



Land and Environment Court
New South Wales

Case Name: Maroubra Property Development Pty Limited v
Randwick City Council

Medium Neutral Citation: [2024] NSWLEC 1716

Hearing Date(s): 27-28 August 2024 and 17 October 2024

Date of Orders: 07 November 2024

Decision Date: 7 November 2024

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The appeal is dismissed.
(2) Development Application No. 80/2023 for demolition of existing structures and construction of an eight storey mixed use development with three basement levels comprising 56 units, retail and commercial tenancies, 90 car parking spaces and strata subdivisions at 138 Maroubra Road, Maroubra is refused.
(3) All exhibits are returned, except for Exhibits A, E, F and H.

Catchwords: DEVELOPMENT APPLICATION: mixed use development in E2 Commercial Centre – whether objectives of the standard are achieved – whether sufficient environmental planning grounds

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 1.3, 3.43, 4.15, 8.7
Land and Environment Court Act 1979, s 39

Randwick Local Environmental Plan 2013, cll 4.3, 4.6
State Environmental Planning Policy (Housing) 2021, s 16

Cases Cited: Tenacity Consulting v Warringah Council [2004]
NSWLEC 140
Woollahra Municipal Council v SJD DB2 Pty Ltd [2020]
NSWLEC 115
Stockland Development Pty Ltd v Manly Council [2004]
NSWLEC 472

Texts Cited: Randwick Comprehensive Development Control Plan
2013
Greater Sydney Commission's Eastern City District
Plan 2018
Randwick City Local Strategic Planning Statement 2020
Apartment Design Guide 2015

Category: Principal judgment

Parties: Maroubra Property Development Pty Limited
(Applicant)
Randwick City Council (Respondent)

Representation: Counsel:
P Tomasetti SC (Applicant)
A Seton (Solicitor) (Respondent)

Solicitors:
K&L Gates (Applicant)
Marsdens Law Group (Respondent)

File Number(s): 2023/235172

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** Development is proposed on a site in the Maroubra town centre, close to the intersection of Anzac Parade and Maroubra Road.
- 2 To this end, development application No. 80/2023 (the DA) was lodged by the Applicant in these proceedings, with the Randwick City Council (the Respondent) on 10 March 2023.
- 3 The DA was publicly notified between 23 March 2023 and 24 April 2024 in response to which 49 written submissions were received.

- 4 On 24 July 2023, as the DA was not otherwise determined, the Applicant filed an appeal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) in Class 1 of the Court's jurisdiction.
- 5 On 20 June 2024, the Sydney Eastern City Planning Panel refused the DA on behalf of Randwick City Council, the Respondent in these proceedings.
- 6 Relevantly, on 2 July 2024, the Court granted the Applicant leave to rely upon amended plans and other documents that had the effect of amending the DA so that it may be now described in the following terms:
 - (1) Demolition of an existing commercial building and bulk earthworks.
 - (2) Construction and use of an 8-storey mixed use development comprising:
 - (a) Two retail tenancies on the ground floor, loading bay, waste collection and storage.
 - (b) Commercial tenancy and landscape open space on Level 1.
 - (c) 56 residential apartments, two of which are nominated as affordable rental housing apartments.
 - (d) Vehicle parking, services and waste storage in three levels of basement.
 - (e) Communal open space for use by residents at Level 2 and level 8, being the rooftop.
 - (3) Extension and augmentation of services and utilities, including the removal of an existing electrical kiosk, to be replaced by a new substation at the Maroubra Road frontage.
 - (4) Consolidation of two lots into one.
- 7 At the commencement of the hearing, the Applicant sought, unopposed, to further amend the development application before the Court, as described in a schedule of amendments (Exhibit A, Tab 1). The Court, exercising the functions and discretions of Randwick City Council as the relevant consent authority, under s 39(2) of the *Land and Environment Court Act 1979* (LEC Act), approved the amending of the DA, agreed by the parties to be not more than minor.

The site and its context

- 8 The site comprises two lots (the Lots) that are legally described as follows:
 - (1) Lot 1 in DP506844, fronts Piccadilly Place with an area of 760.6m².

- (2) Lot 2 in DP506844, fronts Maroubra Road with an area of 756.8m².
- 9 When considered together, the Lots comprise a site described in the Amended Statement of Facts and Contentions (Exhibit 2), prepared by the Respondent, in the following terms:
- (1) The site has an overall area of 1,517m² with the following dimensions;
- (a) A primary frontage of 28.83m to Maroubra Road.
 - (b) A Secondary frontage of 24.83m to Piccadilly Place.
 - (c) Side boundaries measuring 61.11m.
- 10 The site benefits from, and relies on, a right of carriageway and right of easement over what presents as a laneway to the rear of the site, providing access to a carpark to adjoining development.
- 11 The Maroubra Police Station is located on the adjoining site to the west (the Police Site).
- 12 Further to the west stands a residential flat building known as 'Newington' that steps up from a four-storey frontage to Maroubra Road to a maximum of 14 storeys.
- 13 The site is within environs generally characterised by mixed use development, including residential towers on podiums containing retail and commercial tenancies fronting Maroubra Road and Piccadilly Place.
- 14 In particular, the site adjoins development to the east and north known as Pacific Square. For clarity, I will distinguish the development by 'Pacific Square North' and 'Pacific Square East'.
- 15 Relevantly, Piccadilly Place is part public road and part private road and provides vehicular access, including large semi-trailers associated with supermarket operations in Pacific Square.
- 16 Recent development of 6-7 storeys is evident on a site opposite the subject site, at the intersection of Maroubra Road and Robey Street.
- 17 Development on the northern side of Maroubra Road ranges in height from 2 storeys, evident in the Police Station, to 14 storeys on part of the development known as Newington.

