



## Land and Environment Court New South Wales

Case Name: **GFM Investment Group Pty Ltd in its capacity as  
Trustee for GFM Home Trust Subtrust No. 7 v  
Inner West Council**

Medium Neutral Citation: **[2023] NSWLEC 1112**

Hearing Date(s): **21, 22, 23 November 2022**

Date of Orders: **14 March 2023**

Date of Decision: **14 March 2023**

Jurisdiction: **Class 1**

Before: **Walsh C**

Decision: **Proceedings 2021/361705, see orders below at [130].  
Proceedings 2021/361726, see orders below at [131].**

Catchwords: **DEVELOPMENT APPLICATIONS – two  
development applications associated with regionally  
significant mixed use development – site specific  
planning controls – early works development  
application for demolition, tree removal, site  
establishment works – main works development  
application for demolition, excavation, remediation,  
construction including adaptive reuse of existing  
industrial buildings and three new buildings and new  
open space areas – design excellence – need for  
balconies within proposed studios and one-bedroom  
apartments – visual massing of new building and  
whether appropriate transition to adjacent low  
density residential development – lay objections**

Legislation Cited: **Contaminated Land Management Act 1997 s 3, Pt 4  
Environmental Planning and Assessment Act 1979,  
ss 8.7, 8.15, Pt 9  
Inner West Local Environmental Plan 2022 s 1.8A  
Land and Environment Court Act 1979 s 39  
Marrickville Local Environmental Plan 2011 cl 5.21,  
6.2, 6.5, 6.6, 6.20, 6.21,  
State Environmental Planning Policy (Affordable  
Rental Housing) 2009 cl 41D, 41E, Div 6A**

State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 4, s 4.6  
State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.48, 2.122

Cases Cited:	Aloke Holdings Pty Ltd v City of Sydney [2019] NSWLEC 1177 Arxidia Pty Ltd v Randwick City Council; Arthur Wong Pty Ltd v Randwick City Council [2017] NSWLEC 1463 McDonald's Australia Limited v Coffs Harbour City Council [2023] NSWLEC 1067 New Century Developments Pty Ltd v Baulkham Hills Shire Council (2003) 127 LGERA 303; [2003] NSWLEC 154
Texts Cited:	Expert Witness Code of Conduct Marrickville Development Control Plan (2011) NSW Department of Planning and Environment, Apartment Design Guide (July 2015) NSW EPA, Noise Policy for Industry (2017) NSW EPA, NSW Site Auditor Scheme 3rd Edition (2017)
Category:	Principal judgment
Parties:	GFM Investment Group Pty Ltd in its capacity as Trustee for GFM Home Trust Subtrust no. 7 (Applicant) Inner West Council (Respondent)
Representation:	Counsel: N Eastman (Applicant) T To (Respondent)  Solicitors: Allens (Applicant) Clayton Utz (Respondent)
File Numbers:	2021/361705 and 2021/361726
Publication Restriction:	No

## JUDGMENT

- 1 **COMMISSIONER:** These two appeals are brought by the applicant under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act). They follow the deemed refusal by the consent authority of two development applications over land recently consolidated into a single Torrens Title allotment (Lot 100 DP1283113) and with the street address of 67 and 73-83 May Street, 50-52 Edith Street and 43 Roberts Street St Peters (site).
- 2 By way of introduction I note that one of the two development applications before me is classified as regionally significant development, as it would involve a capital investment value of more than \$30m (described below as the Main Works DA). As a consequence, it is the Sydney Eastern City Planning Panel which is consent authority for that particular development application. However, Inner West Council (Council) is the respondent in regard to both appeal proceedings by virtue of s 8.15(4) of the EPA Act. Under s 39(2) of the *Land and Environment Court Act 1979* (LEC Act), the Court has power to exercise the consent authority function in disposing of both appeals.
- 3 The two development applications the subject of this judgement are concerned with redevelopment of the site into a mixed use development of considerable scale. I acknowledge my reference to Council's outline of submissions dated 23 November 2022 (ROS), as I introduce the individual applications as follows:
  - Proceedings 2021/361705 will henceforth be described as the Early Works DA. The Early Works DA seeks consent for demolition of specific buildings and specific works, removal of trees, site establishment of Stage 1 of the overall development, service and access works to an existing lane, and enabling works to allow some buildings to be continued to be used during construction. Council's file reference for the early works DA is 2021/0799.
  - Proceedings 2021/361726 will henceforth be described as the Main Works DA. The Main Works DA seeks consent for specified site preparation, demolition, excavation and remediation works and staged

redevelopment of the site into a mixed-use precinct comprising light industrial/commercial uses, build-to-rent housing (under Division 6A of the applicable, albeit now repealed, State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH)) and community floor space. The specific works include new construction and/or refurbishment work on buildings, basement parking and open space areas, vehicular and pedestrian access paths, ancillary acoustic and utility works. Council's file reference for the Main Works DA is 2021/0800.

## **Background**

### *Site-specific planning controls*

- 4 In July 2020 the site was rezoned from IN2 Light Industrial to B4 Mixed Use under Marrickville Local Environmental Plan 2011 (MLEP). This change to MLEP, termed Amendment 18 happened after, what is described in the ROS (p 1) as, a “developer-led planning proposal”. I note that Inner West Local Environmental Plan 2022 (IWLEP) has consolidated a number of pre-existing local environmental plans including MLEP. However, there is no dispute that MLEP continues to apply to the assessment of the subject DAs under savings provision at cl 1.8A of the IWLEP 2022.
- 5 In support of MLEP Amendment 18, and to “guide the future development of the precinct”, a site-specific amendment was made to Marrickville Development Control Plan 2011 (MDCP). A suite of controls were developed which are relevant to the evaluation of both DAs. Section 9.48 of MDCP carries the essential controls.
- 6 The provisions of Section 9.48 of MDCP include:
  - A desired future character statement
  - An indicative site layout, indicated by way of a plan and a set of controls. The plan is at Figure 5 in Section 9.48 of MDCP and reproduced below at Figure 1)

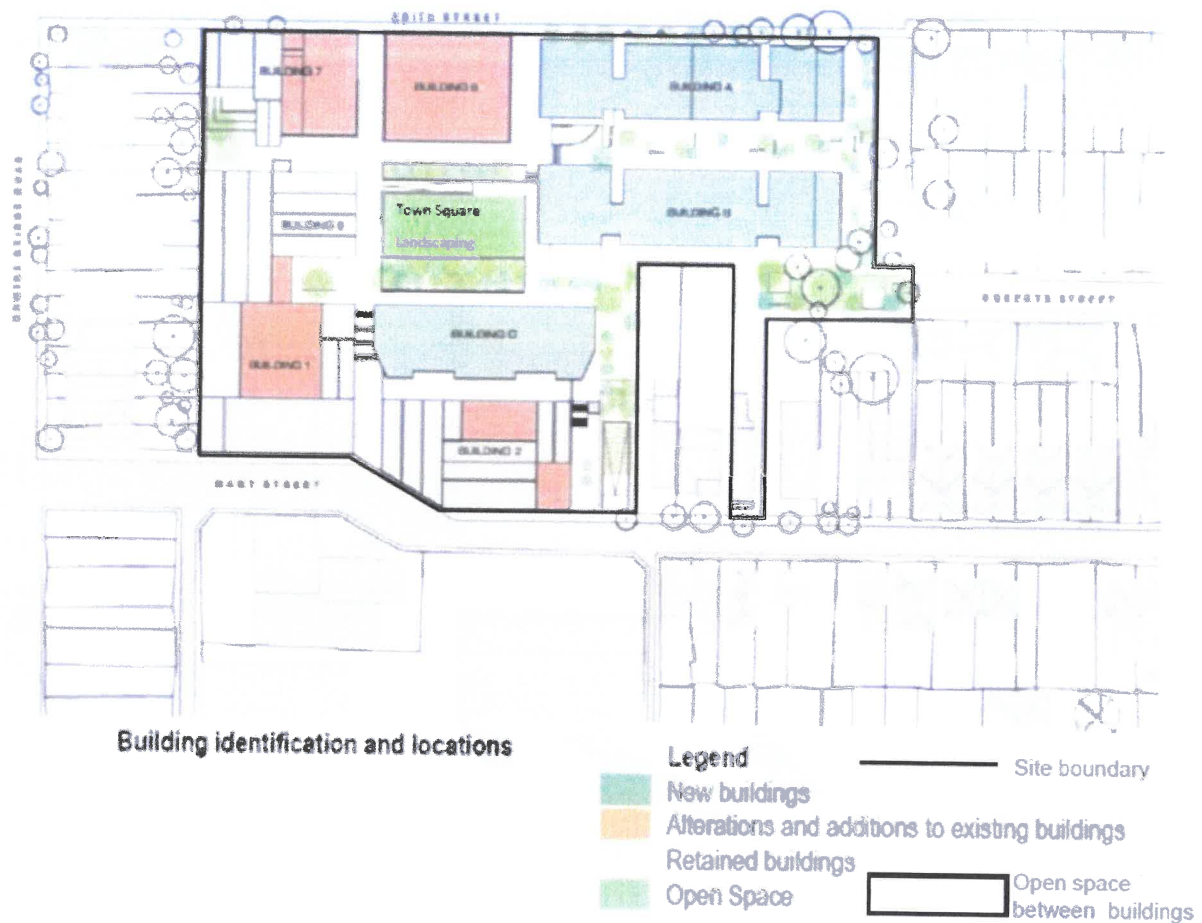


Figure 1 – Indicative Site Layout (Source: Figure 3 Section 9.48 MDCP)

- A set of “built form” objectives and controls, with a plan indicating maximum building heights and numbers of storeys (nominated as Figure 6 in Section 9.48 of MDCP and reproduced below at Figure 2)



Figure 2 – Maximum Building heights and number of storeys (Source: Figure 6 Section 9.48 MDCP)

- Nomination of buildings, and building parts, to be retained.
- Open space and landscaping objectives and controls, including in relation to two new central public access open space areas as indicated in and above.
- Finishes and materials objectives and controls.
- Requirements for housing mix and adaptable housing and affordable housing.
- Requirements for site facilities, waste management and parking.

