



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Coogee Bay Holdings Pty Ltd v Waverley Council [2025] NSWLEC 1888</b>
<b>Hearing dates:</b>	Conciliation conference on 4-5 November 2025
<b>Date of orders:</b>	12 December 2025
<b>Decision date:</b>	12 December 2025
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	O'Neill C
<b>Decision:</b>	<p>The orders of the Court are:</p> <ol style="list-style-type: none"><li>(1) The appeal is upheld.</li><li>(2) In accordance with s 8.15(3) of the <i>Environmental Planning and Assessment Act 1979</i> (NSW), the Applicant is to pay the Respondent's costs thrown away as a result of the amendments made to the application for development consent on 5 August 2025 and 5 November 2025, in the sum of \$75,000 to be paid within 60 days of these orders.</li><li>(3) Development Application No. 245/2024 for the demolition of existing structures, construction of a part-five, part-six storey mixed use development comprising 42 residential units including neighbourhood shop and kiosk, three levels of basement parking, associated landscaping works and tree removal at 439-441 Old South Head Road, 443-445 Old South Head Road, 1 The Avenue and 3-5 The Avenue, Rose Bay (legally described as Lot 1 in DP 857668 and Lot 100 in DP 1328785), is determined by the grant of consent, subject to the conditions of consent at Annexure A.</li></ol>
<b>Catchwords:</b>	DEVELOPMENT APPLICATION — mixed use development — conciliation conference — agreement between the parties — orders
<b>Legislation Cited:</b>	<i>Environmental Planning and Assessment Act 1979</i> (NSW), ss 4.16, 8.7

*Land and Environment Court Act 1979 (NSW), s 34*  
*Roads Act 1993 (NSW)*

Environmental Planning and Assessment Regulation 2021 (NSW)

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.48, 2.119, 2.122, Ch 2

State Environmental Planning Policy (Housing) 2021, ss 15C, 16, 18, 19, 21, 144, 163, 164, 180, Ch 4

Waverley Local Environmental Plan 2012, cll 4.3, 4.4, 4.6, 5.10, 5.21, 6.9, 6.15

**Cases Cited:**

*Cumming v Cumberland Council (No 2)* [2021] NSWLEC 117

*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90  
*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118

*Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827

**Category:**

Principal judgment

**Parties:**

Coogee Bay Holdings Pty Ltd (Applicant)  
Waverley Council (Respondent)

**Representation:**

Counsel:

A Galasso SC (Applicant)  
M Staunton (Respondent)

Solicitors:

Mills Oakley (Applicant)  
Lindsay Taylor Lawyers (Respondent)

**File Number(s):**

2024/286546

**Publication restriction:**

No

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## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979 (NSW)* (EPA Act) against the deemed refusal of Development Application No. 245/2024 for demolition of existing structures, construction of a part-five, part-six storey mixed use development comprising 42 residential units including neighbourhood shop and kiosk, three levels of

basement parking, associated landscaping works and tree removal (the proposal), at 439-441 Old South Head Road, 443-445 Old South Head Road, 1 The Avenue and 3-5 The Avenue, Rose Bay (the site), by Waverley Council (the Council).

- 2 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (NSW) (LEC Act) between the parties, which was held on 4 and 5 November 2025. I presided over the conciliation conference. At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if the parties' decision is a decision that the Court could have made in the proper exercise of its functions.
- 3 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. There are preconditions to the exercise of power to grant development consent for the proposal.

### **Amended application**

- 4 The Council, exercising the functions of the relevant consent authority, the Sydney Eastern City Planning Panel, has consented to the amendment of the application pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021 (NSW). The plans and documents comprising the amended application are:

<b>No.</b>	<b>Drawing No</b>	<b>Rev</b>	<b>Drawing Title</b>	<b>Prepared By</b>	<b>Dated</b>
<b>Architectural Plans</b>					