- 18 The site itself is located within the E2 Commercial Centre zone, according to the Randwick Local Environmental Plan 2013 (RLEP) in which commercial premises, shop top housing and residential flat buildings are permitted with consent, where consistent with the following objectives of the E2 zone:
- To strengthen the role of the commercial centre as the centre of business, retail, community and cultural activity.
 - To encourage investment in commercial development that generates employment opportunities and economic growth.
 - To encourage development that has a high level of accessibility and amenity, particularly for pedestrians.
 - To enable residential development only if it is consistent with the Council's strategic planning for residential development in the area.
 - To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
 - To facilitate a high standard of urban design and pedestrian amenity that contributes to achieving a sense of place for the local community.
 - To minimise the impact of development and protect the amenity of residents in the zone and in the adjoining and nearby residential zones.
 - To facilitate a safe public domain.
 - To support a diverse, safe and inclusive day and night-time economy.
- 19 The site is also within the vicinity of a number of sites listed for their heritage significance, including:
- (1) The Maroubra Junction Hotel, at 195-199 Maroubra Road
 - (2) A post-war house at 2 Robey Street
 - (3) A semi-detached pair of dwellings at 7-9 Walsh Avenue
 - (4) A semi-detached pair of dwellings at 23-25 Walsh Avenue
 - (5) An Art deco residential flat building at 139 Maroubra Road.

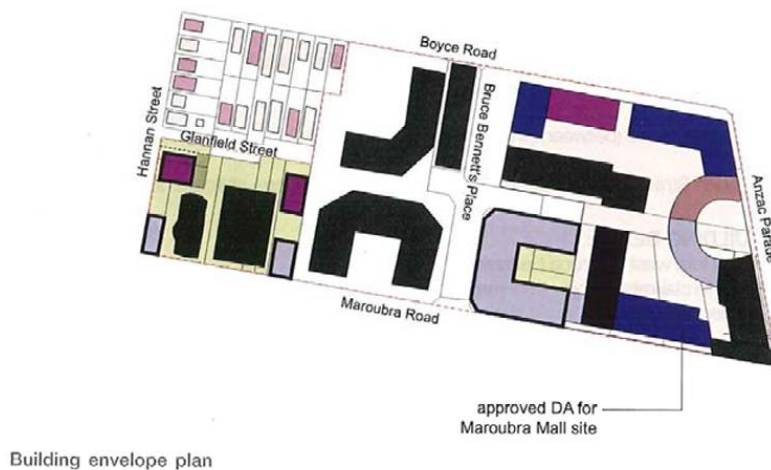
Expert evidence

- 20 On 2 July 2024, the Court directed that experts in town planning, urban design and traffic confer in the preparation of joint expert reports.
- 21 Experts in traffic engineering, Mr Jason Rider on behalf of the Respondent, and Mr Josh Milston on behalf of the Applicant, conferred on the preparation of a joint expert report on traffic (Exhibit 5), in which the experts reach agreement on those issues initially pressed by the Respondent.

- 22 Experts in town planning were identified by the parties as follows:
- (1) Mr Gerard Turrisi on behalf of the Respondent, and Mr Tom Goode on behalf of the Applicant.
- 23 Experts in urban design were identified by the parties as follows:
- (1) Ms Gabrielle Morrish on behalf of the Respondent, and Mr Peter Smith on behalf of the Applicant.
- 24 On 31 July 2024, the Respondent sought case management, seeking to vary the directions such that planning and urban design experts jointly confer in the preparation of a single joint expert report on certain contentions identified to be of common interest.
- 25 I directed that the experts jointly confer and file a joint expert report on 13 August 2024.
- 26 As it transpired, the joint expert report on urban design and planning was filed with the Court on 22 August 2024 (Exhibit 4), necessitating the grant of leave.

Contentions

- 27 The Respondent submits in opening that the contentions remaining in the matter are essentially about urban design and planning.
- 28 The nub of the dispute is whether the appropriate form of development on the site is derived from the Building Envelope Plan at Chapter D4, 3.2.6 of the Randwick Comprehensive Development Control Plan 2013 (RDCP), reproduced below, which envisages a 'C'-shaped building, on the subject site and its adjoining site to the west, or a 'T' shaped building on the subject site itself.



- 29 Relevantly, the open ends of the 'C'-shape depicted in the RDCP fall on the subject site, and the connecting element of the letter falls on the adjoining site, occupied by the Police Station.
- 30 The Respondent accepts the Applicant has made reasonable efforts to acquire the adjoining property known as the Police Site and that, according to correspondence between the Applicant and Police NSW, those approaches have proven fruitless (Exhibit C, Tab 1).
- 31 However, the Respondent also submits that the preferred form of development depicted in the diagram at Section 3.2.6 of the RDCP can be progressed on the subject site whether or not the Police Site may be developed at some time in the future. This would require the design to incorporate two small towers at the open ends of the 'C'-shape so that the remainder of the 'C' shape can be completed sometime in the future.
- 32 The Applicant does not propose such a built form but instead proposes a 'T'-shaped building, with the wider section fronting Maroubra Road to form what the Applicant describes as the continuation of the street wall from development originating at Anzac Parade to the east.
- 33 As a consequence of the departure from the form depicted in Section 3.2.6 of the RDCP and the Maroubra Junction controls in Part D4 of the RDCP, the Respondent contends the proposal exceeds the height and number of storeys permitted on the site, is deficient in urban design such that it fails to achieve

design excellence, provides suboptimal amenity for future residents, and adversely impacts the amenity of neighbouring properties.