- Public domain requirements.
- Signage and wayfinding requirements.
- Public art strategy requirements.
- Environmental management, requiring new development to apply the principles of ecologically sustainable development, along with many other particulars.

*Proposal amendments and refinement of contentions*

- 7 Following what seems to have been extensive constructive exchange of opinions between the experts, there has been a considerable narrowing of issues in dispute between the parties in relation to the matters before me.
- 8 The four expert practitioners involved together in the urban design and town planners matters (see table of experts below) were notable on that front. These four experts together provided four written reports (Ex 7, 11, 18 and 21). The first expert report (Ex 7) included a series of “solution sketches” aimed at addressing many of the built form related contentions. The second expert report, in a sense, provided for the examination of whether amending plans had incorporated the practical principles agreed in the solution sketches. In the broad the experts agreed that this had occurred, although there were some points requiring clarification, with the latter reports providing a catalyst for this, something I explain further below.
- 9 Mentioning these experts and their reports is not intended to detract from the efforts of other experts involved in working at solutions to the contentions raised. Some of the input from these other experts arises later.

*Experts*

- 10 The experts providing written or oral evidence in these proceedings included the following.

Expert	Expertise	Engaged by
A Duggan	Town planning	Applicant
C Brown	Town planning	Respondent
S Cox	Urban design	Applicant
Mr N Dickson	Urban design	Respondent
C Tidswell	Landscape	Applicant
M Taylor	Landscape	Respondent
B Notaras	Acoustics	Applicant
T Taylor	Acoustics	Respondent
K Hollyoak	Traffic	Applicant
A Uddin	Traffic	Respondent

### Remaining issues in dispute

- 11 A platform for the narrowing of contentions in dispute between the parties was provided with Council's filing with the Court of a "List of Issues" document on 16 November 2022 (Ex 14). Six issues were nominated, however a number of these were also resolved to the satisfaction of the parties with plan changes or through agreed consent conditions.
- 12 I can distil the issues remaining in dispute into three topics, as follows:
- (1) Built form matters remaining in contention between the parties – in particular: (1) the visual impact of Building C, and (2) whether balconies or winter gardens should be provided for the apartments in Building 8. These built form contentions relate to the Main Works DA only.
  - (2) Lay objecting submissions – numerous objections were raised by way of lay submissions from neighbours and others. I also heard from a number of objectors on site on the first day of the hearing (Ex 13). With the exception of the question of the visual impact of Building C, both Council and the relevant experts, are generally satisfied that matters raised in lay objections have been satisfactorily addressed as a consequence of amendments to the proposal and through the imposition of proposed conditions. I need to give my own consideration to this, which I do later in the judgement.



- (3) Jurisdiction, in particular in relation to design excellence – there are jurisdictional thresholds through which the applications must pass before the power is available to grant consent. The only contentious jurisdictional threshold is that related to the Main Works DA and cl 6.20 of MLEP, and whether the Court considers that the development exhibits design excellence. Other jurisdictional matters are not contentious and are addressed towards the end of the judgement.

- 13 I note that all contentions originally raised with respect to the Early Works DA were resolved between the parties, with Council noting the need for the Court to give consideration to objecting submissions.

*Built form matters remaining in contention between the parties*

**Building C - visual impact from 71 Mary St**

- 14 Building C would be a new building. It would be set, as shown in Figure 1, fairly central to the site, but also relatively close to a side boundary shared with 71 Mary Street. Building C would be eight storeys in height, not exceeding the numerical height limit, as indicated in Figure 2 above.
- 15 It was the town planning and urban design experts who provided relevant advice to the Court on this topic.
- 16 The experts agreed, generally, that (Ex 21 p 14):

“Existing and new buildings are composed of well- designed facades with a distinct base and middle with high quality roof treatments that are integrated into the design of the building. The use of brickwork in all buildings enables the buildings to have a coherent and consistent visual appearance across the site which links to the adjacent residential locality.”

- 17 Mr Dickson, Council’s urban design expert, held a contrary view to these other three experts in regard to visual impact on 71 Mary Street to the immediate south-east. In his written evidence, Mr Dickson expressed his concern regarding “the bulk of Building C and the manner in which the transition of bulk occurs at the south-eastern edge of that building”. He expressed the view that (Ex 21 p 14):

18 Neither of the town planners (Ms Brown or Mr Duggan) or Mr Cox expressed concern about the visual impact of Building C. These three experts noted that (Ex 21 p 18):

19 Mr Dickson argued that “design changes to Levels 6 and 7 of Building C are required to protect the amenity of the adjoining 69 and 71 Mary Street” (Ex 21 p 18).

Architectural site plan of Building C, showing a multi-story residential and commercial structure. The plan includes a grid of residential units (RESI) and commercial/light industrial spaces. Key features include a plant area, lobby, amenities, waste rooms, loading bay, and parking areas. The building is situated between a shareway and a pedestrian laneway, with a boundary line to the east. Elevation markers and dimensions are provided throughout the plan.

**Labels and Dimensions:**

- SHAREWAY** (top left)
- BUILDING C** (top center)
- PEDESTRIAN LANEWAY** (top right)
- BOUNDARY LINE** (right side, vertical red line)
- PLANT** (top center, above main grid)
- RESI** (multiple locations within the main grid)
- COMMERCIAL LIGHT INDUSTRIAL** (bottom left and bottom right)
- REB LOBBY** (bottom center-left)
- AMENITIES** (bottom center-right)
- WASTE ROOMS** (bottom center)
- LOADING BAY** (bottom right)
- CAR PARKING** (bottom left and bottom center)
- CAR PARKING ENTRY** (bottom right)
- OSD** (bottom left and bottom right)
- ELEVATION MARKERS:** RL 41.000, RL 30.000, RL 27.000, RL 24.000, RL 21.500, RL 18.200, RL 15.500, RL 13.700, RL 11.400, RL 9.200
- Dimensions:** 11m (40' 9" x 3m), 8.5m (28' 0" x 3m)
- Other labels:** BLOCK ROOM, BLD LEVEL 1, BLD LEVEL 2, BLD LEVEL 3, BLD LEVEL 4, BLD LEVEL 5, BLD LEVEL 6, BLD LEVEL 7, BLD LEVEL 8, BLD LEVEL 9, BLD LEVEL 10, BLD LEVEL 11, BLD LEVEL 12, BLD LEVEL 13, BLD LEVEL 14, BLD LEVEL 15, BLD LEVEL 16, BLD LEVEL 17, BLD LEVEL 18, BLD LEVEL 19, BLD LEVEL 20, BLD LEVEL 21, BLD LEVEL 22, BLD LEVEL 23, BLD LEVEL 24, BLD LEVEL 25, BLD LEVEL 26, BLD LEVEL 27, BLD LEVEL 28, BLD LEVEL 29, BLD LEVEL 30, BLD LEVEL 31, BLD LEVEL 32, BLD LEVEL 33, BLD LEVEL 34, BLD LEVEL 35, BLD LEVEL 36, BLD LEVEL 37, BLD LEVEL 38, BLD LEVEL 39, BLD LEVEL 40, BLD LEVEL 41, BLD LEVEL 42, BLD LEVEL 43, BLD LEVEL 44, BLD LEVEL 45, BLD LEVEL 46, BLD LEVEL 47, BLD LEVEL 48, BLD LEVEL 49, BLD LEVEL 50, BLD LEVEL 51, BLD LEVEL 52, BLD LEVEL 53, BLD LEVEL 54, BLD LEVEL 55, BLD LEVEL 56, BLD LEVEL 57, BLD LEVEL 58, BLD LEVEL 59, BLD LEVEL 60, BLD LEVEL 61, BLD LEVEL 62, BLD LEVEL 63, BLD LEVEL 64, BLD LEVEL 65, BLD LEVEL 66, BLD LEVEL 67, BLD LEVEL 68, BLD LEVEL 69, BLD LEVEL 70, 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Figure 3 – Sketch of relationship between Building C and residence at 71 Mary Street (Source: Ex p 18)

### Consideration

- 21 There are two main merits-related policy documents which were drawn to my attention in the consideration of this question. The first is MDCP, noting Figure 6 of Section 9.48 which indicates Building C as of eight storeys, and in the location identified (generally). However, there are various other provisions in Section 9.48 which look to neighbour amenity outcomes. Some excerpts from Section 9.48 Part 7 relating to built form, are reproduced below:

#### “Objectives

O1 To ensure built form outcomes reflect the objectives of Marrickville Local Environmental Plan 2011 Clause 6.21.

