



Land and Environment Court  
New South Wales

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Case Name: Legion Cabs (Trading) Co-Operative Society Ltd v Bayside Council

Medium Neutral Citation: [2021] NSWLEC 1443

Hearing Date(s): 10-11 May 2021

Date of Orders: 5 August 2021

Decision Date: 5 August 2021

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:  
(1) The appeal is dismissed.  
(2) The exhibits, other than A and C, are returned.

Catchwords: DEVELOPMENT APPLICATION – residential apartment development – cl 4.6 written request – FSR exceedance – design excellence – appeal dismissed – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, s 8.7  
Land and Environment Court Act 1979, s 34  
Rockdale Local Environmental Plan 2011, cll 4.6, 6.14, 7.1  
State Environmental Planning Policy (Infrastructure) 2007  
State Environmental Planning Policy No 55—Remediation of Land  
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development  
Water Management Act 2000

Cases Cited: PDE Investments No 8 Pty Ltd v Manly Council (2004)

139 LGERA 358; [2004] NSWLEC 355

Texts Cited: Apartment Design Guide  
Land and Environment Court, 'COVID-19 Pandemic Arrangements Policy' (April 2021)  
Rockdale Development Control Plan 2011

Category: Principal judgment

Parties: Legion Cabs (Trading) Co-Operative Society Ltd (Applicant)  
Bayside Council (Respondent)

Representation: Counsel:  
A Pickles SC (Applicant)  
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File Number(s): 2020/242925

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application No. 2020/196 (DA) by Bayside Council (the Respondent). The DA sought consent for demolition of the existing structures and construction of a part nine- and part ten-storey mixed use development comprising lower ground floor and ground floor commercial units, 134 residential apartments, two levels of basement parking and removal of trees (the proposal) at 137a Princes Highway, Wolli Creek (the site).
- 2 Consistent with the Court's *COVID-19 Pandemic Arrangements Policy*, published on 6 April 2021, the matter commenced with an onsite viewing, limited in its number of participants, before thereafter being conducted by Microsoft Teams.
- 3 On 27 November 2020, and pursuant to s 34 of the *Land and Environment Court Act 1979* (LEC Act), the parties participated in a conciliation conference.

At the conclusion of the conference, the matter remained unresolved and was terminated.

- 4 Subsequently, the Applicant prepared an amended proposal which aimed to resolve a number of the contentions set out by the Respondent.
- 5 At the hearing, the Applicant sought and was granted leave to amend the application and rely upon a further amended proposal, including a range of further - also relatively minor - amendments. The final amended proposal forms Exhibit C and is the subject of these proceedings.
- 6 This final amended proposal remains largely consistent with the original DA, but reduced its overall bulk and scale, and similarly reduced the total number of residential apartments from 134 to 130 - along with a number of other amendments.

#### **The site and its context**

- 7 The site, located at 137a Princes Highway, Wolli Creek is legally described as Lot 700 in DP 845017.
- 8 The allotment is approximately trapezoidal in shape. The site area is 3,692 sqm. The site has a primary frontage to Princes Highway of 68.615 metres in length. Secondary frontages to Allen Street and Ann Street are 42.46 metres and 64.7 metres in length respectively. The northerly boundary to the single neighbour is 67.07 metres in length.
- 9 The site is characterised by topography, falling from the south to the north by approximately 4.3 metres. Along the primary frontage to the Princes Highway, the site falls approximately 1.4m to the north.
- 10 The site is currently occupied by two and three-storey commercial buildings, on grade car parking and limited perimeter vegetation.
- 11 The immediate vicinity surrounding the site comprises a varied urban character.
- 12 Directly opposite the site's primary address along the Princes Highway is mixed commercial development consistent with the B4 Mixed Use zoning, occurring on a range of lot sizes between approximately 460 sqm and 970

sqm. This includes commercial buildings of two and three storeys, some set back behind on grade parking. Also contributing to the varied character here are a series of what appear to be Federation-era single detached dwellings.

