (iv) Condition 2f is amended to state '*cores of all buildings are to provide direct access to the central courtyard space between the buildings*'. I prefer the applicant's position because, whilst it is important to direct residents towards the central core, direct access through the northern buildings to Crown Road is not necessary, as it not the primary street frontage and access is still

achieved through the building separation of the (northern) buildings. The design principles are archived by the proposed amendments to the design of the buildings.

Conclusion

- 128 The amended application has been assessed, based on the evidence before the Court, including the (amended) supporting plans, documents, agreed conditions of consent, expert reports and submissions from residents.
- 129 In determining to grant consent to this amended application, I find that the concept development application as described to the Court is unlikely to cause adverse impact, and satisfies the requirements of the relevant regulatory instruments, namely the EPA Act, BC Act, BC Reg, SEPP 65 and the RLEP. The reasons for my determination, as described above, are principally because the conceptualised development: does not cause adverse serious and irreversible impact to biodiversity values or likely to affect threatened species; is compatible with the character of the local area and surrounding heritage conservation areas/items; does not cause adverse amenity impact; and is in the public interest.
- 130 Pursuant to s 4.22(5) of the EPA, this determination does not consider the likely impact of the carrying out of development which would be the subject of subsequent development applications.
- 131 Therefore, I grant consent for DA 698/2020, with conditions pursuant to s 4.16(1)(a) of the EPA Act.

Orders

- 132 The Court notes that:
- (1) The Randwick City Council, as the relevant consent authority, has agreed under cl 55 of the Environmental Planning and Assessment Regulation 2000 to amending the application for development consent (DA 698/2020) and uploading to the NSW Planning Portal.
 - (2) The applicant has uploaded the documents that amend the application on the NSW Planning Portal.
 - (3) The applicant has filed with the Court the amended application, consistent with the documents uploaded to the NSW Planning Portal.
- 133 The orders of the Court are:
- (1) The amended written request under clause 4.6 of the Randwick Local Environmental Plan 2012, prepared by Planning Ingenuity dated 1 June 2020 seeking a variation to the development standard for building height under clause 4.3, is upheld.
 - (2) The appeal is upheld.
 - (3)

Development Application 698/2020, as amended, is a Stage 1 concept development application which seeks a part 3, part 4 storey residential flat building with parking, tree removal, landscaping and associated civil works on Lot 11 DP 1237484, also known as 11 Jennifer Street, Little Bay, is determined by the grant of consent, subject to conditions in Annexure A.

- (4) The applicant is to pay the respondents costs thrown away as a result of the amendments of the application for development consent, granted leave on 22 March 2022 and 16 June 2022, pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.
- (5) The exhibits are returned.

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Sarah Bish

Commissioner of the Court

[21.238291 Annexure A \(252851, pdf\)](#)

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Decision last updated: 19 October 2022