O2 To achieve design excellence buildings must not exceed the maximum number of storeys and

O3 To ensure built forms have architectural treatments to ameliorate the impacts their scale could have on neighbouring buildings and nearby residential neighbourhoods.

O4 To ensure that buildings achieve the site’s character objectives in Part 5 of MDCP 2011.”

- 22 The controls at Section 9.48 Part 7 C4 are specifically related to “(ameliorating) the impact of tall buildings in close vicinity to low rise dwellings”, but make no special provisions in regard to the relationship at hand. Under Control C6(ii) the built form proposals are to provide effective built form and façade articulation to break up the overall podium and tower envelopes. Under Control C7 some additional criteria are itemised “for consideration to determine whether design excellence is achieved”. These criteria include but are not limited to:

“(i) Compliance with character objectives in Part 5 of MDCP 2011.

(ii) Compliance with the Apartment Design Guide including building separation and

(iii) Excellence of architectural design, including internal layout, façade treatment, architectural detailing, roof features and spaces between buildings.

(iv) Streetscape character and site context.

(v) The location of any buildings having regard to the need to achieve an acceptable relationship on neighbouring sites in terms of separation, setbacks, amenity and urban form.

(vi) The bulk, massing and modulation of buildings.”

23 When I turn to the Apartment Design Guide (ADG) itself, there seems to be little disagreement that the proposal complies with the numerical controls concerning building separation. As put by Mr Cox and articulated in (hard to decipher) text in Figure 3, under the provisions at Objective 3F-1 of the ADG (under design criteria 1), buildings up to 12m (four storeys) would have a 6m separation to habitable rooms, buildings up to eight storeys would have 9m building separation. There is an additional note of design guidance that:

“Apartment buildings should have an increased separation distance of 3m (in addition to the requirements set out in design criteria 1) when adjacent to a different zone that permits lower density residential development to provide for a transition in scale and increased landscaping...”

24 The proposal would provide for a 9m setback to the side boundary up to four storeys, then 12m above this level up to the maximum eight storey building height.

25 Here I am aware that the topic behind the ADG’s interest in building separation, as referenced at Objective 3F-1, is achieving “reasonable levels of external and internal visual privacy”. However, the numerical provisions are similar to those at Section 2F of the ADG which, comes under the broader topic of “developing controls”, and relates to the broader question of desired future character. relates more generally to building separation, where visual impact can be seen to be within the remit.

26 In the circumstances, the first point of acknowledgement is that this site is to be redeveloped to considerably higher density than the next door development at 71 Mary Street. Then, it seems to me, there would need to be the identification of some particular circumstances, of neighbour visual impact, that would cause me to seek something additional to the building height/setback configuration as suggested in the ADG and adopted, if not exceeded, with the subject application. But it seems to me the contrary is more evident. That is, there is evidence of considerable landscaping along the side boundary of 71 Mary Street and proposed landscaping within the site that would act to cushion the visual effect of the proposal. This is perhaps best understood from the agreed evidence at p 11 of Ex 21 where the experts note survey evidence that:

“the relevant screening trees between the site and 71 Mary Street are generally 7-8 metres tall and the trunks are located on the 71 Mary Street side of the boundary.”

- 27 While I note the submissions from Council that the retention of the landscaping on 71 Mary Street is not able to be controlled by the proposal, I do not find this particularly persuasive. There are two points. The first is the common sense argument. That is that if the concern is visual impact as perceived at 71 Mary Street and the existing trees ameliorate that impact, there is an incentive to retain the vegetative screening. The second is to note the intended landscaping within the site itself. The experts also noted the fact of deep soil (1.5m in width) within the site, to the immediate north of 71 Mary Street, and the proposed landscape treatment within that strip and its relationship with the proposed built form. This was illustrated by a series of sections, which were more related to the question of visual privacy interface (arising below).
- 28 A further factor is the massing of Building C at the upper levels with a “chamfering” of what might be thought of as the eastern corner of the building to reduce the building width as perceived from most of 71 Mary Street.
- 29 It follows from the above that, as a matter of merit, I am not inclined to accept Mr Dickson’s suggestion on the removal of four units from levels 7 and 8 of Building C. I will return to this issue when considering the design excellence question.
- 30 I do take note of the applicant’s submissions in regard to the provisions of Divisions 6A of the SEPP ARH, and in particular cl 41D in regard to non-discretionary development standards. For want of a point of difference, I would categorise these provisions as procedural, rather than directly merits based. While I generally accept the applicant’s position, I do not need to call that procedural matter up as I am satisfied on the merits.

#### **Building 8 – balconies and wintergardens**

- 31 As part of the proposal there would be alterations and additions to the existing industrial building known as Building 8. Building 8 fronts Edith Street and is two

levels to that frontage at present. In accordance with MDCP provisions represented in Figure 2 above, Building 8 would be redeveloped to a five storey building. The ground level would mostly be used for commercial and light industrial purposes. Levels 1, 2 and 3 would be residential apartments, mostly studios. There would be a total of 30 studios (10 studios on each level) with half facing Edith Street and half facing the site's central internal open space area ("The Commons"). In addition, there would be two one-bedroom apartments on each level, facing either way. Building 8 apartments are part of the proposal's build-to-rent component. Levels 4-5 contain communal facilities, including a gymnasium, lounge, outdoor deck and pool. They are available to all residents across the whole development.

- 32 The point of contention is that the none of the residential apartments in Building 8 have balconies. Council proposes a deferred commencement condition as follows:

"Building 8 is to be designed to provide juliet balconies or winter gardens to the living rooms of all apartments at level 1, 2 and 3. Such balconies on the Edith street frontage are to be wholly located within the site boundary and be within the retained masonry facade. Balconies in the southeast façade of the building are to face The Commons. No enlargement of the floor plate at the ground floor are to be made from this amendment."

- 33 Council submits, referencing the design excellence clause and supported by the evidence of Mr Dickson (Ex 11 par 25), that the ADG would generally require modest balconies for studio apartments (4m<sup>2</sup> as indicated at ADG Part 4E-1 Design Criteria for studios and one-bedroom apartments). According to Mr Dickson, the balconies would sit behind the retained façade of Edith Street (Ex 21 p 17). Council points to the findings of *Arxidra Pty Ltd v Randwick City Council*; *Arthur Wong Pty Ltd v Randwick City Council* [2017] NSWLEC 1463 at [101], where Dickson C found in relation to a boarding house proposal:

"There is no reason why affordable housing should not provide a high level of amenity and in this case I do not consider that it would be in the public interest to approve a development that has an inferior level of internal amenity."

- 34 Mr Cox (Mr Duggan indicating agreement with him) did not believe these changes, introducing private open space to these apartments, were necessary. His explanation was as follows (Ex 11 par 29):

a. The proposed apartments form part of a Build-to-rent project and hence a small studio or 1-bedroom apartment without balcony is considered an appropriate dwelling type where a variety of dwellings are offered in the development. A resident in one of the Building 8 apartments would be able to relocate to another similar apartment with balcony with greater ease than in a more typical residential situation. One key advantage of a Buildto-rent development is to be able to change apartment type as situation arises.

b. Building 8 is an adaptive re-use project using sections of the existing building fabric. Therefore, balconies are not as easily provided within existing building fabric and in light of the existing openings.

c. The Apartment Design Guide Objective 4E-1 notes that balconies may be limited in some proposals for several reasons including exposure to significant levels of aircraft noise, and heritage and adaptive re-use of existing buildings. Both reasons are relevant for Building 8. The ADG notes in these situations that other amenity benefits should be considered for the residents. Building 8 includes the main residential amenity for the Precinct and hence offers substantial and convenient amenity for residents. The amenities include the residents' lounge and concierge (ground level), residents' media lounge, lounge/bar, co-workspace, kitchen, and gym (all level 4), outdoor dining, pool, and pool deck (level 5).

d. The Affordable Rental Housing SEPP (cl41 E) notes that for Build-to-rent housing there should be flexibility in applying the design criteria set out in the Apartment Design Guide including, in particular, the design criteria set out in 4E-1 (Private open space and balconies). Clause 41E also notes the importance of common spaces and shared facilities and services, different options being provided for prospective tenants, and the ability of residents to relocate to other dwellings should their requirements change. These considerations are well addressed in the proposal."

- 35 While not involving a complete examination of implications, Ex Y was prepared by Mr Cox as (borrowing the term) a solution sketch, to demonstrate how the changes might be brought about to introduce the balconies and/or wintergardens for Levels 1-3 in Building 8. My understanding of the schema proposed in Ex Y was that the apartments facing Edith Street would be able to include a 1m wintergarden while sitting behind the retained façade of Edith Street. To incorporate a balcony, the apartments facing The Commons would need to extend up to about 2m (ref ROS par 79) to the south-west. Section 3 (Drawing DA-40-01 Rev C) indicates that these balconies would not encroach into the grassed area of The Commons, but rather would sit over a walkway

which effects the north-east bounds of The Commons. Council suggests this could provide some weather protection at the ground level (ROS par 78).