1.	DA 1100	15	Basement 02	Orosi	05.11.2025
	DA 1101	15	Basement 01	Orosi	05.11.2025
	DA 1102	15	Lower Ground Level	Orosi	05.11.2025
	DA 1103	15	Ground Level	Orosi	05.11.2025
	DA 1104	15	Level 01	Orosi	05.11.2025
	DA 1105	15	Level 02	Orosi	05.11.2025
	DA 1106	15	Level 03	Orosi	05.11.2025
	DA 1107	15	Level 04	Orosi	05.11.2025
	DA 1108	15	Roof Plan	Orosi	05.11.2025
	DA 2001	15	Elevation – North & South	Orosi	05.11.2025
	DA 2002	15	Elevation – East & West	Orosi	05.11.2025
	DA 3002	15	Cross Section B	Orosi	05.11.2025
	DA 3003	15	Cross Section C	Orosi	05.11.2025
	DA 3004	15	Cross Section D	Orosi	05.11.2025
	DA 3005	15	Longitudinal Section F	Orosi	05.11.2025
	DA 3006	15	Cross Section G	Orosi	05.11.2025
	DA 3007	15	Cross Section E	Orosi	05.11.2025
	DA 3008	15	Longitudinal Section H	Orosi	05.11.2025
	DA 4021	15	Finishes Schedule	Orosi	05.11.2025
	DA 7001	15	GFA Calculation	Orosi	05.11.2025
	DA 7002	16	Landscape Calculations	Orosi	07.11.2025

	DA 7051	15	Adaptable Unit Layout 1	Orosi	05.11.2025
	DA 7052	15	Adaptable Unit Layout 2	Orosi	05.11.2025
	DA 7053	15	Adaptable Unit Layout 3	Orosi	05.11.2025
	DA 9001	15	3D Height Blanket 22.75	Orosi	05.11.2025
<b>Landscape Plans</b>					
2.	DA_000	08	Cover Page & Contents	Wyer & Co	27.10.2025
	DA_001	08	Landscape Installation and Maintenance Specification	Wyer & Co	27.10.2025
	DA_002	08	Landscape Controls and Schedules	Wyer & Co	27.10.2025
	DA_100	08	Landscape Masterplan	Wyer & Co	27.10.2025
	DA_102	08	Ground Flood Plan	Wyer & Co	27.10.2025
	DA_104	08	Level 02 Plan	Wyer & Co	27.10.2025
	DA_107	08	Roof Plan	Wyer & Co	27.10.2025
	DA_200	08	Typical Details	Wyer & Co	27.10.2025
	DA_400	08	Elevation - South	Wyer & Co	27.10.2025
<b>Stormwater Plans</b>					

8.	D00	E	Cover Sheet, Legend and Drawing Schedule	Smart Structures Australia	29.10.2025
	D01	H	Basement 2 Stormwater Drainage Plan	Smart Structures Australia	29.10.2025
	D02	I	Basement 1 Stormwater Drainage Plan	Smart Structures Australia	29.10.2025
	D03	K	Lower Ground Floor Stormwater Drainage Plan	Smart Structures Australia	29.10.2025
	D04	F	Ground Floor Stormwater Drainage Plan	Smart Structures Australia	29.10.2025
	D13	C	Pre and Post Development Catchment Plan	Smart Structures Australia	29.10.2025
	D14	C	Catchment Plan and Music Model Results	Smart Structures Australia	29.10.2025
	D15	E	Stormwater Drainage Sections and Details Sheet 1	Smart Structures Australia	28.07.2025
	D16	A	Stormwater Drainage Sections and Details Sheet 2	Smart Structures Australia	28.07.2025
	D20	G	OSD Design Calculations and Details Sheet 1	Smart Structures Australia	21.10.2025

D21	A	OSD Design Calculations and Details Sheet 2	Smart Structures Australia	18.09.2025
D25	A	External Pipe Extension	Smart Structures Australia	18.09.2025
D30	A	Erosion and Sediment Control Plan	Smart Structures Australia	18.12.2023
D31	A	Erosion and Sediment Control Details	Smart Structures Australia	18.12.2023

### Supporting Documentation

No.	Document	Prepared By	Date
9.	Updated Design Verification Statement and ADG Compliance Table	Dickson Rothschild	04.11.2025
10.	Clause 4.6 Variation Request (Height - 443-445 Old South Head Road)	GSA Planning	04.11.2025
11.	Clause 4.6 Variation Request (FSR - 443-445 Old South Head Road)	GSA Planning	04.11.2025
12.	Precautionary Clause 4.6 Variation Request (Landscaping Non-Discretionary Development Standard)	GSA Planning	07.11.2025
13.	Flood Impact Assessment Report	Smart Structures Australia	29.10.2025
14.	Truck Swept Path Analysis	Smart Structures Australia	10.10.2025
15.	Registered Community Housing Provider Statement	Bridge Housing	30.09.2025