Public submissions

34 The hearing commenced with an onsite view at which the Court, in the company of the legal representatives, a representative of the Applicant and experts, heard oral submissions from residents of an adjoining development, the operator of a child care centre located at No 142 Maroubra Road, and from a planning expert on behalf of residents of Pacific Square.

35 The list of objectors and written submissions reflecting those heard at the onsite view is marked Exhibit 1. A summary of concerns expressed in those submissions, and submissions contained in the Respondent's Bundle of documents (Exhibit 3, Tab 5), may be summarised as follows:

- Overdevelopment in respect of height bulk and scale.
- Loss of solar access.
- Privacy and overlooking.
- View loss.
- Traffic congestion in Piccadilly Place.
- Insufficient onsite car parking.
- Construction-related impacts.
- Basement drainage and de-watering.

36 During the onsite view, the Court was also taken to:

- (1) Apartment 505 of the Pacific Square development to the east of the site and observed the view from the external balcony across the subject site to the district beyond and to Botany Bay.
- (2) The Child Care centre adjacent to the site, on Level 3, No 142 Maroubra Road, including the outdoor play space located on the eastern boundary it shares with the subject site.
- (3) Piccadilly Place to observe the source of acoustic noise, traffic behaviour and the nature of an easement on adjoining land that benefits the subject site.

The height is exceeded

37 As stated at [33], the proposed development exceeds the height of building standard at cl 4.3 of the RLEP.

- 38 The Applicant initially relied upon a written request prepared by Mr Tom Goode of Planning & Co dated 24 August 2024 (Exhibit B, Tab 1). However, during cross examination on the second day of the hearing, Mr Goode advised that the written request had been updated overnight and that a revised written request dated 28 August 2024 had been prepared to correct the objectives of the zone.
- 39 The Applicant submits the revision of the written request was not on the instruction of legal representatives and was, until Mr Goode's evidence, unknown to the Applicant. The Applicant foreshadowed an application to adjourn the proceedings, opposed by the Respondent, to allow experts to consider the revised written request.
- 40 I directed the revised written request be served with changes tracked, and that a short adjournment be granted to allow experts to consider the written request.
- 41 Upon resumption, the Respondent and its experts advised they were able to deal with the written request as amended (written request) (Exhibit H), as the revisions were limited to the correction of the zone objectives.
- 42 The experts agree that the exceedance of the height standard is measured at 6.25m above the permitted height of 25m, with a maximum height proposed of 31.56m.
- 43 Architectural drawing DA8.320, Height Plane Analysis, re-produced on p 16 of the written request, provides further explanation of the height exceedance as follows:
- (1) The proposed parapet to the east is 3480mm above the height standard.
 - (2) The proposed parapet to the north is 4200mm above the height standard.
 - (3) A pergola proposed to the north east of the rooftop is 5600mm above the height standard.
 - (4) The plant enclosure, identified with an area of 180m², is 5600mm above the height standard.

- 44 In considering the height exceedance, and the controls referred to in the written request, it is helpful to first set out the controls applicable to the site and its immediate context within the Maroubra Junction centre.

Maroubra Junction Controls

- 45 Maroubra Junction is an area identified at Part D4, Section 1.2 of the RDCP as bounded by Shepherd Street on the north, Wise Street on the south, Garden Street on the east and Hannan Street on the west. The subject site is located within this area.

- 46 Part D4, Section 2.4 sets out the Urban Strategy for Maroubra Junction, providing guidance as follows:

- (1) The intersection of Anzac Parade and Maroubra Road has historically been, and still is, the main focus of the Maroubra Junction Centre. The junction of these two main roads will be reinforced or emphasised as much as possible by an increase in building heights (8 storeys). (Section 2.4.1)
- (2) The extra width of Anzac Parade allows for taller buildings of 7 storeys. (Section 2.4.2)
- (3) As Maroubra Road is less dominant than Anzac Parade, the building heights recommended along this street are lower than the ones recommended on Anzac Parade (6 storeys). (Section 2.4.3)

- 47 Section 3 of the RDCP advises that the area within Maroubra Junction has been divided into twelve blocks. Objectives and controls are set out for each block.

- 48 Section 3.1.4 of the RDCP sets out objectives and controls in respect of building height, with the second Control stating:

“ii) Development is to comply with the building heights shown in colour in the block diagrams in Section 3.2 Block-by-Block Controls.”

- 49 The subject site is within the area identified as Block 6.

- 50 Block 6 is described in Section 3.2.6 of the RDCP in the following terms:

“Block 6 is generally bound by Boyce Road to the north, Maroubra Road to the south, Anzac Parade to the east and Hannan Street to the west. This block contains the Pacific Square site, the biggest shopping centre in the centre. This block also contains the Centrelink and Police Station sites. There are three thirteen storey towers along Maroubra Road, which are strata-titled and unlikely to change in the next 10 -15 years. There are also one to two storey residential buildings on Glanfield Street.”

- 51 The objectives relevant to Block 6 are at Section 3.2.6 of the RDCP, and provide the following:

“Objectives

Reinforce Anzac Parade as the main street

Reinforce Maroubra Road as the cross street.

Reinforce the ‘Junction’ of Maroubra Rd and Anzac Pde as the main focus of the Maroubra Junction Centre.

Encourage a mix of commercial/retail uses within the retail core.

Provision of an open space in the middle of the centre away from the traffic noise and surrounded by shopping activity providing the focus for the centre.