- 13 Opposite the site in a northerly direction, on the corner of Allen Street and the Princes Highway, is a larger site of approximately 3,200 sqm characterised by a single storey commercial building and on grade parking.
- 14 The subject site shares a common boundary with a single neighbour to the north at 10-12 Allen Street (also referred to as 11-13 Ann Street). This neighbouring site comprises a relatively recently constructed five-storey residential apartment building with address to both Allen and Ann Streets.
- 15 On the opposite side of Ann Street, the existing urban character is defined by a series of single, attached and semi-detached residential dwellings along with a series of lots currently configured as landscaped open space. Notwithstanding their current character, these sites are each zoned B4 Mixed Use.
- 16 Also significant to the immediate urban character is the M5 East tunnel, which comes to surface south of the site - with associated noise wall infrastructure - and intersects with the Princes Highway.
- 17 In combination, the proximity of the Princes Highway and M5 East tunnel portal, make traffic noise and pollution a significant characteristic of the site.

### **The planning controls**

- 18 The site is situated within the Bayside West Precinct, also known as the Arncliffe and Banksia Precincts as defined in the Rockdale Development Control Plan 2011. The zoning of the subject site was changed from B6 Enterprise Corridor to B4 Mixed Use through a relatively recent State Government Priority Precinct amendment to the Rockdale Local Environmental Plan 2011, and the amendment made during October 2018.
- 19 Alongside this change in zoning has been floor space ratio (FSR) and height of building increases, reflecting the change in zone, anticipated land uses and underlying strategic planning objectives. The relevant height of building development standard for the subject site has been increased from 14.5m to

31m and the FSR development standard has been increased from 1.5:1 to 2.5:1.

20 The key relevant statutory controls are as follows:

- (1) *Water Management Act 2000*
- (2) *Environmental Planning and Assessment Act 1979*
- (3) State Environmental Planning Policy No 55 – Remediation of Land
- (4) State Environmental Planning Policy (Infrastructure) 2007
- (5) State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development
- (6) Rockdale Local Environmental Plan 2011 (RLEP)
- (7) Rockdale Development Control Plan 2011 (RDCP)

### **Actions of the Respondent**

- 21 On 19 June 2020, Development Application No. 2020/196 was lodged with the Respondent by the Applicant.
- 22 The DA was advertised and notified in accordance with the RDCP from 1 July 2020 until 31 July 2020. One submission - an objection - was received during the public notification period.
- 23 On 10 July 2020 the Respondent registered the application with the Sydney Eastern City Planning Panel and made external referral requests to Water NSW, Ausgrid, Sydney Water Corporation, Sydney Airport Corporation and the Roads and Maritime Service.
- 24 On 30 July 2020, the Roads and Maritime Services provided its referral response.
- 25 On 7 August 2020, Sydney Airport Corporation provided its referral response.
- 26 On 17 August 2020, Ausgrid provided its referral response.
- 27 On 20 August 2020, the Applicant filed a Class 1 application to the Court appealing against the deemed refusal of the DA by the Respondent.
- 28 On 31 August 2020, Sydney Water provided its referral response.
- 29 The Applicant notes that as recently as 22 October 2020, a referral response had not been received from Water NSW.