#### Consideration

- 36 It is clear enough that there is no specific regulatory requirement for the balconies and wintergardens, for these build-to-rent apartments. Clause 41E of SEPP ARH, directly concerned with build-to-rent housing stipulates a requirement to be flexible in applying certain design criteria set out in the ADG, including in relation to Part 4E. However, I understood Council's argument to include reliance on the design excellence provisions at cl 6.20 of MLEP.
- 37 I will return to the design excellence question at the end of the judgement but, briefly here, I am not convinced by Council's position on this topic, and more convinced by the points raised by Mr Cox. First of all, I believe that the opening position of a consent authority should be of wariness about the imposition of additional requirements of this kind (ie beyond a regulatory standard and at odds with the position adopted by an applicant). It seems to me valid to think that the proponents of a large housing scheme such as this, with a considerable portion of build-to-rent apartments, have an understanding of the needs of the market it is serving.
- 38 In regard to the apartments facing Edith Street, the suggested changes bring no, or little, effect to Building 8's Edith Street presentation, as I understand it. Essential there are no external implications for the proposed changes. However, it seems to me unreasonably presumptive to take a position that for these mostly studio apartments, it is preferable for around 4m<sup>2</sup> of the space to be allocated as a wintergarden, over other uses of the space. The tenants may have all sorts of demands for the use of the small studio area. Recognising the northern orientation, should tenants wish to effect a wintergarden area of their own volition, it seems that this could occur to some considerable extent without the formalisation, and space inefficiencies, created with the scheme at Ex Y.
- 39 The changes to the apartments facing The Commons do have some external implications. It seems to me the pressing out of the bulk of Building 8 has



potential to affect adversely the sense of space experienced in The Commons. Given my point above, that the proponents can be understood to have an understanding of their market, along with the other points raised by Mr Cox, including in relation to the communal facilities available within Building 8 itself, my sense is that it not an appropriate intervention for the Court to impose this requirement. There seems to be a cohesion to the overall design, including the function of The Commons and its design parameters, which may be adversely affected by expanding Building 8's three levels of apartments further into The Commons spatial setting.

#### *Lay objecting submissions*

- 40 These applications have been subject to considerable public objection. Numerous issues of concern have been raised in lay submissions. I also heard from a number of objectors on site on the first day of the hearing (Ex 13). It is fair to say that the objecting submissions have already resulted in substantial changes to the proposals from those originally submitted by the applicant. My attention here is to the outstanding submissions, that is, matters not already attended to.
- 41 How lay submissions of this kind are to be addressed is a matter of common consideration in this Court. I note for example the more recent framing of the topic by Dixon SC in *McDonald's Australia Limited v Coffs Harbour City Council* [2023] NSWLEC 1067 ([49] et seq) who refers to the findings of Lloyd J in *New Century Developments Pty Ltd v Baulkham Hills Shire Council* (2003) 127 LGERA 303; [2003] NSWLEC 154 (*New Century Developments*) [61]. The statutory position is clear in that s 4.15(1)(d) of the EPA Act requires a consent authority to take into consideration submissions of this kind. *New Century Developments* then points to the need for discernment and to seek objective substantiation (ie rather than "blindly accepting") such lay submissions. Where practical, a useful means of verifying (or otherwise) the content of the lay submissions is through use of the experts already giving sworn evidence and bound, under the Expert Witness Code of Conduct, to assist the court impartially. The position adopted by government officials can also be useful

(eg through Council assessment reports). Other means of substantiation can also be useful in the circumstances of the case.

- 42 In this matter I decided to prepare a list of considerations which I believe synthesised the matters raised in lay submissions which were not otherwise relatively directly addressed by way of expert reports or amendments to the proposals. This document was circulated to the parties on the afternoon of 21 November 2022. My intention was to reduce without notice questions, from the Bench, to the parties or experts; and maximise time for proper consideration. It led to a series of further joint reports from various experts, which I refer to below as necessary. For the purposes of this judgement, I can aggregate the objecting submissions into four topics, which I move through now: (1) contamination and migration of toxins, (2) neighbour amenity related concerns, (3) infrastructure capacity concerns, (4) construction stage concerns, and (5) other issues. Mindful of *New Century Developments*, I use expert evidence and other, for me, useful points of substantiation in giving consideration to the substance of the lay submissions.

#### **Contamination management**

- 43 Chapter 4 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH) is concerned with remediation of contaminated land 2021. Of particular relevance is s 4.6 of SEPP RH which provides:

- (1) A consent authority must not consent to the carrying out of any development on land unless—
  - (a) it has considered whether the land is contaminated, and
  - (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
  - (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

- 44 Lay submissions raised objections in regard to the management of on-site contamination, which was suggested to include toxic substances, and the migration of such material off site. This was in light of the continuing and

previous industrial uses, including paint production. There was seen to be a need for independent validation of remediation.

- 45 In opening submissions, Council indicated that the issue of contamination had been extensively studied and the remediation program had been given close consideration by the technical experts involved, and an agreement had been reached on the appropriate remediation approach, including the approach to unexpected finds. As might be expected, both the Early Works DA and Main Works DA had been accompanied by contamination studies.

#### Early Works DA

- 46 Amendments to the Early Works DA mean that no in-ground disturbance would occur with this DA (ROS par 25-26). I note that proposed Conditions 24 makes this clear. That is to say, the in-ground disturbance works would occur only with the Main Works DA. This restriction has led Council to the view, mindful of s 4.6(1)(b) of SEPP RH that the site is suitable in its presently contaminated state for the Early Works DA. With this advice, so far as the Early Works DA is concerned, I too am satisfied in regard to s 4.6(1)(b) of SEPP RH.

#### Main Works DA

- 47 Council also indicated in the ROS (par 27) that it is satisfied that the site can be made suitable for the proposed uses in the Main Works DA. This conclusion was based on the contamination studies and a proposed Remedial Work Plan (dated 5 July 2022 prepared by Golder) adopted in proposed conditions, and after related investigatory works undertaken by Council's own contamination expert. Conditions are proposed which Council believes will ensure the Remedial Work Plan is implemented, and other recommended actions concerning monitoring and ongoing evaluation of contamination is undertaken.
- 48 In regard to the concerns raised in lay submissions, I particularly note proposed Conditions 13-16 (see Annexure B). These conditions require the appointment of an accredited Site Auditor under the *Contaminated Land Management Act 1997* (CLM Act). Briefly here, it is the CLM Act which establishes the "process

for investigating and ... remediating” applicable contaminated land (see s 3(1)).  
An object of relevance is (s 3(2)(c)):

to provide for the accreditation of site auditors of contaminated land to ensure appropriate standards of auditing in the management of contaminated land

- 49 Then Part 4 of the CLM Act provides for the accreditation of Site Auditors by NSW Environment Protection Authority (EPA) and provides that site audits be undertaken in accordance with EPA guidelines. Relevant here are the Guidelines for the NSW Site Auditor Scheme 3rd Edition, NSW EPA, 2017 (Site Auditor Guidelines). The Site Auditor Guidelines make clear that the role of Site Auditors is to be separate from that of the technical experts involved in the preparation of contamination related site investigations and remediation plans for development applications. Page 2 of the Site Auditor Guidelines refers to the Site Auditors as providing services that are independent and authoritative.
- 50 Again having a mind to the objector concerns, proposed Condition 13 is concerned with “off-site migration risk management”. This condition requires a plan to be prepared of works intended to be undertaken for the purposes of Condition 13 and for this plan to be reviewed and accepted by the appointed Site Auditor under the CLM Act, after which the planned approach would be submitted to Council. The further soil vapour assessment work to be undertaken under Condition 13 would need to be prepared by a suitably qualified person. But this work would also be subject to review and acceptance by the accredited Site Auditor and referred to Council.
- 51 There are a number of other contamination and remediation related conditions proposed for the Main Works DA. Here I note proposed Condition 15 concerned with the validation of the proposed remediation works by the Site Auditor and Condition 16 concerned with a hazardous materials survey and requirements for removal and disposal methods in accordance with the requirements of SafeWork NSW. In addition I note: (1) proposed Condition 50 brings the Site Auditor into the process for the review of the basement design (prior to construction certificate issue), (2) proposed Condition 78 requires Council to be advised should any new evidence of contamination emerge, and (3) proposed

Conditions 88-91 are concerned, respectively, with procedures for off-site disposal of soil, remediation validation, the potential requirements of any long term environmental management plan (which would need to be accepted by the Site Auditor, and requirements for the decommissioning and validation of the underground petrol storage systems. These conditions are to be satisfied prior to the issue of an occupation certificate for the proposed use. Conditions 122-123 require continued implementation of any long term environmental management plan and its notification on the title of the land.

- 52 Based on the evidence before me in regard to the Main Works DA, and mindful of s 4.6(1)(b) and (c) of the SEPP RH, I am satisfied that the land will be suitable after remediation for the purpose for which development is proposed to be carried out, and that this land remediation will occur before the land is used for that purpose.

#### **Neighbour amenity related concerns**

- 53 Neighbour amenity related concerns related primarily to the Main Works DA. Here I also note there is a separate consideration of construction related amenity impacts, below. I identified six subtopics, related to amenity, which I will work through now.