16.	Title Search and Deposited Plan for Lot 100 in DP 1318785	LRS	25.09.2025
17.	Amended Operational Waste and Resource Management Plan	WasteTech	03.11.2025
18.	Updated BASIX Certificate No. 1818191M_04 and Stamped Plans	AENEC	06.11.2025
19.	NatHERS Certificate	AENEC	06.11.2025

### **Pre-conditions to the grant of consent**

#### *State Environmental Planning Policy (Resilience and Hazards) 2021*

5 I accept the Council's assessment that the land can be made suitable for the proposed use once remediated, on the basis of a Preliminary (Stage 1) Site Investigation prepared by K2 Consulting Group, the Detailed Site Investigation prepared by Sydney Environmental Group and the Remedial Action Plan prepared by Sydney Environmental Group, and that the matters under s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 have been addressed.

#### *State Environmental Planning Policy (Transport and Infrastructure) 2021*

- 6 Section 2.48 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport SEPP) applies to applications in which development is to be carried out immediately adjacent to an electricity substation (s 2.48(1)(b)). Section 2.48 applies because the site shares its eastern boundary with an operating substation.
- 7 Pursuant to s 2.48(2) of the Transport SEPP, before determining a development application, the consent authority must give written notice to the electricity supply authority and under s 2.48(2)(b), take into consideration any response to that notice. The (amended) application was re-referred to Ausgrid on 6 August 2025, requesting comments about potential safety risks. On 21 August 2025, Ausgrid provided a written response. These comments have been considered and incorporated in the development works, and conditions have been included in the conditions of consent which reflect and incorporate Ausgrid's comments.
- 8 Chapter 2 of the Transport SEPP provides a series of planning controls and mandatory considerations, aimed at facilitating the effective delivery and management of public infrastructure throughout NSW. Old South Head Road is identified as a classified road (Gazetted Road No. 173) pursuant to the Standard Instrument definition and *Roads Act 1993* (NSW). Accordingly, s 2.119 of the Transport SEPP applies. The application is supported by an acoustic assessment which provides recommendations for acoustic mitigation measures pursuant to sub-s (c) and concludes that the proposed

development (subject to the uptake of those recommendations) is deemed to satisfy the relevant noise emission criteria. The acoustic assessment is included in the proposed conditions.

- 9 Section 2.122 Traffic-generating development – The application proposes 62 car parking spaces. Accordingly, the development is considered to be of a 'relevant size or capacity' to be traffic generating development pursuant to Column 2 of the Table to Schedule 3, requiring referral to Transport for NSW (TfNSW). By written letter dated 31 July 2024, TfNSW provided concurrence in relation to the application in accordance with s 2.122 of the Transport SEPP.

*State Environmental Planning Policy (Housing) 2021*

- 10 Through the provision of in-fill affordable housing, the proposal seeks to rely on an additional 30% bonus to the applicable height and floor space ratio (FSR) controls under s 180(3) of the Housing SEPP (relevant to the area of land identified as and Lot 100 in DP 1318785 (Lot 100)) and cl 4.3 and 4.4 of the Waverley Local Environmental Plan 2012 (LEP 2012) (relevant to the area of land identified as Lot 1 in DP 857668 (Lot 1)).
- 11 In satisfaction of s 15C(1)(a), the proposed development is permissible with consent under both Ch 6 of Housing SEPP and another environmental planning instrument (LEP 2012), the division applies. In satisfaction of s 15C(1)(b), the affordable housing component is at least 10% and in satisfaction of s 15C(1)(c) the development is in an accessible area.
- 12 Pursuant to the requirements under s 16(1)-(3) and s 18(1)-(3), in order to achieve an additional 30% to the relevant controls, the development must provide a minimum affordable housing component of 15% of the overall gross floor area (GFA). The development is calculated as having a total of 5,159.5m<sup>2</sup> of GFA, therefore requiring a minimum of 773.92m<sup>2</sup> affordable housing component. As amended, the building proposes the dedication of 7 units comprising 783m<sup>2</sup> of GFA in satisfaction of the control.
- 13 The development application is accompanied by a letter from a registered community housing provider containing an agreement that it will manage the proposed affordable housing component for a minimum of 15 years in satisfaction of s 21(1).
- 14 Chapter 4 of the Housing SEPP prescribes a series of controls for residential apartment development, which is defined under s 144(1)-(2) as including residential flat buildings, shop top housing, and mixed-use development that contains certain residential components. The proposal is for a mixed-use development containing residential components, so Ch 4 applies. The application includes a Design Verification Statement and Apartment Design Guide (ADG) Compliance Table which assesses and supports the form of the proposed development, as amended against the design quality principles and ADG. The application was assessed in its original form by the Waverley