## **The issues**

- 30 The contentions set out by the Respondent can be found in the Amended Statement of Facts and Contentions at Exhibit 6.
- 31 These contentions are summarised as follows, and include a number that are no longer pressed by the Respondent as result of the amended proposal:
- (1) Bulk, scale, streetscape, overdevelopment, non-compliance with the street wall height and setback requirements
  - (2) Non-compliance with the FSR development standard, overdevelopment and visual dominance
  - (3) Groundwater/water table/basement - no longer pressed by the Respondent
  - (4) Design excellence
  - (5) State Environmental Planning Policy No 65 — Design Quality of Residential Apartment Development
  - (6) Design of non-residential component (showroom/retail)
  - (7) Landscaping/adverse impact on existing vegetation - no longer pressed by the Respondent
  - (8) Vehicular access and parking
  - (9) Satisfaction of cl 7.1 of the RLEP - no longer pressed by the Respondent
  - (10) Stormwater management - no longer pressed by the Respondent
  - (11) Insufficient information
- 32 It is helpful to group these various, occasionally intersecting, contentions into a series of related design and planning issues. In framing these critical issues, the Court was guided by the joint report of urban design experts:
- (1) Exceedance of the FSR development standard
  - (2) Proposed building scale and relationship to the immediate neighbour
  - (3) Street interfaces and proposed material quality
  - (4) Internal residential and common circulation amenity
  - (5) The achievement of design excellence
  - (6) Configuration of the proposed showroom

## **The evidence**

- 33 The Court was assisted by experts in planning, who conferred to prepare a joint report of planning experts. The experts are Mr Patrick Nash for the

Respondent and Mr Anthony Betros for the Applicant. Their joint expert report forms Exhibit 4.

- 34 Similarly, the Court was assisted by experts in urban design, who conferred to prepare a joint report of urban design experts. The experts are Ms Gabrielle Morrish for the Respondent and Mr Peter Smith for the Applicant. Their joint expert report forms Exhibit 5.
- 35 In their joint expert report, at par 15, Mr Nash and Mr Betros generally limit their disagreement to three points:
- (1) The adequacy of the Applicant's clause 4.6 written request seeking to justify the exceedance of the FSR development standard
  - (2) The acceptability of the proposed built form relationship to the immediate neighbour
  - (3) The suitability of the proposed street wall heights and associated setbacks above the sixth storey
- 36 In his oral evidence, Mr Nash reiterated his view that the final amended proposal - although relatively improved - still failed to establish an acceptable justification for the FSR exceedance.
- 37 He offered a view that the proposed transition in scale along Ann and Allen Streets warranted a greater horizontal extent of four-storey building form to appropriately manage the transition between six and seven storey elements closer to the Princes Highway and the five storey scale evident at 10-12 Allen Street.
- 38 Mr Nash also indicated his concern for the technical non-compliance with the height in storeys control (specifying a maximum of six storeys) as set out in the RDCP.
- 39 In response, Mr Betros noted that the final amended proposal is consistent with building setback and separation targets set out in the ADG, that trees to be retained along Ann Street help maintain a strong landscape character, and together these factors assist to mitigate against the scale and bulk transition concerns raised by Mr Nash.
- 40 In support of the Applicant's cl 4.6 written request seeking to justify the FSR exceedance, Mr Betros noted the final amended proposal would create no

additional adverse overshadowing impacts upon any neighbour, nor create any additional view loss when compared to a development occupying a complying building envelope. At pars 35 and 36 of the joint expert report, Mr Betros sets out in greater detail the basis by which, in his view, the cl 4.6 written request does justify the FSR exceedance.

- 41 Again, in oral evidence, Mr Betros offered a view there is a potential misalignment between the FSR development standard and a notional building envelope otherwise determined from the RDCP controls - effectively an error evident within the suite of strategic planning documents.
- 42 Mr Nash, at par 41 of the joint expert report, sets out his view that the FSR exceedance is a contributing factor to the deficient building separation with the neighbouring residential apartment building at 10-12 Allen Street, the non-compliance with the anticipated six-storey street wall control in the RDCP, and poor internal amenity received by a number of apartments and common circulation corridors.
- 43 In their joint expert report, at pars B2 and B4, Ms Morrish and Mr Smith (when discussing the earlier amended proposal) generally find agreement on the following points:
- (1) Aspects of the proposal require further amendment before it could be considered to achieve design excellence
  - (2) The proposal requires reduction in its floor area in order to achieve design excellence
- 44 Having generally agreed these points, the urban design experts - at par B3 of the joint expert report - note their remaining disagreement lies “on the degree to which the building mass needs to be reduced”.
- 45 Of assistance to the Court, both urban design experts provided drawings appended to the joint expert report which explored the question of FSR, building mass and scale. At Appendix A, Ms Morrish identifies areas of the amended proposal which in her view should be removed to resolve the contentions. And at Appendix B, Mr Smith examines a series of related envelopes to establish an indicative range of FSRs appropriate for the site.