#### Adverse visual impacts

- 54 I saw the key objector concerns on visual impact were related to the proposed tower structures as perceived from Unwins Bridge Road properties (towards the corner of Mary Street including 106 Unwins Bridge Road) and from 71 and 69 Mary Street. There was also a concern raised in regard to visual massing of Buildings A and B as perceived from 48 Edith Street.
- 55 Building 1 was the point of concern for the Unwins Bridge Road properties. The planning and urban design experts agreed that the design and materiality of Building 1 would create a visually interesting building when viewed, for example, from the backyard of 106 Unwins Bridge Road and, it can be assumed, other properties that might have a similar outlook. The addition of the setback from the southern boundary (of residential properties at Unwins Bridge

Road) above the first story of Building 1 would help mitigate the bulk of the building. Other elements such as landscaping on level 1 will also assist in breaking up the building form, according to the experts (Ex 18 par 22). There was a concern expressed about the viability of the intended vertical gardens on Building 1 given the northern sun exposure. In Ex 20, the landscape experts jointly detailed certain specifications for these plantings aimed at ensuring their survival. The landscape experts also indicated that they were satisfied with the soil volumes and width of the planters for the slab planted areas (Ex 20 pars 1 and 2 and noting proposed Condition 2(b) to Main Works DA at Annexure B to this judgement).

56 In regard to impact from 48 Edith Street, the experts agreed that the setbacks and stepping of Buildings A and B mitigate visual bulk and mass. According to the experts, the use of brick and landscaping on the southern façade near the boundary of the rear of 48 Edith Street would also assist in mitigating impacts as will the use of landscaping in the 6m landscape strip between Buildings A and B and 48 Edith Street (Ex 18 par 22). Landscape experts advised on a suitable tree species to prevent future vegetation from unreasonably affecting solar availability to the western building window and backyard area (Ex 20 par 3 and noting proposed Condition 2(a)(iii) to Main Works DA).

57 I have considered the visual impact from 71 Mary Street above (at [29] and preceding) and found the proposal reasonable on that front. The general height and bulk perception of Building C from 69 Mary Street would be a little less considering the added distance separation. Without discounting Mr Dickson's opinion, here I also note the agreed observation of Ms Brown, Mr Duggan and Mr Cox that MDCP's provisions would anticipate a building of a similar or greater bulk than proposed Building C (Ex 18 par 22).

#### Loss of privacy

58 In regard to 71 Mary Street, the experts agreed that the separation distance between Building C and the property boundary would be acceptable. It was further agreed that the combination of the landscaping and fencing on the common boundary between the site and 71 Mary Street, as shown on drawing

DA-40-04 Rev B, would provide privacy between Building C and 71 Mary Steet and from within the pedestrian pathway. The provision of opaque glass to windows on the south-eastern façade of Building C would further protect privacy of adjoining residential dwellings. I note the advice of the experts that the orientation of the balconies and screen walls limits view lines into the adjoining residential properties as shown on drawing DA21-06 and DA30-06 Rev C (Ex 18 par 2.1).

59 In regard to 48 Edith Street, the experts agreed that the variable setback (6m to 13.8m) between Buildings A and B to the common boundary with 48 Edith Street as shown on DA-40-00 Rev C Section 2 were appropriate. The setbacks in combination with the proposed boundary fence at 1.8m height as shown on Drawing DA-21-0G Rev D would be appropriate and would protect the privacy to 48 Edith Street. It was noted by the experts that secondary communal open space area known as The Grove would be enclosed (shown on drawing DA21-OG Rev D) to prevent viewing into the rear yard of 48 Edith Street. A privacy screen on the window to Unit BA.1.13 would prevent overlooking to the rear yard of 48 Edith Street and no windows would be placed in the low-level facades of Buildings A and B facing 48 Edith Street which might otherwise cause privacy problems (Ex 18 par 2.1).

60 In regard to the Unwins Bridge Road properties, the experts agree that the treatment to and setback of Building 1 to the common boundary would provide some protection of privacy. They also recommended an additional condition should be inserted that requires the existing ground floor windows within Building 1 on the boundary with the Unwins Bridge Road properties are to be replaced with fire rated frosted glazing. This is addressed at Condition 2(i) of the proposed conditions. The experts noted that the new components of Building 1 are to be setback a minimum of 10.3m. The experts requested that it be made clear that the privacy louvres and screens at Levels 1 to 3 of Building 1 should be angled upwards to prevent overlooking into the adjacent Unwins Bridge Road properties. This is addressed at Condition 2(j) of the proposed conditions for the Main Works DA. The experts agreed that the setback coupled with the detailed screening solution will prevent sight lines towards the rear

yards and windows of the Unwins Bridge Road properties (Drawing DA-40-02 Rev B). Perforated screening on the upper levels of Building 1 as shown on Drawing DA40-02 Rev B, as amended by proposed Condition 2(e), would limit overlooking into the adjacent Unwins Bridge Road properties (Ex 18 par 2.1).

- 61 In relation to Building 6 the experts agreed that the details shown on Drawing DA-40-03 Rev C and DA-30-02 Rev C and proposed Condition 72 will provide adequate privacy protection to the adjacent premises in Unwins Bridge Road. In relation to Building 7 the experts noted that the setback to the adjoining boundary is 19.2 metres as shown on drawing DA-21-04 Rev B and agreed that a screening solution is provided to prevent sightlines into the adjacent Unwins Bridge Road properties as shown on Drawing DA-30-02 Rev C and detailed section 2 of DA-40-02-Rev B (Ex 18 par 2.1).

#### Operational noise

- 62 The noise concerns raised by objectors included trading hours for the commercial and industrial operations and how sensitive neighbour relations might be managed, more generally. A particular concern was raised in regard to whether “acoustic echo/sound reflectance” had been taken into account given the proximity of jet flight paths to nearby Kingsford Smith airport.
- 63 The noise experts indicated that examination of noise from the operation of commercial tenancies (Section 6.2 of the Noise and Vibration Impact Assessment, version dated 22/11/2022) assumed that tenancies traded with all doors and windows closed and did not make use of any outdoor area. The planning experts gave advice that there would be inoperable windows facing the Unwins Bridge Road properties. The acoustic assessment concluded that the site was capable of accommodating commercial use while still complying with the EPA Noise Policy for Industry (Ex 17 p 2).
- 64 The noise experts noted that while many commercial uses (eg offices) can be conducted without noise impact on nearby development, but a tenancy that proposes outdoor dining, outdoor music (other than background music) or industrial activities has a risk that an excessive noise impact could occur. A



consent condition was recommended by the acoustic experts to ensure relevant future uses were subject to new applications and approvals and were required to meet established noise standards, and address cumulative effects (Ex 17 p 2 – see proposed Condition 21A and 21B). The noise emissions from the proposed mechanical plant would need to comply with target levels, with Condition 21 confirming performance requirements in terms of operational industrial noise (Ex 17 p 2). The planning experts also pointed to Conditions 21, 22, 23 and 24 which impose noise limitations and compliance measures on future uses within the site. These experts noted that the single ownership and management aspects provided more scope for tenant management by the owner and operator and thus a ready mechanism for complaint management.

- 65 The acoustic experts also advised that echo and sound reflectance was a consideration for all modelling and prediction of noise emissions. The experts indicated that any effect on noise during plane fly over experienced by residents in the site surrounds would be imperceptible (Ex 17 p 5).

#### Overshadowing

- 66 The properties of concern included in particular those at 48 Edith Street and 71 and 69 Mary Street. The planning and urban design experts agree that, based on the analysis undertaken, solar access to the Principal Open Space at these three properties would be compliant with Control C2 of Section 2.7.3 of the MDCP. It was further noted that the window referred to in Particular (g)(v) of Contention 4 of the Main Works DA (at 71 Mary Street), while clearly experiencing reduced solar access, receives more than 2 hours of solar access in mid-winter in compliance with Control C2 of Section 2.7.3 of the MDCP (Ex 18 par 2.4).

#### Sufficiency of greenspace as proposed

- 67 In regard to concerns about the quantity and quality of green space proposed, the planning and urban design experts noted the proposal's three new areas of open space (to be named The Commons, The Garden and The Grove) which were seen to be well-connected to local streets and accessible for residents

within the precinct, provided a significant improvement over the current setting. The open space areas were supplemented by improvements to the public domain and landscape buffer strips along land adjoining 48 Edith, 71 Mary and the northern boundaries of Mary Street properties. It was indicated the proposal met the requirements of MDCP and ADG for open space. The experts also indicated that ground level landscape and open space would be complemented by vertical landscape integrated into the building forms (Ex 18 par 2.4).

#### Conclusion on amenity-related concerns

- 68 I have considered the lay submissions relating to amenity impact along with the evidence presented by experts already appointed to give evidence to assist the Court in this case. As can be seen, the objections have resulted in further changes to the Main Works DA, by way of new consent conditions. Based on the evidence before me, and giving recognition to: (1) the fact of the planning controls applying to the site, and (2) the various measures adopted to mitigate amenity impacts; the proposals are acceptable in relation to neighbour amenity related concerns.

#### **Infrastructure capacity concerns**

- 69 These matters related principally to the Main Works DA. There were four subtopics which I will address in turn.

#### Road widths and capacities

- 70 The traffic experts have found that the additional traffic will not exceed the operational capacity of either road. The empirical work in the traffic study accompanying the application found that the intersections “will generally work acceptably”. The particulars were cited as follows (Ex 19 par 1.15):

“All the analysed intersections, except Princes Highway/Canal Road/Mary Street, will perform at LOS B or better in the peak hours with the development traffic in 2022. In 2037, the Unwins Bridge Road/Edith Street intersection will operate at LOS C or D in the peak hours, which are considered as satisfactory performance levels in Sydney’s urban context.