Design Excellence Advisory Panel (DEAP) on 16 July 2024. The amended application was re-notified to the DEAP and their comments were incorporated into the amended Statement of Facts and Contentions.

15 On 31 October 2025, the Housing SEPP was amended without a savings and transitional provision, as follows.

16 Section 163, as amended, now reads as follows (new wording underlined):

**"low and mid rise housing area** means-

(a) land within 800m walking distance of-

(i) land identified as "Town Centre" on the Town Centres Map, or

(ii) a public entrance to a railway, metro or light rail station listed in Schedule 11, or

(iii) for a light rail station listed in Schedule 11 with no public entrance-a platform of the light rail station, and

(b) if part of a lot is on land identified in paragraph (a)-the lot.

...

**low and mid rise housing outer area** means-

(a) land between 400m and 800m walking distance of-

(i) land identified as "Town Centre" on the Town Centres Map, or

(ii) a public entrance to a railway, metro or light rail station listed in Schedule 11, or

(iii) for a light rail station listed in Schedule 11 with no public entrance-a platform of the light rail station, and

(b) if part of a lot is on land identified in paragraph (a)-the lot, unless the lot is also in the low and mid rise housing inner area."

17 The Site contains a lot of land (Lot 100) which is partly within 800m walking distance of the Rose Bay Town Centre. Accordingly, Lot 100 is considered to be land within the low and mid rise housing area, and specifically, the low and mid rise housing outer area.

#### *Waverley Local Environmental Plan 2012*

18 The site is zoned R3 Medium Density Residential under LEP 2012 and the proposal is permissible with consent. The objectives of the R3 zone, to which regard must be had, are:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To maximise public transport patronage and encourage walking and cycling.
- To increase or preserve residential dwelling density.
- To encourage the supply of housing, including affordable housing, that meets the needs of the population, particularly housing for older people and people with disability.
- To provide development that is compatible with the desired future character and amenity of the surrounding neighbourhood.
- To promote development that incorporates planning and design measures that reduce the urban heat island effect.

- To improve the urban tree canopy by providing high levels of deep soil planting and additional landscaping.

- 19 Pursuant to cl 5.10(4), prior to the grant of development consent, the consent authority must consider the effect of the proposed development on the heritage significance of the item or area concerned, as Lot 1 in DP 857668 is identified as an archaeological site (Sch 5 to LEP 2012). I am satisfied, on the basis of the conclusions of the Heritage Impact Statement prepared by Urbis and other relevant documents, that the proposal will not impact on the identified heritage values of Lot 100.
- 20 A small south-eastern portion of the development site (albeit not an area in which significant built form is proposed) is identified as being within the flood planning area (i.e. land identified below the “flood planning level” – which is set as the 1% AEP flood event plus freeboard). Under cl 5.21, development consent must not be granted to development on land the consent authority considers to be within the flood planning area unless the consent authority is satisfied the development addresses the matters in sub-cl 5.21(2)(a)-(e), and consider the matters under sub-cl 5.21(3)(a)-(d). The application is supported by a set of updated stormwater plans and a flood impact assessment report, which depict measures incorporated within the proposal for the management of flooding impacts. These measures, and the consistency of the proposed development as a whole with cl 5.21 of LEP 2012, have been considered and agreed by the stormwater experts.
- 21 The proposal includes bulk excavation to a depth between 8-13m for the delivery of three levels of basement carparking. The application includes:
- Preliminary Geotechnical Investigation Report prepared by Green Geotechnics, and
  - Geotechnical Investigation Report prepared by Green Geotechnics.
- 22 The geotechnical investigations undertaken assess the quality of the fill to be extracted and provides necessary recommendations to avoid adverse impacts during the construction phase. Subject to the uptake of certain recommendations (which are incorporated in the conditions of consent) this report concludes the proposed development is geotechnically feasible and supported.
- 23 I am satisfied that the Design Excellence Statement demonstrates that the proposal is consistent with the relevant matters to which the consent authority must have regard under cl 6.9 Design Excellence.
- 24 I am satisfied that the proposal is consistent with the matters under cl 6.15(3) as the proposal delivers a net increase in water permeable surfaces on the site relative to its existing state through the provision of additional landscaped and deep soil areas; incorporates an on-site detention and rainwater tank for re-use within the building, and is not considered likely to cause significant impacts associated with stormwater run-off to neighbouring properties.