- 46 In her oral evidence and addressing the final amended proposal tendered as Exhibit C, Ms Morrish put forward her residual concerns as follows:
- (1) The final amended proposal meets minimum building separation targets set out in the ADG, but still represents a “very sharp” transition to the immediate neighbour.
  - (2) The final amended proposal still exhibits portions which exceed the six-storey street wall control set out in the RDCP, presenting as a seven-storey street wall in two key instances.
  - (3) A series of instances in the internal planning, generally coincident with the internal re-entrant corners of the perimeter block form, where internal amenity and privacy within a number of apartments were compromised.
  - (4) The final amended proposal includes a reduction in building height – by one storey – along the central portion of the Princes Highway façade where a reduction of three levels was warranted.
- 47 Further concerns raised by Ms Morrish, not resolved by the final amended proposal, include the resultant internal dimensions of the central courtyard and adjacencies of a number of related apartments.
- 48 In Ms Morrish’s view, there remains “lots of opportunity to reduce density and to improve (contextual) fit and amenity”.
- 49 In support of the Applicant’s final amended proposal, Mr Smith provided oral evidence stating he was satisfied the most recent final amendments were sufficient to meet the desired future character anticipated by the RDCP.
- 50 Similarly, in Mr Smith’s view, the inclusion of double-height levels coinciding with each of the building lobbies could each be regarded as a generous single storey and thereby resolve the technical non-compliance with the six-storey street wall control.
- 51 When providing concurrent evidence Ms Morrish and Mr Smith were questioned on whether the final amended proposal exhibits design excellence. Mr Smith stated it does. Ms Morrish stated it does not.
- 52 When questioned on the quality of the architectural expression exhibited by the final amended proposal, Ms Morrish stated that in determining the achievement of design excellence, it is not possible to isolate a proposal’s expression from

questions of its internal amenity and for this reason the final amended proposal does not yet exhibit design excellence.

53 Mr Smith stated it was an acceptable architectural character and expression exhibiting design excellence, and that a series of shortcomings in internal amenity were capable of resolution by way of conditions of consent.

54 Similarly, when questioned on whether the final amended proposal manages the built form transition to the immediate neighbour appropriately, Mr Smith stated it does. Ms Morrish stated it does not.

## **Findings**

55 I have determined to dismiss the appeal and in doing so, I set out my reasons in the following paragraphs.

56 Two jurisdictional prerequisites are particularly relevant in this matter. Firstly, an appropriate justification of the proposed exceedance of FSR set out in a written request pursuant to cl 4.6 of the RLEP. And secondly, the requirement for a consent authority to form a view that the final amended proposal exhibits design excellence prior to grant of consent pursuant to cl 6.14(3) of the RLEP.

57 I find the final amended proposal falls short of both these jurisdictional thresholds. The issues and reasons for this are intertwined.

58 Ultimately, the final amended proposal would over-fill the available building envelope to the point where a series of indicators of excess density become evident and would serve to diminish the resultant urban amenity when regarded internally or externally to the site.

59 The key indicators of excess density I refer to are the resultant built form relationship to the immediate neighbour, its overall mass, bulk and scale, and also the resultant internal amenity available to a number of apartments located near the internal re-entrant corners of the central courtyard.

60 I accept the failure of the final amended proposal is not entirely or automatically a consequence of consistently poor design, since in some regards and as offered in oral evidence by Mr Smith, the general architectural expression is adequate. Rather, it appears the architects' spatial and programmatic brief - and hence the building mass - exceeds the site's capacity to accommodate it.