The Princes Highway/Canal Road/Mary Street intersection currently operates at LOS D or better in the peak hours. The development traffic in 2022 will not

deteriorate the existing performance of this intersection in any of the peak hours considered. However, by 2037, independently of the development traffic, the intersection will deteriorate to a LOS F in the weekday AM and PM peak hours and LOS D in the Saturday peak hour. It is also noted that the development traffic will only make up a minor proportion of the future intersection traffic (up to 1.3%) by this time”.

#### Footpath capacity and safety

- 71 The traffic experts pointed to proposed Condition 56 for the Main Works DA which provided for improvements to footpaths:

“The public domain along all frontages of the site inclusive of footpath paving, kerb, street trees and landscaping must be reconstructed and upgraded in accordance with the Street Tree Master plan and the Public Domain Design Guide or scheme in place at the time the works are undertaken;

...

New footpath and kerb and gutter along the frontage of the site. The kerb type (concrete/brick/stone) must be consistent with the desired future kerb for the street as determined by the Council Engineer;

Provide a continuous minimum 2m wide footpath in Mary Street by adjustment of the road width and on street parking as detailed on Plan No. CI\_DA-520-03;”

#### Local parking impacts

- 72 The traffic experts advise that the proposal provides for the required number of parking spaces on site under existing controls (Ex 19 par 1.10).

#### Local stormwater management and flooding

- 73 Of importance to me in regard to stormwater management is that Council is satisfied that appropriate arrangements are in place (including in regard to conditions required to be complied with) for both the Early Works DA and the Main Works DA. I note Council’s direct advice on the suitability of the proposed overland flow path and the proposed stormwater management plan (ROS par 40-41). I note a relatively small portion of the site is mapped as within a flood planning area (in particular 50 Edith Street at the south-east corner of the site). I am satisfied in regard to flood planning related matters and note that the matters at cl 5.21(3) of MLEP have been addressed in advice dated 23 November 2022 by Stantec (Ex W).

#### Conclusion on amenity-related concerns

- 74 On the evidence before me, the proposal is satisfactory in regard to infrastructure capacity concerns.

**Construction stage concerns**

- 75 These concerns related to both the Early Works DA and the Main Works DA. There were four subtopics which I will address in turn.

Construction access details

- 76 The traffic experts did not believe estimated construction traffic would unreasonably affect the traffic capacity on local roads. They pointed to a requirement of Section 4.7 of the Construction Traffic Management Plan (which would form part of any approval under Condition 1 to the Main Works DA) which provides that:

“The Principal Contractor will ensure construction traffic is spread throughout each day, to ensure there is no notable impact on the capacity or operation of the road network.”

- 77 The experts advised that swept paths have been prepared demonstrating how vehicles would enter/leave the site in a forward direction. Mr Hollyoak noted a potential issue relating to turning traffic at the Unwins Bridge and Edith Street intersection but saw this as resolvable at the detailed Construction Traffic Management Plan stage (Condition 39 allows opportunity for such matters to be addressed to Council’s satisfaction prior to the commencement of demolition or any works commencing).

Siting of construction waste bins adjoining 71 Mary Street

- 78 Plans had indicated a construction waste bin was located adjacent to 71 Mary Street. The planning experts agreed that a condition should be imposed restricting bins to a position greater than 5m from any site boundaries. Construction waste collection would be restricted by the various requirements imposed under the detailed Construction Noise and Vibration Management Plan (CNVMP) to be approved by Council (proposed Condition 40 Main Works DA).

#### Construction hours

- 79 I note that proposed Condition 86 for the Main Works DA provides that, unless otherwise approved by Council, excavation, demolition, or construction work must only be permitted during the following hours: 7:00am to 6.00pm, Mondays to Fridays, inclusive (with demolition works finishing at 5pm); 8:00am to 1:00pm on Saturdays with no demolition works occurring during this time. Any changes to hours (eg for painting) would need to be approved in the CNVMP prepared and approved pursuant to Condition 40.

#### Noise (noting anticipated 3-4 year construction period)

- 80 The acoustic experts noted that detailed construction noise impacts are typically addressed at the construction certificate stage (in a CNVMP). I accept that at this point the construction details for this project (ie such as to be evaluated on noise grounds) would simply not be available. The experts undertook a high level review to assist this development application stage. The experts recommended that Council must review the CNVMP (as opposed to private certifier only) to ensure a suitable level of scrutiny of the noise impacts and mitigation measures is provided to protect the nearby residents. In turn proposed Condition 40 provides that Council is required to review and approve a CNVMP prior to the issue of the initial construction certificate. Three matters of particular attention for inclusion in the CNVMP, as raised by the acoustic experts, were: (1) the definition of suitable evaluation measurement heights (not just at 1.5m above ground level) to ensure an accurate representation of noise impact, (2) to ensure noise from truck movements and fixed plant is addressed in a detailed manner (especially in regard to truck movements on close proximity to 71 Mary Street) and (3) the definition of respite periods, which were agreed to be required.

#### Sufficiency of parking and traffic flows during construction

- 81 Proposed Condition 46 takes up the recommendation of the traffic experts to limit continued operations within retained buildings to a GFA of 1925 m<sup>2</sup> of GFA during Main Works Stage 1 construction (Ex 10 par 1.6). The parking demand for this area would be provided through temporary parking on-site.

82 It is nonetheless clear from the submitted Construction Traffic Management Plan (CTMP) (dated 12 July 2022) that there will be effects on parking availability during construction. The traffic experts advise that to accommodate heavy vehicle manoeuvres and a proposed Works Zone, there would be a net loss of on street parking up to 5 spaces (for Stage 1a), 4 spaces (Stage 1b) and 3 spaces (Stage 2). It is indicated that construction Stage 1a will have 25 workers and Stage 1b will have up to 200 workers (Ex 19 p 4). The stage 1b works include the parking basement, which would allow for on-site parking for construction workers.

83 Council is satisfied with the applicant's proposed means of minimising parking loss and parking impact on residential streets by construction workers. This involves: (1) a green travel plan, (2) a peak hour shuttle bus to deliver/collect workers from the nearest rail station, and (3) a requirement in the CTMP that workers do not park on local streets. In recognition that this will be difficult to enforce fully, a contact phone number would be provided on hoarding/fencing for residents to report any workers parking on street.

#### Control of dust

84 The planning experts were asked to consider how dust will be managed and controlled and impacts mitigated. The planning experts referred me to the Construction Management Plan (prepared by Home dated 6 July 2022 and which is referred to in proposed Condition 1 for both the Early Works DA and Main Works DA). Section 8.1 of the Construction Management Plan sets out the following mitigation measures required to be implemented (Ex 21 p 2) :

- “• The construction site will be maintained and kept clean. Where suitable, the use of mechanical sweepers and covered waste bins will be utilised;
- Completed surfaces will be kept clean;
- Controlled site access will be maintained with vehicle wash down/clean down facilities to be established to maintain access roads;
- All materials transported from site in trucks will be appropriately covered.
- The site perimeter will be encapsulated with hoardings / shade cloth to minimise the egress of dust at the boundary of the site
- Water points will be located round the perimeter of the site and will be used during specific activities as required.”

#### Conclusion on construction-related concerns

- 85 Construction works of the scale proposed will bring some local inconvenience. However, the evidence suggests to me that as far as the current DA approvals are concerned, reasonable efforts have been adopted to moderate impacts. Clearly, further detailed information on construction is still to come. That Council will play an approval role in regard to the CNVMP is notable.

#### **Other matters**

##### Risk of damage

- 86 The planning experts pointed out the distance separation between the edge of the excavation and the residential properties to the south, including (DA 20-99 Rev D): 48 Edith Street – 5.58m, 39-41 Roberts Street – 5.66m, 71 Mary Street – 4.75m (adjacent to dwelling). It is indicated that pre-works dilapidation reports are required to be prepared under Condition 43 on the Main Works DA. The experts agree that an equivalent version of condition 108 for the Main Works DA relating to the provision of a post works dilapidation report should be included in the Early Works DA (now in evidence as Condition 36 of the Early Works DA, see Annexure A).

##### Sufficiency of affordable housing

- 87 The planning experts note that a planning agreement entered into between the proponent and Council, and which is registered on title and referred to at proposed Condition 73, requires a minimum of \$1M to be used as an affordable housing contribution to Council. This is money is to be paid at Construction Certificate stage. In addition, the experts note that the provision of Build-to-Rent Housing will assist in providing housing choice for rental stock in the vicinity of St Peters and Sydenham.

##### Tree loss and biodiversity

- 88 The planning experts advise that while many trees will be required to be removed, there has also been considerable attention to tree protection with proposed Condition 25 for the Main DA identifying trees in the site environment which are subject to a tree protection plan. The planning experts also noted that Section 2.13 of MDCP deals with provisions relating to biodiversity protection

and identifies in the Biodiversity Map areas denoted as Wildlife Corridors, and Bandicoot Protection Areas. The site is not located within any of these areas and is not in the vicinity of any of these areas. The planning experts agreed on a condition that requires an ecologist to be present on the day of tree removal to attend to any wildlife that may be disturbed by such tree removal.