Provide a transition in scale from the centre along Boyce Rd, Maroubra Rd and Glanfield St to the lower scale residential buildings on the periphery.

Maintain the amenity of the residential buildings by providing a green buffer between the busy commercial/retail activities on Anzac Parade and adjacent low scale residential uses.”

- 52 The controls for Block 6, relevant to the subject site, are as follows:

- (1) The building envelope controls applicable to development proposed on Maroubra Road, other than pre-existing development, is six storeys (Control (i)).
- (2) Building use is to be two levels retail/commercial; residential above (Control (ii)).
- (3) Building depth of 22m is nominated to the west of Bruce Bennetts Place, without guidance as to building depth east of Bruce Bennetts Place, other than a margin note advising that, in the event of inconsistency, setback provisions at Section 3.1.6 apply. Side and Front setbacks are nominated in Controls (iii) and (iv) to be zero to Maroubra Road and to Bruce Bennetts Place.

- 53 The Respondent notes that building heights nominated in Block 6 are consistent with the description of urban structure at Section 2.1.4 of the RDCP, to the effect that taller buildings should be in the core of the centre at the junction, gradually decreasing in height towards the periphery.

- 54 Likewise, Section 2.1.10 of the RDCP considers potential development in the Maroubra Junction in similar terms:

“The key commercial area of the Maroubra commercial area of the Maroubra Junction Centre (ie the area of study) is envisaged to have higher and denser development, which then scales down towards the periphery of the study area, into lower and less dense residential zones.”

- 55 That said, as stated at [50], existing strata-titled buildings within Maroubra Junction area are also identified as existing development unlikely to change within 5-10 years given ownership arrangements.
- 56 Relevantly, Section 3.1.3 of the RDCP also provides for objectives and controls in respect of building envelope as follows:

“Objectives

To define the bulk, height and scale of development throughout the centre.

To create a transition between the centre and the surrounding residential area.

Controls

i) Residential floors: All developments are to demonstrate that the gross floor area achieved occupies not more than 70% of the maximum building envelope for residential floors.

ii) Commercial floors: All developments are to demonstrate that the gross floor area achieved occupies not more than 80% of the maximum building envelope for commercial floors above the ground floor.”

The written request is considered

- 57 The written request asserts that compliance with the height standard is unreasonable or unnecessary, because the objectives of the height standard are achieved notwithstanding the non-compliance set out above.
- 58 The objectives of the height standard, at cl 4.3 of the RLEP are in the following terms:
- (a) to ensure that the size and scale of development is compatible with the desired future character of the locality,
 - (b) to ensure that 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
- 59 In respect of objective (a) of the height standard, the written request states the proposal is consistent with the adjacent built form and provides a transition in scale from development to the north and east, to the development to the south, and because:
- (1) The desired future character of Maroubra Junction of which the site is a part, can be found in the following strategic planning documents:
 - (a) The Greater Sydney Commission’s Eastern City District Plan, 2018 that identifies Maroubra Junction as a strategic centre,

which pre-dates the Council's Local strategic Planning Statement and supporting Local Housing strategy – all of which identify the area for growth and transport infrastructure investment.

- (b) The Randwick City Local Strategic Planning Statement, dated 2020, anticipates additional density in the area, supported by integrated land use and transport appropriate to the economic importance of Maroubra Junction. The site is one of the few undeveloped sites in the area that can achieve the additional employment and housing density sought by the Council.
- (c) The Randwick Housing Strategy identifies Maroubra Junction as a key location for long term housing growth, from 2026 onwards, with a housing target of 4,300 dwellings, that is not likely to be achieved on current figures, resulting in what the written request describes as a 'compounding deficit'. As such, the lower height permitted on the site by reference to the relevant height of buildings map reflect a 'status quo' misaligned with the desired future character set out in the Local Housing Strategy, is incompatible with the planning context of its surrounds, and does not account for the additional height permitted by certain provisions of the State Environmental Planning Policy (Housing) 2021 (Housing SEPP).
- (d) Part D4 of the RDCP outlines a desired future character that provides a mix of commercial, retail and residential use that serve the needs of the local community. Existing development in the immediate vicinity of the site is of substantial height, with which the proposal is compatible when viewed in context with the Maroubra Road streetscape, and provides a transition down from the taller development of Pacific Square, to the development on the southern side of Maroubra Road when viewed from Bruce Bennetts Place. As such the proposal achieves the objectives of Block 6 by reinforcing Maroubra Road as the cross street; providing a mix of retail and commercial uses within the retail core, and providing a transition in scale from the centre along Maroubra Road to the lower scale residential buildings on the periphery.

60 In respect of objective (b) of the height standard, the written request asserts the objective is largely irrelevant as the site is not within a conservation area, and is not near a heritage item other than No 2 Robey Street which is located 45m to the south and agreed to be unaffected by the proposal.