## Contravention of the height of buildings development standard under LEP 2012

- 25 The height of buildings development standard for the portion of the site 443-445 Old South Head Road is 12.5m (cl 4.3 of LEP 2012). The site has a height and FSR bonus of 30% (s 16(1) and (3) of SEPP Housing) because Ch 2, Pt 2 Div 1 applies to the proposal as the affordable housing component is at least 10% (s 15C(b) of the Housing SEPP). The affordable housing component of the development is 15.25%.
- 26 The proposed maximum height for this portion of the site is 16.25m. The Applicant provided a written request seeking to justify the contravention of the height of buildings development standard, prepared by GSA Planning and dated 4 November 2025.
- 27 The rest of the site has a building height standard of 17.5m and floor space ratio (FSR) standard of 1.5:1 (s 180(3) of the Housing SEPP) as the site is within a low and mid rise housing area as defined by s 163(a) of the Housing SEPP. The Ch 2 30% bonus height results in a height of buildings standard of 22.75m and a FSR of 1.95:1 for the rest of the site.
- 28 The Ch 6 controls do not apply to the portion of the site subject of this request because it is an archaeological heritage item (Sch 5 to LEP 2012, Pt 3 item A538 'SOOS Bakery') (s 164(1)(d) of the Housing SEPP).
- 29 Clause 4.6(3) of the LEP 2012 establishes preconditions that must be satisfied before a consent authority, or the Court exercising the functions of the consent authority, can exercise the power to grant development consent (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [13] "*Initial Action*"). The consent authority must form two positive opinions of satisfaction under cl 4.6(3). The consent authority, or the Court on appeal, must be satisfied that, (a) compliance with the development standard is unreasonable or unnecessary in the circumstances, and (b) there are sufficient environmental planning grounds to justify the contravention of the development standard.

### *The applicant's written request to contravene the height of buildings development standard*

- 30 The applicant bears the onus to demonstrate that the matters in cl 4.6(3) have been adequately addressed in order to enable the Court, exercising the functions of the consent authority, to form the requisite opinion of satisfaction.
- 31 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42]-[51] ("*Wehbe*") and repeated in *Initial Action* [17]-[21]:
- (1) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
  - (2) the underlying objective or purpose of the development standard is not relevant

to the development, so that compliance is unnecessary;

- (3) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
- (4) the development standard has been abandoned by the council;
- (5) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

32 The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).

33 The applicant's written request justifies the contravention of the height of buildings development standard on the bases that compliance is unreasonable or unnecessary because the corner lot is excluded from the height and FSR development standards for the rest of the site as it is a heritage item. The nature of the heritage item, being archaeological heritage significance, has no bearing on the final building envelope of the development. For this reason, the building envelope on the corner lot should be consistent with the rest of the site.

34 The grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature, and environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* at [23]). The environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (*Initial Action* at [24] and *Cumming v Cumberland Council (No 2)* [2021] NSWLEC 117 at [78]). Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

35 I am satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). I am satisfied that justifying the aspect of the development that contravenes the development standard in this way can be properly described as an environmental planning ground within the meaning identified by his Honour in *Initial Action* at [23].