#### Monitoring and enforcement generally

- 89 Some local residents were sceptical about the actual monitoring and enforcement of the various conditions imposed to address lay objections. While a commonly raised concern, I need to rely on the fact that the EPA Act, at Part 9, includes clear provisions aimed at ensuring enforcement of, among other things, development consent conditions. That is to say, enforcement powers are already established and should breaches occur statutory powers are available to remedy them.

#### **Jurisdiction**

- 90 I express my appreciation to Council for its commentary on jurisdictional matters in ROS which were generally not contentious and, it will be seen, I adopt generally in the jurisdictional considerations below. The exception to the above is in regard to cl 6.20 of MLEP which I address directly.

#### *Clause 6.20 of MLEP and design excellence*

- 91 Clause 6.20 is concerned with design excellence and applies to the Main Works DA as it will result in a building higher than 14m. The clause objective is “to ensure that development exhibits design excellence that contributes to the natural, cultural, visual and built character values of Marrickville”. Subclause (3) provides that a consent authority must not be granted to development to which this clause applies unless the consent authority considers that the development exhibits design excellence. Subclause (4) then sets out a series of matters for attention in this “consideration”:

In considering whether the development exhibits design excellence, the consent authority must have regard to the following matters—



- (a) whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved,
- (b) whether the form and external appearance of the development will improve the quality and amenity of the public domain,
- (c) whether the development detrimentally impacts on view corridors,
- (d) whether the development detrimentally impacts on any land protected by solar access controls established in the Marrickville Development Control Plan,
- (e) the requirements of the Marrickville Development Control Plan,
- (f) how the development addresses the following matters—
  - (i) the suitability of the land for development,
  - (ii) existing and proposed uses and use mix,
  - (iii) heritage issues and streetscape constraints,
  - (iv) the relationship of the development with other development (existing or proposed) on the same site or on neighbouring sites in terms of separation, setbacks, amenity and urban form,
  - (v) bulk, massing and modulation of buildings,
  - (vi) street frontage heights,
  - (vii) environmental impacts such as sustainable design, overshadowing, wind and reflectivity,
  - (viii) the achievement of the principles of ecologically sustainable development,
  - (ix) pedestrian, cycle, vehicular and service access and circulation requirements,

92 Council's position was that it believed a positive finding in regard to cl 6.20(3) was open to the Court provided the position adopted by Mr Dickson with regard to Buildings C and 8 was accepted. As I am in disagreement with Mr Dickson on both points, it follows that Council would argue that a consent authority could not accept that the development exhibits design excellence. The applicant of course disagrees.

93 In response to questions raised by me on the first day of the hearing, the planning and urban design experts provided a written response to each of the matters listed for consideration at cl 6.20(4). The experts' comments were tendered as Ex 21 (pp 14-21). It is notable that the experts remarked in positive terms, and with full agreement in this documented commentary, with a few exceptions. The points of disagreement related to the position adopted by Mr Dickson in his evidence in regard to Building C and Building 8 (see [17] and [33]). I will come back to these matters when making my conclusions in regard to cl 6.20(4).

94 I have considered each of the matters listed in the sub clauses to cl 6.20(4) of MLEP. Below I provide brief notes in regard to each:

- 95 In regard to subcl (a), the architectural design, materials and detailing are clearly of a high calibre, sitting well with the provisions of MDCP and appropriately referencing the local industrial aesthetic. I note the advice of the experts that joint conferencing between them has resulted in amendments to the original built form fabric and materials to deliver the quality now presented in the architectural drawings. When considering this subclause (in Ex 21), Mr Dickson expressed concern about the bulk of Building C and the lack of a transition of bulk, when considering the relationship between Building C and the low density (one and two storey) residential development to the south-east. I will come back to this issue in my conclusions on the design excellence topic, below.
- 96 In regard to subcl (b), and as noted above, I see the form of the buildings as appropriately referencing the local industrial aesthetic, including facebrick facades, with now this new scale of development to occur following establishment of the new suite of planning controls. The direct question of whether the form and external appearance of the development would improve public domain quality and amenity, is not easily answered. It is clear that the “form and external appearance” of the proposal, overall, would present as something different and of considerable visual interest in the public domain. The proposal would open up some new sightlines from the public domain into the site including some landscaped areas. But some would see the scale of development, essentially proposed with the new planning controls, as jarring.
- 97 In regard to subcl (c), I do not believe the development would detrimentally impact on view corridors at all. On the contrary, the proposal would open up some new sightlines from the public domain.
- 98 In regard to subcl (d), I accept the advice of the experts that overshadowing has been a matter of careful consideration and refinements in the course of the joint conferencing and that the proposal would comply with the solar access provisions of MDCP.

- 99 In regard to subcl (e), I accept the advice of the experts that the proposal has carefully considered the requirements of MDCP, particularly Section 9.48 which relates directly to the site. Ms Brown, Mr Duggan and Mr Cox agree that there is compliance within MDCP, whereas Mr Dickson, as I have mentioned above has concerns about Building C in the south-east transition.
- 100 In regard to subcls (f)(i) and (f)(ii), it seems clear to me that the proposed residential/light industrial/commercial/retail precinct where, as the experts put it, artisan goods can be made and sold, is entirely suitable for the site in this mixed use setting, consistent with the planning provisions already established.
- 101 In regard to subcl (f)(iii) and how the development addresses heritage issues in streetscape constraints, I accept the advice of Ms Brown, Mr Duggan and Mr Cox that the proposal is consistent with MDCP Section 9.48 subsection 8 which outlines which buildings are to be retained on site in order to retain the site's industrial feel, and that new buildings which are designed to relate to the retained buildings appropriately. I am not convinced that Mr Dickson's concerns in relation to Building C's streetscape appearance are significant, at least to the extent that the removal of the proposed two levels of Building C (along its south-east façade) would make a material difference to the post-development streetscape in Mary Street.
- 102 In regard to subcl (f)(iv) and the relationship of the proposed development with other development, I accept the advice of Ms Brown, Mr Duggan and Mr Cox that the proposal is consistent with the Site Indicative Layout (at MDCP Section 9.48 subsection 6 Figure 3) and meets or exceeds the requirements of the ADG for building separation. I note that Mr Dickson believes the amenity of studios and one bedroom apartments in Building 8 would be improved with Juliet balconies or wintergardens.
- 103 In regard to subcl (f)(v) and the bulk massing and modulation of buildings, I accept the advice of the experts that the proposal is consistent with MDCP's Site Indicative Layout (Section 9.48 subsection 6 Figure 3), and that at another level of detail various amendments, following joint conferencing, have brought

further improvements to façades, building articulation, materiality, screenings and roof form treatments. It seems to me the proposal lines up well with MDCP ambitions.

- 104 In regard to subcl (f)(vi), I accept the view of the majority of the planning and urban design experts that street frontage heights are consistent with MDCP requirements. I note Mr Dickson has a point of difference in suggesting that the height of Building C on Mary Street needs to transition at the south-eastern edge of the building. I am not convinced that this change is warranted.
- 105 In regard to subcl (f)(vii), I note the experts advise in regard to the nominated matters (at Ex 21 p 19-20). It is clear to me that there has been a consciousness to the principles of sustainable design. This is clear from the adoption of an adaptive reuse as a hallmark of the overall scheme (rather than demolition and redevelopment) and incorporation of passive solar design in some building elements (Buildings 1 and 7). It is also evident from the fact that the proposal meets in MDCP requirements in regard to solar access to neighbouring properties. In regard to the topic of reflectivity, I accept the advice of the parties that building materiality avoids shiny materials and incorporate screening to glazing to avoid glare and reducing heat loading to buildings.
- 106 In regard to subcl (f)(viii) and how the development addresses the achievement of Ecologically Sustainable Development (ESD) principles, I note the consideration of the topic in the applicant's ESD report, and the passive solar design features of Buildings 1 and 7, in particular. The experts have agreed that the proposal does achieve ESD principles (Ex 21 p 20).
- 107 In regard to subcl (f)(ix), I note the advice of the experts that vehicular access is consistent with MDCP and, in particular through the provision of underground parking and services, there would be an overall improvement to pedestrian and cycle access in the site environments. I have noted the advice of the traffic experts that they are satisfied with the proposal in terms of both traffic movement and parking provision.

- 108 In regard to subcl (f)(x), I note that the proposal includes public domain improvements to Edith Street and Mary Street including pedestrian path improvements and new street trees to a portion of Edith Street. The proposal connects the three street frontages with open space areas and potentially commercial areas as public destinations within the site, improving permeability and connectivity.

### **Consideration**

- 109 I thank Council for the authorities it cited in ROC at par 54, which I have had regard to. Of some note to me was the findings of Dickson C in *Aloke Holdings Pty Ltd v Council of the City of Sydney* [2019] NSWLEC 1177 at [85]. In this case, it is my finding that, when considering the matters listed in cl 6.20(4) cumulatively, I do consider that the proposal exhibits design excellence. There are three major points, which warrant the most weight in this instance.
- 110 The first point is the overriding one, it relates to subcl (e) of MLEP cl 6.20. It is my finding that the proposal, aligns well with the MDCP site-specific provisions at Section 9.48. These site specific provisions outline complex ambitions for this site as a mixed use precinct of itself, and then one which enhances certain aspects of the local setting. The proposed Main Works DA's alignment with Section 9.48 means there are good prospects for achievement of these ambitions in my view. The proposal's alignment with Section 9.48 of MDCP spins off into successful outcomes in regard to other considerations under cl 6.20 of MLEP.
- 111 The second point is in regard to the minimisation of impacts in the local lower density setting. My own view is that there has been quite extensive identification of, and design response to, potential impacts. I have identified many of these above. Here, I do note that Mr Dickson was not happy with the bulk of Building C and the lack of a transition of bulk, when considering the relationship between Building C and the low density (one and two storey) residential development to the south-east. Council's view is that the changes proposed by Mr Dickson were critical to a finding of design excellence. On balance, I disagree with Mr Dickson on this point. The landscaped screening on the site and at 71 Mary Street would

provide a sufficiently effective visual barrier in the circumstances. Retention of the Building C as proposed helps with the achievement of other goals of Section 9.48 of MDCP, such as: “(promoting) housing diversity through a mix of dwelling types and (promoting) affordable housing” (see aims of Section 9.48 of MDCP at Section 3.1).