61 In respect of objective (c) of the height standard, the written request asserts the proposal does not adversely impact the amenity of adjoining and neighbouring land for reasons summarised as follows:

- (1) In terms of visual bulk:

- (a) The proposal improves on the bulk anticipated in the C-shaped form in two ways from that anticipated by the Block plan at Section 3.2.6 of the RDCP. Firstly, the C-shape form presents two blank walls to the Pacific Square development to the east of the site. In contrast, the proposal is for one single form presented to the neighbouring land to the east, with a setback consistent with the Apartment Design Guide (ADG). Secondly, the C-shaped form anticipates a continuous street wall along Piccadilly Place whereas the proposal offers breaks in the visual mass viewed from Pacific Square North.
 - (b) While additional mass will be located in the centre of the site, built form in this location will provide visual privacy consistent with Objective 3F-1 of the ADG, and conform to the design guidance seeking new development to be located and oriented to maximise visual privacy and avoid direct lines of sight for windows and balconies across corners.
 - (c) The written request also asserts that the massing of the proposed development complies with the relevant envelope controls in the RDCP, such as the limits on gross floor area for residential and commercial at Section 3.1.3; the building depth set out in Section 3.1.5, building separation at Section 3.1.6; articulation in the manner set out in Section 3.1.7, and the open space required by Section 4.1.4, exceeding the minimum required by the ADG.
- (2) In terms of privacy:
- (a) The proposal responds to existing development to the north and east of the site, and to future development to the west on the site currently occupied by the Police Station. The Applicant has prepared an indicative scheme for the Police Station site demonstrating visual privacy achieved by an alternative solution to screen balconies and windows on west-facing apartments, or by perimeter planting to rooftop terraces.
 - (b) For development to the north, separation distances conform to the ADG for the lower 4 storeys, and screening and planting achieves visual privacy from level 5 and above.
 - (c) For development to the east, pop out windows oriented to the north east achieve visual privacy, and rooftop planting screens the communal open space at this level.
- (3) In terms of overshadowing:
- (a) The proposed additional overshadowing does not result in additional adverse overshadowing when compared with the C shape form in Section 3.2.6 of the RDCP, when the childcare at Level 2 of the adjoining building at No 142 Maroubra Road is excluded. Such exclusion is considered reasonable given the extent of awning covering this area, and the requirement for shade to outdoor play areas in the relevant National Regulations.

- (b) Living areas to west facing apartments in Pacific Square East are generally located behind the balconies. This façade receives direct sunlight at midday, with shading occurring from 2pm.
 - (c) In the existing condition, four apartments in Pacific Square East site receive less than 2 hours solar access to the balcony/living area due to overshadowing by the Pacific Square North.
 - (d) The C shape form preferred by the RDCP overshadows an additional 6 apartments.
 - (e) The proposed development affects one additional balcony, but improves solar access to three other balconies.
 - (f) Drawing DA8.321, reproduced in the written request, is said to show the proposal casts less shadow than the C shape form and results in a better outcome for the site, including those balconies at the south west corner of Pacific Square East which enjoy both north and south exposure.
 - (g) Based on the drawing cited above, the written request identifies 74% of the living rooms and balconies to Pacific Square East retain 2 hours solar, exceeding the minimum required by the ADG.
 - (h) Sun eye diagrams also demonstrate improved solar access when compared with an envelope conforming to that preferred by the RDCP.
 - (i) The footpath along Maroubra Road to the south of the site is overshadowed by the Pacific Square development for most of the day in mid-winter. The proposed development casts additional shadow on the footpath from 4pm in mid-winter. Footpath dining in this location enjoys partial solar access from 11am-4pm, after which the impact may be considered minor and not detrimental to lunchtime dining.
 - (j) Additional shadow from the proposed development is cast on the land at No 2 Robey Street, a heritage item, limited to the front yard.
 - (k) Overshadowing to the mixed use development opposite the site, at 165-167 Maroubra Road, is the subject of architectural drawing DA8.322, re-produced on p 25 of the written request. The analysis concludes that all apartments facing Maroubra Road receive more than 2 hours of solar access, except for four apartments at level 1 and 2 of the development. However, the duration is not affected as a result of the proposed development, and so the additional height cannot be said to adversely impact these apartments.
- (4) In terms of views:
- (a) A view sharing analysis prepared by Virtual Ideas on behalf of the Applicant (View Impact Report) (Exhibit B, Tab 13), re-

produced in part in the written request, compares the existing condition with development that complies with the C shape in the RDCP, the proposal as originally lodged with the Respondent, and the proposal as amended at [7].

- (b) As the proposal does not exceed the height of Pacific Square East, views from development to the west of Bruce Bennetts Place are assumed to be unaffected by the proposed development.
- (c) Views from Pacific Square East, looking south west are described as views to medium to high density urban areas in the immediate foreground with distant low density areas further south, and are later considered against the principles set out in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140.
- (d) Views affected from Pacific Square North, at the intersection with Bruce Bennetts Place, are assessed to be short-range views from balconies of medium to high density urban areas of low value.
- (e) Views affected from Pacific Square North at the eastern end of Piccadilly Place are assessed to be of medium to high density urban areas, with distant water views of Port Botany from balconies. The extent of impact is assessed as moderate to severe, and greater than is the case in development complying with the height standard and development preferred by the RDCP.
- (f) The View Impact Report also states that the impact on views would be affected by a proposal that sought the benefit of height under the provisions of the Housing SEPP.

62 Next, the written request advances two primary reasons by which it asserts there are sufficient environmental planning grounds to justify the contravening of the height standard, pursuant to cl 4.6(3)(b) of the RLEP.

63 Firstly, the proposed development is consistent with the objects of the EPA Act at s 1.3, for reasons summarised as follows:

- (1) The height variation promotes the economic and social welfare sought by object s 1.3(a) by enabling the highest and best use of the land, and furthers the strategic planning aims of the Council for housing, including two affordable units.
- (2) Enabling the variation ensures the site is regenerated in accordance with principles of environmentally sustainable development that meets or exceeds the requirements of BASIX and the ADG, consistent with object s1.3(b). The additional height has no unreasonable impact on environmental or social considerations.