- 61 Dealing first with the exceedance of FSR, the Applicant has provided a written cl 4.6 request seeking to justify an additional 4,010 sqm of gross floor area (GFA), equivalent to 43.3% of the maximum FSR applicable to the subject site.
- 62 As leave was granted to the Applicant to rely upon the final amended proposal (Exhibit C), this has the effect of reducing the FSR exceedance to 3,330 sqm of GFA, equivalent to 36% of the maximum FSR applicable to the subject site.
- 63 I note the final amended proposal potentially also results in a relative increase in the provision of car parking - by virtue of reducing the number of residential units whilst maintaining the extent of basement parking initially proposed. The Respondent notes this possibly further contributes to the technical FSR exceedance. This question was not resolved during the hearing, and is not addressed further in this judgment, noting that if it were the case, any additional GFA and FSR accommodated in a basement does not necessarily contribute to the proposal's bulk, scale and mass, nor the ultimate reasons for the dismissal of this appeal. However, if it were determined to be additional FSR, technically, this should be addressed in the Applicant's cl 4.6 written request.
- 64 The Applicant's cl 4.6 written request, forming Appendix 3 to Exhibit 4, seeks to demonstrate that strict compliance with the FSR development standard is unreasonable or unnecessary in the circumstances of this matter for a number of reasons as follows:
- (1) The amended proposal is consistent with the B4 zone objectives
  - (2) The amended proposal creates a desirable streetscape outcome
  - (3) The amended proposal is consistent with a building envelope otherwise generated by the RLEP and RDCP controls
  - (4) The proposed FSR exceedance brings with it an absence of environmental impacts
  - (5) The FSR development standard is inconsistent with the height of building development standard when compared with similarly zoned sites
  - (6) The subject site has ample frontages to accommodate the exceedance
  - (7) The absence of impacts of the amended proposal upon the neighbour
  - (8) The absence of indicators of poor internal amenity

- (9) The availability of infrastructure - public transport and open space
- 65 I find the cl 4.6 written request does not adequately justify a number of aspects of the final amended proposal, most significantly its mass, bulk and scale, its presentation to the streetscape, the proposed built form relationship to the immediate neighbour, the resultant amenity available to a number of apartments and internal communal spaces, and a failure to demonstrate any inherent misalignment between the suite of strategic planning controls - specifically between the FSR development standard and a notional building envelope for the site.
- 66 I prefer Mr Nash's evidence in a number of areas, particularly when considering the resulting built form relationship between the subject site and the immediate neighbour at 10-12 Allen Street, and the continuous built form response to Ann Street, the Princes Highway and Allen Street. Mr Nash sets out these perceived shortcomings of the cl 4.6 written justification at pages 14-16 of the joint expert report forming Exhibit 4.
- 67 Additionally, in his oral evidence Mr Nash emphasised his view that the final amended proposal does not go far enough to justify the FSR exceedance, nor to adequately resolve the scale transition to 10-12 Allen Street, which he described as "too close and too abrupt". He also noted two remaining instances where the final amended proposal presents as a seven-storey building contrary to the six-storey street wall control contained within the RDCP.
- 68 In submissions, the Respondent noted a central argument of the Applicant is that the FSR should be higher to allow the final amended proposal to fill a notional building envelope set by the RLEP maximum height of building, the RDCP set back and street wall controls and other guidance for building siting and separation provided by the ADG.
- 69 The Court was directed to an established planning principle. In *PDE Investments No 8 Pty Ltd v Manly Council* (2004) 139 LGERA 358; [2004] NSWLEC 355, Tuor C set the following planning principle:

**"Planning Principle – Floor Space Ratio and Building Envelope**

48. The question of whether a building envelope can be filled when the FSR control would produce a smaller building is one that arises from time to time in

Court proceedings. The following planning principles are therefore of assistance:

- i. FSR and building envelope controls should work together and both controls and/or their objectives should be met.
- ii. A building envelope is determined by compliance with controls such as setback, landscaped area and height. Its purpose is to provide an envelope within which development may occur but not one which the development should necessarily fill.
- iii. Where maximum FSR results in a building that is smaller than the building envelope, it produces a building of lesser bulk and allows for articulation of the building through setbacks of the envelope and variation in building heights.
- iv. The fact that the building envelope is larger than the FSR is not a reason to exceed the FSR. If it were, the FSR control would be unnecessary."