- 112 The third point is in regard to the public amenity offered by the proposal to its residents and commercial/industrial tenants and the local community more generally. The point lines up with a number of the subclauses to cl 6.20(4), but it is concerned with the permeability and connectivity offered by the intended uses, design configuration and hard and soft landscaping. The site can become an important new (or extensively expanded) node for local residents. The Commons, and its interfaces of built form, land use and movements configuration into the wider public domain, is a key part of this. It is a concern about prejudicing this green space, through extending the envelope of Building 8 into it (with associated sense of space and solar access diminution), that was the central reason why I was not with Mr Dickson in regard to his favouring of balconies for the units facing into The Commons. The retention of the scale and spacing of The Commons is an important element of the design excellence of the proposal.

#### *Other MLEP jurisdictional considerations*

- 113 Permissibility: The proposals are permissible in the B4 zone under an additional permitted use provision which applies to the site (under cl 2.5 and Schedule 1). These provisions allow residential flat buildings when they are proposed as part of a mixed use development and provided cl 6.21 applies. I note that proposed demolition is permissible under cl 2.7. Clause 6.21 does apply and I accept Council’s advice that the limit on the proportion of certain residential and other uses is not exceeded (ROS par 39).
- 114 Clause 5.21 and flood planning: A portion of the site is mapped as within a flood planning area. I have considered the matters listed at cl 5.21(3) and am satisfied in regard to the matters listed at cl 5.21(2). Of assistance to me here was the letter of advice dated 23 November 2022 by Stantec (Ex W) which

worked through the relevant provisions and Council's advice on the suitability of the proposed overland flow path and the proposed stormwater management plan (ROS par 40-41).

- 115 Clause 6.2 and earthworks: I have considered the matters at cl 6.2(3) and note the advice from Council that design of the earthworks (for the Main Works DA) has been assessed in detail in the application, including in consideration of the matters required by clause 6.2(3) and that relevant recommendations have been incorporated into the conditions.
- 116 Clause 6.5 and aircraft noise: I have considered the matters at cl 6.5(3)(a) and (b) and note the advice from Council that the acoustic experts agree that mechanical ventilation systems (the details of which are yet to be specified) can result in compliance with the standard and that conditions have been proposed to achieve this outcome (ROS par 46-47).
- 117 Clause 6.6 and airspace operations: I note the advice of Council that an authorised person of the Civil Aviation Safety Authority has advised no objection to the development to a maximum height of 45m Australian Height Datum (AHD), and that the tallest building on the Site, Building C, is 41.6m AHD (ROS par 46-47).

*Other jurisdictional considerations*

- 118 State Environmental Planning Policy (Transport and Infrastructure) 2021 (TI SEPP): Section 2.122 of TI SEPP requires referral of the Main Works DA to Transport for NSW (TfNSW). I accept Council's advice that this has occurred and TfNSW's response dated 6 October 2021 recommended conditions which have been incorporated into the proposed Main Works DA conditions (ROS par 28-29). Section 2.48 of TI SEPP requires referral to a relevant electricity supply authority of any application that involves placement of power lines underground. I accept the advice of Council that Ausgrid is the relevant authority, and it was consulted and consented to the proposed development. (ROS par 30-31).

- 119 SEPP ARH: As outlined early in the judgement, the build-to-rent housing that is proposed with the Main Works DA is subject to Division 6A of the SEPP ARH. That Division contains matters for consideration and jurisdictional preconditions which I am satisfied have been incorporated into the design of the application, relevantly. Council makes clear that satisfaction with the jurisdictional provisions are not in dispute between the parties (ROS par 38).
- 120 Integrated development: The Main Works DA proposes construction of two basement parking levels. General terms of approval from Water NSW have been issued for temporary dewatering during construction, dated 30 August 2022, and incorporated into the proposed consent conditions.
- 121 Voluntary planning agreement: A voluntary planning agreement (VPA) applies to the site after being initiated by a prior owner in contemplation of the rezoning of the site. It provides for the provision of public benefits in the form of a dedication of land for an Art Studio to be operated by Council and certain works and monetary contributions. I note Council's advice that conditions are proposed to require the provision of the public benefits described in the VPA.

### **Disputed conditions**

- 122 There are no disputed conditions in regard to the Early Works DA.
- 123 In regard to the Main Works DA, Council had proposed deferred commencement conditions for new plans to be prepared, and approved by Council, incorporating the changes to Building C and Building 8 suggested by Mr Dickson. As I have found no need for these changes, deferred commencement conditions A1 and C are not required.
- 124 Draft deferred commencement condition B, as proposed by Council, is as follows:

“Amended Architectural Plan details for the south-eastern façade of Building C are to be prepared detailing the profiles of all floor slabs, off form concrete columns, precast panels and brickwork consistent with and to enable construction the façade as shown on DA 30-06, detail drawing 02. Plan and



wall section details are to be dimensioned and all materials nominated at 1:10 scale”

125 The applicant claims that deferred commencement condition B, should be made an operational condition. However, the evidence of Mr Cox (the urban design expert appointed by the applicant) was that the appropriate place for this condition was as a deferred commencement condition. It seems to me that I should understand Mr Cox to be expressing his considered view here in attempting to assist the Court. It follows that deferred commencement condition B will remain.

126 Draft Conditions 6, 7 and 8 are concerned with development staging. Condition 8, as proposed by Council, is as follows

“Construction works to be undertaken in Main Works Stage 2 are to follow the following phased approach. Each Phase to be the subject of a separate Construction Certificate.

Phase 1	Demolition and soft strip out of retained buildings
Phase 2	Superstructure
Phase 3	Services
Phase 4	Fitout
Phase 5	Landscaping and public domain works

The Main Works Stage 2 works are to be commenced no later than 12 months from occupation of the Main Works Stage 1 works.”

127 The applicant argues that the final sentence in the condition should be deleted (ie providing a maximum 12 month period between occupation of Main Works Stage 1 works and the commencement of the Main Works Stage 2 works). The applicant has pointed out that there are already enforcement provisions in the EPA Act, available to Council, relating to the completion of authorised works under a planning approval within a specified time (ACS par 77-79). The applicant argues (ACS par 80):

“Given the existence of the power, which has conditions such as allowing for procedural fairness before making such an order, allowing a proponent to be heard in relation to it and conferring rights of appeal, it is otherwise inappropriate to impose a condition of the type proposed to be imposed by condition 8.”

128 I have considered the oral advice of Ms Brown in support of Condition 8, which I might summarise as pointing to a situation where the Main Works Stage 2 construction was less about the rolling out of new development floor space and more about the upgrading of retained buildings. It would seem to me that something of a more exceptional circumstance would be required for the Court to intervene with a condition of consent when there is already a statute-based regime for its management. The position of the applicant is adopted in regard to Condition 8.

## **Conclusion**

129 Based on the reasoning outlined above, both of the Early Works DA and the Main Works DA warrant the grant of consent subject to the conditions provided at Annexures A and B respectively.

## **Orders**

*Proceedings 2021/361705*

130 The Court orders that:

- (1) The appeal is upheld.
- (2) Development application No. 2021/0799 for partial demolition of existing buildings, tree removal, site establishment works, alterations to the existing north-south lane between Edith Street and Mary Street for temporary service and tenant vehicle access and enabling works to allow existing site to continue operation during construction of Main Works (the subject of DA2021/800 and Court Proceedings 2021/361726); at Nos 67 & 73-83 Mary Street, 50-52 Edith Street and 43 Roberts Street, St Peters (Lot 100 in DP1283113); is determined by the grant of consent, subject to the conditions at Annexure A.

*Proceedings 2021/361726*

131 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Application No. 2021/0800, for site preparation, demolition, excavation, remediation works, construction of a mixed-use development comprising commercial/light industrial, build-to-rent residential housing and community facilities involving the construction of two levels of basement car parking, alterations and additions to existing buildings, construction of three new buildings, creation of new publicly accessible open space, new pedestrian connection to Roberts Street and a north-south shared zone between Mary and Edith Street; at Nos. 67 & 73-83 Mary Street, Nos. 50-52 Edith Street and No. 43 Roberts Street, St Peters (Lot 100 in DP1283113); is determined by the grant of consent subject to the conditions at Annexure B.
- (3) The exhibits are retained with the exception of the following exhibits which are returned: 3-8, 11-23, W, X and Y.

I certify that this and the preceding **39** pages are a true copy of my reasons for judgment.



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**P Walsh**

**Commissioner of the Court**

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