- (3) Strict compliance with the height standard is a lost opportunity to enable additional housing on the site with no unreasonable environmental impact. Rather, the proposal responds to unique characteristics of the site in a manner that is balanced and orderly, in accordance with object s 1.3(c), and consistent with Council's Local Housing Strategy in the Maroubra strategic Centre.
- (4) The proposal includes affordable housing, consistent with s 1.3(d) to promote the delivery and maintenance of the same.
- (5) The proposed variation to the height standard does not compromise design quality or result in unreasonable impact on the amenity of the built environment when compared to a compliant scheme, consistent with s 1.3(g) which seeks to promote good design and amenity of the built environment.

64 Secondly, the proposed variation to the height standard results in an outcome that does not adversely impact the amenity of adjoining and neighbouring land when visual bulk, loss of privacy, overshadowing and views are considered, and in a manner set out at [61].

65 The written request also assesses the proposal against the objectives of the E2 Commercial Centre zone, at [18], concluding the proposed development is consistent with those objectives because:

- (1) The proposed development includes non-residential floor space that will strengthen the role of the centre as a hub for business, retail, community and cultural activity.
- (2) Non-residential floor space contributes to the provision of employment opportunities in Maroubra Junction that is unaffected by the additional height.
- (3) The site's close proximity to major bus routes on Anzac Parade and Maroubra Road, and the foreshadowed extension of light rail, deem it highly accessible. Variation to the height standard permits additional housing for residents to access such services, and proposes a lower number of carparking spaces to maximise public transport use and pedestrian activity.
- (4) When the Council's Local strategic Planning Statement, Local Housing Strategy and Part D4 of the RDCP are considered, the proposal is consistent with the strategic planning goals for the Maroubra Junction centre.
- (5) Non-residential uses at ground level activate the Maroubra Road frontage that will attract pedestrian traffic and contribute to a vibrant, safe, diverse and functional street, and public space.
- (6) A high standard of urban design and pedestrian amenity is evident in the detailed envelope design process that flows from the need to

consider the site without the benefit of amalgamation with the Police site, and as is described at [61] which also outlines the manner in which the impact of the development has been minimised and the amenity of residents in the zone is protected.

Expert evidence on height

- 66 Ms Morrish's oral evidence is that she was involved in a study undertaken by the Urban Design Advisory Service (UDAS) that informed the DCP from as early as 2001. At the time, the UDAS study adopted the heights of buildings that existed in Maroubra Junction, but also considered the existing built form to be other than a precedent or an exemplar.
- 67 This explains the emphasis on achieving a transition in height downward from the heights of development that was approved, or existed, in 2004 when the former DCP was adopted, to the lower scale development on the southern side of Maroubra Road.
- 68 A control of 6 storeys was also adopted on the subject site, in part, to obscure the view of the Pacific Square development from Maroubra Road.
- 69 Furthermore, Ms Morrish identifies that while the development at Pacific Square is large, it steps down to a lower section of built form adjacent to the proposed development that is virtually identical to the parapet at Level 7 of the proposal, which approximates the height permitted on the site, when the controls at cl 4.3 of the RLEP and Section 3.2.6 of the RDCP are read together.
- 70 While the tallest built form of the Newington development rises to 14 storeys, the development also transitions down to only 4 storeys fronting Maroubra Road despite the height standard applicable to the whole of the Newington site being nominated at 35m.
- 71 Ms Morrish also believes the storey control at Section 3.1.4 of the RDCP to be consistent with the height standard at cl 4.3 of the RLEP when the explanatory paragraph associated with the diagram on p 20 (folio 605) is read. That is, the storey control at Control vi) is a height measured to the underside of the topmost ceiling of development, which is a lesser value than the height standard so as to allow for the provision of plant and equipment, communal

open space and other built form, that may even include habitable floor space above the height at Control vi).

- 72 So understood, the storey control at Control vi), permits 21m to the underside of the topmost floor, and an additional 4m to the maximum height allowed by the height standard.
- 73 According to Ms Morrish, the explanation of storeys in respect of height at Section 3.1.4 of the RDCP clearly states the maximum allowable building height for sites on which 6 storeys is nominated, is 21m; while development of 7 storeys is nominated at a height of 24m. As such the storey control is still within the height of buildings standard at cl 4.3 of the RLEP. However the RDCP contemplates 7 storeys but not 8 as is proposed.
- 74 Mr Goode acknowledges in his oral evidence that the sun eye diagrams at DA8.310 depict overshadowing to Pacific Square East from 1pm onwards in mid winter, to a greater degree than is imposed by the C shape form preferred by the RDCP, depicted on DA8.306.
- 75 Mr Goode also accepts that views will be lost from level 9 of the Pacific Square East building as a result of the height exceedance proposed, and that shade structures and the like on the rooftop of the proposed development would also obstruct views from apartments on Level 10.
- 76 Likewise, Mr Goode accepts that views from Pacific Square North, opposite Piccadilly Place, will also be affected by the exceedance.
- 77 However, according to Mr Goode, those views are not iconic as the view is predominantly to Mascot and to other buildings.
- 78 Mr Goode and Mr Smith are of the view that the impact on amenity of neighbouring land is improved by the T shape form when compared with the C shape form preferred by Section 3.2.6 of the RDCP.
- 79 Ms Morrish describes in some detail certain assumptions made during the preparation of the relevant Block plan, or which can now be read into the diagrammatic block plan on the site. In summary, these assumptions include:

- (1) Two small towers located on the site, separated by a courtyard. A tower to the north of the site fronts Piccadilly Square, and another tower fronts Maroubra Road.
- (2) Rather than a long corridor providing access from Maroubra Road to the northern tower, Ms Morrish describes an open courtyard that can be traversed, with ground level retail, and lift access and other services located to the frontage with Piccadilly Lane to partly obstruct a sightline between the northern tower and the existing development to Pacific Square North opposite Piccadilly Lane.
- (3) Visual privacy to apartments in both small towers could be managed through the careful placement of balconies, openings and the like.