70 I accept this planning principle is relevant and should be applied in the current matter.

71 Referring to page 19 of the urban design joint expert report at Exhibit 5, I accept Ms Morrish's view that the resultant urban amenity is deficient as a direct consequence of the quantum of additional building mass, GFA and FSR, being sought, which is contributing to building bulk and mass that would compromise its relationship to the streetscape and in particular to the relationship with the immediate adjoining neighbour.

72 I also accept the final amended proposal creates internal amenity compromises for a number of apartments and communal circulation spaces generally coincident with the re-entrant corners of the central courtyard. And without a break or greater relief in the building form, is not an appropriate design solution.

73 Later on page 19 of the joint report, Ms Morrish outlines her disagreement with Mr Smith's position (addressed separately on pages 21 and 22) that compliance with the FSR development standard would result in a poorer built form solution. I accept her view when she states:

"The 6 storey street wall, setback upper floor, perimeter form and landscape outcomes are all achievable. The depths of the buildings would simply reduce which could deliver improved residential amenity."

74 Further, I am not persuaded there is any particular misalignment or inconsistency within the strategic planning documents, nor any obvious error

established at the time the FSR and height of building development standards relevant to this site were set.

75 The parties and their planning experts generally agree upon the chronology of strategic planning processes that led to the relatively recent rezoning, and the Court heard no evidence supporting the notion of an error.

76 At page 18 of the urban design joint expert report (Exhibit 5) the experts also agree:

“...at the time of the exhibition of the controls for this area the Applicant made a submission to the Department (of Planning, Industry and Environment) to have the FSR increased and that the Department maintained the FSR for this site at 2.5:1 stating that if an applicant sought additional FSR then it should be sought via a planning proposal.”

77 I accept that - to the extent it appears to exist - a volumetric margin between the final FSR development standard and the notional building envelope derived from the other determinants of built form (the RLEP, RDCP and ADG) is likely to be conscious and deliberate, and intended to contribute to greater building articulation, reduced mass, unconstrained internal amenity and an improved contextual response.

78 Finally, the Applicant’s cl 4.6 written request relies - in part - on justifying the FSR exceedance and associated additional building bulk on the basis there are sufficient environmental planning grounds to do so. This, in turn, is largely sought to be argued by the stated absence of additional adverse environmental impacts and other areas of general compliance.

79 In this, I accept the Respondent’s submission - supported by evidence of both the planning and urban design experts - that the additional building mass, bulk and scale defining three street frontages with insufficient modulation or building breaks does result in visual and spatial impacts to neighbouring properties and from the public domain.

80 Further, the resultant internal amenity achieved by a number of apartments and common circulation spaces is constrained by the attempt to accommodate additional building mass.

81 In this matter, cl 4.6(3) of the RLEP requires consideration of a written request from the Applicant demonstrating compliance with a development standard is

unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

- 82 Clause 4.6(4) of the RLEP requires the consent authority to be satisfied the Applicant's written request has adequately addressed the matters required by cl 4.6(3), and the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 83 Additionally, cl 4.6(4)(b) of the RLEP requires the concurrence of the Planning Secretary be obtained, while cl 4.6(5) requires the Planning Secretary to consider whether, in granting this concurrence, the proposed contravention of the development standard raises any matters of significance for State environmental planning, the public benefits of maintaining the standard, and any other matters required to be considered by the Planning Secretary.
- 84 In terms of the FSR development standard, the parties generally agree the final amended proposal exceeds the numeric standard of 2.5:1. The final amended proposal has a FSR of approximately 3.4:1. This equates to an exceedance of approximately 3,330 sqm or approximately 36%.
- 85 I am not satisfied the Applicant's cl 4.6 written request, prepared by ABC Planning and dated May 2021, demonstrates the objectives set out in cl 4.4(1) of the RLEP have been met despite the numeric non-compliance.
- 86 The objectives include minimising adverse environmental effects on the use or enjoyment of adjoining properties, and maintaining an appropriate visual relationship between new development and the existing character of areas or locations that are not undergoing or likely to undergo a substantial transformation.
- 87 For the reasons set out earlier in this judgment, I am not satisfied the final amended proposal minimises adverse amenity impacts on adjoining properties as a result of the proposed bulk and scale, nor does the final amended proposal maintain an appropriate visual relationship with the immediate

neighbour and the local context. Consequently, I find the objectives of the FSR development standard are not met and the cl 4.6 written request must fail.

- 88 Dealing with the second of the jurisdictional thresholds, I note the achievement of design excellence is a consideration prior to any grant of consent, having regard to a range of matters set out at cl 6.14(4) of the RLEP. The stated objective of cl 6.14 is to deliver the highest standard of architectural, urban and landscape design.
- 89 In summary, those considerations most relevant to the achievement of design excellence in this matter include:
- (1) At cl 6.14(4)(a) - whether a high standard of architectural design, materials and detailing appropriate to the building type and location will be achieved.
  - (2) At cl 6.14(4)(b) - whether the form, arrangement and external appearance of the development will improve the quality and amenity of the public domain.
  - (3) At cl 6.14(4)(e)(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.
  - (4) At cl 6.14(4)(e)(v) - the bulk, massing and modulation of buildings.
- 90 Despite the final amended proposal working some way toward resolving the contentions identified by the Respondent and toward the exhibition of design excellence, on balance, I prefer the evidence of the Respondent's urban design and planning experts.
- 91 Although the parties' experts generally agree the proposed siting strategy - a perimeter block form - is an appropriate response to the site, its context and is consistent with the various built form controls, I accept the Respondent's position that a number of the proposed apartments and associated common circulation areas are constrained by their location and separation at internal re-entrant corners of the perimeter block form. These constraints are typical of perimeter block forms and in this instance create impacts upon internal amenity, separation, privacy, outlook and access to natural light.
- 92 Similarly, the relatively unrelieved perimeter block form creates a building mass with streetscape impacts and tends to also crowd the immediate neighbour at 10-12 Allen Street.



- 93 In their joint report, the urban design experts agreed that a reduction of building mass was warranted. Although the final amended proposal does reduce the GFA, FSR and building mass, the experts disagree on whether the reduction was adequate to resolve the design issues, and in the view of Ms Morrish it does not.
- 94 Ms Morrish highlighted the constrained internal re-entrant corners as a further opportunity to reduce building mass and in doing so present an opportunity to resolve both the constraints on internal amenity and at the same time introduce some further relief to the otherwise unbroken external perimeter block form when viewed from the adjacent streets.
- 95 In his oral evidence - when asked if a smaller building might not be more capable of achieving design excellence - Mr Smith made the point that merely being smaller was no guarantee of improved design quality.
- 96 Although I can accept this general point, in this particular matter the achievement of design excellence in a larger building is not currently evident.
- 97 In summation, due to the absence of an appropriate justification for the FSR exceedance pursuant to cl 4.6 of the RLEP, and because of the failure of the final amended proposal to exhibit design excellence as required by cl 6.14(3) of the RLEP, I find the plans forming the subject of this appeal fail at both jurisdictional thresholds.
- 98 Accordingly, I dismiss the appeal and now dispose of the matter.

## **Orders**

- 99 The Court orders that:

- (1) The appeal is dismissed.
- (2) The exhibits, other than A and C, are returned.

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**M Pullinger**

**Acting Commissioner of the Court**

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