## **Contravention of the FSR development standard under LEP 2012**

- 36 The FSR development standard for the portion of the site 443-445 Old South Head Road is 12.5m (cl 4.4 of LEP 2012). The site has a height and FSR bonus (see [25] above).
- 37 The proposed FSR for this lot is 0.9:1. The applicant provided a written request seeking to justify the contravention of the height of buildings development standard, prepared by GSA Planning and dated 4 November 2025.
- 38 The rest of the site has a FSR development standard of 1.5:1 (s 180(3) of the Housing SEPP) as the site is within a low and mid rise housing area as defined by s 163(a) of the Housing SEPP. The Ch 2 30% bonus results in a FSR of 1.95:1 for the rest of the site.
- 39 The Ch 6 controls do not apply to the portion of the site subject of this request because it is an archaeological heritage item (Sch 5 to LEP 2012, Pt 3 item A538 'SOOS Bakery') (s 164(1)(d) of the Housing SEPP).

### *The applicant's written request to contravene the FSR development standard*

- 40 The applicant's written request justifies the contravention of the FSR development standard on the basis that compliance is unreasonable or unnecessary because the corner lot is excluded from the height and FSR development standards for the rest of the site as it is a heritage item. The nature of the heritage item, being of archaeological heritage significance, has no bearing on the final building envelope of the development. For this reason, the building envelope on the corner lot should be consistent with the rest of the site.
- 41 I am satisfied that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). I am satisfied that justifying the aspect of the development that contravenes the development standard in this way can be properly described as an environmental planning ground within the meaning identified by his Honour in *Initial Action* at [23].

## **Contravention of the minimum landscaped area development standard under the Housing SEPP**

- 42 The development standard for minimum landscaped area is set out at s 19(2)(b) of the Housing SEPP, as follows:

### **19 Non-discretionary development standards—the Act, s 4.15**

(1) The object of this section is to identify development standards for particular matters relating to residential development under this division that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

Note—

See the Act, section 4.15(3), which does not prevent development consent being granted if a non-discretionary development standard is not complied with.

(2) The following are non-discretionary development standards in relation to the residential development to which this division applies—

...

(b) a minimum landscaped area that is the lesser of—

(i) 35m<sup>2</sup> per dwelling, or

(ii) 30% of the site area,

43 The Applicant provided a written request seeking to justify the contravention of the height of buildings development standard, prepared by GSA Planning and dated 7 November 2025.

44 The non-compliance with a standard under s 19 of the Housing SEPP does not prevent development consent being granted. They are standards that, if complied with, prevent the consent authority from requiring a more onerous standard for that matter.

45 I am satisfied that the non-compliance of the proposal with the minimum landscaped area under s 19(2)(b) of the Housing SEPP is acceptable and does not prevent development consent being granted.

### **Conclusion**

46 The Applicant's written request, pursuant to cl 4.6 of LEP 2012, to vary the development standard for the height of buildings contained under cl 4.3 of LEP 2012 as prepared by GSA Planning and dated 4 November 2025 is acceptable.

47 The Applicant's written request, pursuant to cl 4.6 of LEP 2012, to vary the development standard for FSR under clause 4.4 of LEP 2012 as prepared by GSA Planning and dated 4 November 2025 is acceptable.

48 I have considered the submissions made by the Council in the Jurisdictional Statement provided to the Court on 5 November 2025 and I am satisfied on the basis of the evidence before me that the agreement of the parties is a decision that the Court could have made in the proper exercise of its functions.

### **Orders**

49 The orders of the Court are:

(1) The appeal is upheld.

(2) In accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW), the Applicant is to pay the Respondent's costs thrown away as a result of the amendments made to the application for development consent on 5 August 2025 and 5 November 2025 in the sum of \$75,000 to be paid within 60 days of these orders.

(3) Development Application No. 245/2024 for the demolition of existing structures, construction of a part-five, part-six storey mixed use development comprising 42 residential units including neighbourhood shop and kiosk, three levels of basement parking, associated landscaping works and tree removal at 439-441 Old South Head Road, 443-445 Old South Head Road, 1 The Avenue and 3-5

The Avenue, Rose Bay (legally described as Lot 1 in DP 857668 and Lot 100 in DP 1328785), is determined by the grant of consent, subject to the conditions of consent at Annexure A.

**S O'Neill**

**Commissioner of the Court**

**Annexure A (1.77 MB, pdf)**

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Decision last updated: 12 December 2025