80 Ms Morrish considers overshadowing by the proposed T shape form to be greater than the shadow cast by the C shape form preferred in the RDCP, with overshadowing shown to upper level unit windows and balcony to the south west corner of Pacific Square East building that is not otherwise cast by the C shape form.

81 Mr Smith appends a Solar Heat Map at Annexure A of the joint expert report that compares solar access performance to facades and courtyard areas in the C shape and T shape forms.

82 Mr Smith summarises the results for solar access to the proposed façade by stating the T shape form is not so overshadowed by the Pacific Square North building and so receives 44% more façade area with 2 hours or more solar access than the C shaped form (Exhibit 4, par 183)

83 While the initial results would appear to show greater solar access into courtyards in the T shape form, two things can be said about this Solar Map:

- (1) Firstly, Mr Smith accepts that reference to the sun eye diagrams would suggest the courtyard to the east of the proposed T form would receive around half an hour of solar access and not the 2 hours as stated in the Solar Map.
- (2) Secondly, whether the courtyard to the west of the T shape form receives solar access is questionable as the Police site is not compelled to develop in the manner depicted by the Applicant, but may return development around the corner from Bruce Bennetts Place into Piccadilly Place, as shown in a sketch by Ms Morrish at par 192(d) of the joint expert report.

- 84 Mr Goode's evidence is that the C shape form is found in an RDCP which pre-dates the Apartment Design Guide, and so is an aged document without the benefit of later standards.
- 85 The Applicant submits that the controls set out in Part D4 of the RDCP cannot set aside or supplant the development standards in cl 4.3 and 4.6 of the RLEP when the provisions at s 3.43 of the EPA Act are properly understood.
- 86 This is because the provisions found in Part D4 of the RDCP inherently conflict. While the relevant control at Section 3.2.6 of the RDCP nominates 6 storeys as the preferred height on the site, Section 3.1.4 of the RDCP provides the maximum allowable building height for sites on which 6 storeys is nominated, to be 21m while development of 7 storeys is nominated at a height of 24m, being within the height of buildings standard at cl 4.3 of the RLEP.
- 87 Given the height standard permits a height of 25m on the site, and cl 4.6 permits the standard to be varied, the controls on building height within the RDCP have no effect to the extent they are inconsistent or incompatible with cl 4.3 and 4.6 of the RLEP, according to s 3.43 of the EPA Act.
- 88 Furthermore, the provisions of a development control plan cannot be used to interpret the provisions of a local environmental plan, and so the desired future character with which the development must be consistent is not derived from a development control plan (see *Woollahra Municipal Council v SJD DB2 Pty Ltd* [2020] NSWLEC 115, at [46]).

The objectives of the height standard are not achieved

- 89 While the parties contest the merits of the C or T shape and whether or not one is preferred over the other for its comparative advantages, the Court must first be satisfied that the height of the built form as proposed by the Applicant is justified in terms set out in cl 4.6 of the RLEP.
- 90 This is because cl 4.6(2) permits a consent authority to grant development consent for development even though that development contravenes a development standard imposed by an environmental planning instrument (see Initial Action at [9]). The permissive power in cl 4.6(2) to grant development consent for a development that contravenes the development standard is,

however, subject to conditions. Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority can exercise the power to grant development consent for development that contravenes a development standard (Initial Action at [13]).

- 91 The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that the Applicant's written request seeking to justify the contravention of the development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3). These matters are twofold: first, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)) and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)). The written request needs to demonstrate both of these matters (Initial Action at [15]).
- 92 For the reasons that follow, the Court cannot be satisfied in respect of either of these matters.
- 93 In respect of the objective at cl 4.3(1)(a) of the RLEP, I accept that there is no inconsistency between the height and number of storey controls in Part D4 of the RDCP and the height standard at cl 4.3 of the RLEP.
- 94 The height standard is not applied as a blanket across a wide area of Maroubra Junction, as is often the case, but is conspicuously particular about its application, most notably on the subject site and adjoining Police Site where the height is indeed a departure from the 35m height standard that is otherwise widely applied in the immediate vicinity of the site.
- 95 The Applicant submits that the height of buildings map is "curious to say the least". It may be so.
- 96 The applicable height standard of 25m is consistent with the explanation provided by Ms Morrish at [73], to the extent that six storeys is anticipated within a height of 21m, with a remainder of 4m available to accommodate roof plant and the like.

- 97 So understood, the approval of development at seven storeys across the road at 165-167 Maroubra Road is not an abandonment by the Respondent of the controls, but is entirely consistent with them.
- 98 As a consequence, I cannot accept the Applicant's argument that the height preferred in Part D4 of the RDCP is inconsistent or incompatible with the height standard at cl 4.3 of the RLEP.
- 99 Likewise, while Mr Goode relies on *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC 472 (at [87]) to contend the age of the RDCP now renders it at odds with other environmental planning instruments such as the Housing SEPP. The RDCP is a development control plan for the purposes of s 4.15(1)(a)(iii) of the EPA Act, with height controls that are consistent with those in the RLEP.
- 100 I also accept Mr Turrisi's opinion that while the strategic planning documents cited at [59(1)] may be read to prefigure a desired future character of greater growth and density in Maroubra Junction, such strategic statements are not understood to supplant development standards in the RLEP.
- 101 The growth and density sought in these documents are for the area bounded by Shepherd Street, Wise Street, Garden Street and Hannan Street, within which the site is located but is not otherwise identified as the object of additional height or density. To the extent the written request invokes the potential for such incentives to apply under State Environmental Planning Policy (Housing) 2021, I note that as the site is not subject to a floor space ratio standard, it is unclear how additional height incentives would be obtained by a development seeking the same in the future, given s 16(4) of the Housing SEPP excludes the application of additional FSR on land not subject to an FSR control.
- 102 Additionally, development in respect of Parts 3 and 5 of the Housing SEPP may permit additional height or FSR but not without also considering the desirable elements of the character of the local area, or for precincts undergoing transition, the desired future character of the precinct.

- 103 The experts agree that the parapet height of the proposed development fronting Maroubra Road appears consistent with the desired future character of the precinct. This is unremarkable as the parapet height virtually aligns to the height standard of 25m, and below which are seven storeys.
- 104 It is the built form above this level that represents the exceedance, and it is this built form that impacts the amenity of adjoining development, which is an objective of the height standard at cl 4.3(1)(c) of the RLEP.
- 105 The built form comprising the exceedance fails to ensure the development does not adversely impact the amenity of adjoining land in two ways I consider fatal.
- 106 Firstly, it is not disputed by the experts that the built form comprising the exceedance obstructs views from apartments in the Pacific Square East development. The written request characterises these views at [61(4)(c)] as views to medium to high density urban areas in the immediate foreground with distant low density areas further south. The extent of impact is said to obscure medium/long term views of existing lower density residential development and distant views to the horizon to the south to Port Botany, with a moderate to severe impact (p 33). The Applicant submits that views are not so much lost as changed. As I understand it, the thrust of this submission is that views are views, whether they are of the waters of Botany Bay or of an apartment building in close proximity.
- 107 Viewpoints 10-12 and 15-16, re-produced in the written request, depict these views being retained by development on the subject site at a height of 25m, but are either wholly or mostly lost as a result of the height of the proposed development.
- 108 Under the Tenacity assessment in the written request, the reasonableness of these Viewpoints is expressed in virtually identical ways, stating, in the case of Viewpoint 15;

“A DCP compliant envelope would maintain some glimpses of a long term view to Port Botany – but obscure a large proportion of the immediate short/medium views. A compliant SEPP Housing envelope would obscure long term view to Port Botany. The proposed development will obscure longer term views of Port

Botany. Considering the urban nature of the site and the impact of a compliant SEPP envelope, the impact is considered of moderate impact.”

- 109 For reasons set out at [101]-[102], I do not consider a comparison with a hypothetical envelope that relies on height incentives in the Housing SEPP helpful, and to the extent such a comparison is relied on, as it is, I consider the assessment of the severity of impact resulting from the proposal to be under estimated in the written request. Absent reference to an actual proposal that enjoys the benefit of such incentives, the reality is that views to Port Botany (which lies on the shores of Botany Bay) are retained by a compliant development and lost by the proposed development.
- 110 I cannot find that the objectives at cl 4.3 of the RLEP are achieved notwithstanding the non-compliance, and so I cannot be satisfied that compliance with the height standard is unreasonable or unnecessary as I am required to be by cl 4.6(3)(a) of the RLEP.
- 111 The second reason I consider fatal is that I am also unable to find the environmental planning grounds advanced in the written request sufficient to justify the contravention because the statement summarised at [64] is not made out. The adverse impact on views at Viewpoints 10-12 and 15-16 results from the exceedance that is evenly distributed across the uppermost levels of the proposal such that I am unable to find that the proposed development minimises the impact of development, while the extent and degree of view loss fails to demonstrate that the proposal protects the amenity of residents, which is the seventh objective of the E2 zone.
- 112 As such, I cannot be satisfied that there are sufficient environmental planning grounds as I am required to be by cl 4.6(3)(b) of the RLEP, nor do I consider the proposal consistent with the objectives of the E2 zone.
- 113 As the Court cannot be satisfied that the exceedance is justified on the basis of those matters about which the Court must be satisfied at cl 4.6(3) and cl 4.6(4)(a)(ii) of the RLEP, the Court does not have power to grant consent.
- 114 The Applicant submits that notwithstanding the non compliances, the endorsed recommendations of the Randwick Design Excellence Advisory Panel (Exhibit 3, Tab 11) states its support for the proposal in the following terms:

“The panel welcomes considered challenges to DCP envelopes where property ownership patterns assumed in the DCP are not achievable...The T-shaped block proposal would be suitable providing it:

Achieves compliant solar access to the subject site and all the adjacent apartments.

Is amended to achieve compliant building separation between the subject site and all adjacent apartments, including potential future habitable rooms on the police site to the west.

Improves landscape areas, communal open space and deep soil planting

Does not negatively impact on privacy and views, both onsite and on neighbouring sites.”

115 For reasons set out above, it is evident that not all of the provisos of the Panel have been achieved so as to rely upon its endorsement.

Orders

116 The Court orders that:

- (1) The appeal is dismissed.
- (2) Development application No. 80/2023 for demolition of existing structures and construction of an eight storey mixed use development with three basement levels comprising 56 units, retail and commercial tenancies, 90 car parking spaces and strata subdivisions at 138 Maroubra Road, Maroubra is refused.
- (3) All exhibits are returned, except for Exhibits A, E, F and H.

T Horton

Commissioner of the Court

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.