
ORTA RECENS QUAM PURA NITES

New South Wales

Medium Neutral Citation:	**Emag Apartments Pty Limited v Inner West Council [2022] NSWLEC 1042**
Hearing dates:	15-16 December 2021
Date of orders:	1 February 2022
Decision date:	01 February 2022
Jurisdiction:	Class 1
Before:	Horton C
Decision:	The Court orders that: (1) The Applicant's written request to vary the floor space ratio standard at cl 4.4 of the Marrickville Local Environmental Plan 2011, pursuant to cl 4.6 of the Marrickville Local Environmental Plan 2011, is upheld. (2) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979. (3) The appeal is upheld. (4) Development consent is granted to development application No. DA/2020/0578 for the demolition of existing structures and construction of a mixed-use development comprising a boarding house, and ground floor commercial tenancy, with basement parking, at 2-18 Station Street, Marrickville, subject to conditions of consent at Annexure 'A'. (5) All exhibits are returned except for Exhibits B, 4 and 5.
Catchwords:	DEVELOPMENT APPLICATION – boarding house development – application of State Environmental Planning Policy (Housing) 2021 - whether contravention of the FSR development standard is justified – character of the local area
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 1.3, 4.15 4.16, 8.7, 8.15 Environmental Planning and Assessment Regulation 2000, cl 55 Land and Environment Court Act 1979, s 39 Marrickville Local Environmental Plan 2011, cll 4.4, 4.6, 5.10, 6.2, 6.15, 6.20, Sch 5 State Environmental Planning Policy (Affordable Rental Housing) 2009, cll 29, 30, 30A State Environmental Planning Policy (Housing) 2021, cll 2, 8, 68, 69, Sch 7 State Environmental Planning Policy (Infrastructure) 2007, cll 85, 87

	State Environmental Planning Policy No 55—Remediation of Land, cl 7
Cases Cited:	HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 Gregory v Central Coast Council [2017] NSWLEC 1400
Texts Cited:	Department of Planning, and Environment, Apartment Design Guide, July 2015 Marrickville Development Control Plan 2011
Category:	Principal judgment
Parties:	Emag Apartments Pty Limited (Applicant) Inner West Council (Respondent)
Representation:	Counsel: R Lancaster SC (Applicant) C Norton (Respondent) Solicitors: Mills Oakley (Applicant) Inner West Council (Respondent)
File Number(s):	2021/190305
Publication restriction:	No

JUDGMENT

1 **COMMISSIONER:** This Class 1 appeal concerns the proposed demolition of existing structures and construction of an eight storey mixed use development comprising a boarding house, and commercial tenancies at a site adjoining the Marrickville train station known as No 2 Station Street, Marrickville (the site).

2 The development application No. DA/2020/0578 was refused by the Sydney Eastern City Planning Panel on behalf of Inner West Council (the Respondent) on 10 June 2021. The Applicant, Emag Apartments Pty Limited, now appeals the refusal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).

Evolution of the appeal

3 The development application was amended by the Applicant on 5 November 2021 and the parties agree a number of the contentions were resolved as a result.

4 On the eve of the hearing, the Applicant filed a Notice of Motion seeking to further amend the application before the Court by further amended architectural plans identified as Revision F, in respect of which I directed experts to confer and provide supplementary joint reports.

5

The Notice of Motion was not opposed by the Respondent, but as the further amended architectural plans did not incorporate certain changes agreed by the experts in joint conferencing to be deserving of consideration, the Applicant advised that a further set of amended plans would be prepared.

6 On the second day, the Applicant sought to rely upon further amended architectural plans, identified as Revision I, later marked Exhibit D, with changes summarised as follows:

- Accessible room 101 has been changed into another manager's room, and room 702 converted into an accessible room.
- The middle portion of the eastern façade of the proposal has been setback to 4m on Levels 3 to 6.
- Details of typical room sizes have been provided at 1:50 scale.
- A reduction in gross floor area (GFA) and Floor Space Ratio (FSR) (that is from that which is shown on the plans appended to the urban design joint report and currently before the Court).
- The common areas on level 7 have been amended and the roof over setback further.
- A change in room mix and reduction in rooms overall – 16 single rooms and 65 double rooms.

7 The Respondent, as the relevant consent authority, agreed to the Applicant amending the application before the Court in accordance with cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation), subject to the Applicant paying the Respondent's costs thrown away as agreed or assessed pursuant to s 8.15 (3) of the EPA Act.

8 Accordingly, I directed the Respondent to lodge the amended application on the NSW Planning Portal within 7 days.

9 With the application before the Court so crystalised, the parties by consent sought for the Court to determine the matter on the basis of the agreed evidence.

10 The primary questions that arise from the oral submissions, the joint expert reports, and a written submission prepared by the Respondent titled 'Outline of Relevant Statutory Provisions' are twofold:

(1) Firstly, whether the exceedance of the FSR development standard is justified in the circumstances of the case pursuant to cl 4.6 of the Marrickville Local Environmental Plan 2011 (MLEP), and;

(2) Secondly, whether the character of the proposed development is compatible with the local area.

11 It is also necessary, in determining these questions, to identify the applicable environmental planning instruments. The necessity arises from the commencement of State Environmental Planning Policy (Housing) 2021 (Housing SEPP) after the

development application was made. At the time the application was made, State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) was in force.

The site and its context

12 The site is located to the immediate south of Marrickville railway station, on a lot of land that is bounded by Station Street which forms a 'one-way loop road' providing access to the south entrance to the station from Schwebel Street.

13 Accordingly, the site has three frontages to Station Street on its west, north and east.

14 The site is legally described as Lot 100 in DP 1229420, having a total area of 694.3m^2.

15 To the west of the site, beyond Station Street, is the Illawarra Road bridge, spanning the T3 Bankstown Railway line.

16 To the north of the site is the Marrickville railway station, which is identified as a heritage item of State significance in Sch 5 of the MLEP, as 'Marrickville Railway Station group, including interiors'.

17 To the south of the site, are two lots of land under different ownership, beyond which is Schwebel Street that is also identified as a heritage item of local significance for its stonewalling, terracing and street planting as part of the High, Junction, Ruby and Schwebel Streets (streetscape group).

18 The site is located within the B2 Local Centre zone according to the MLEP, in which boarding house development and commercial premises are permitted with consent, and where consistent with the following objectives of development in the B2 zone:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To provide housing attached to permissible non-residential uses which is of a type and scale commensurate with the accessibility and function of the centre or area.
- To provide for spaces, at street level, which are of a size and configuration suitable for land uses which generate active street-fronts.
- To constrain parking and reduce car use.

19 An area of single storey residential development is located to the east of the site within the R2 Low Density Residential zone fronting Leofrene Avenue. The interface between this existing residential character and the proposed development is the subject of public submissions, and consideration by the experts.

Public submissions and the onsite view

20 Thirty five public submissions were received in response to notification of the development application by the Respondent on 13 August 2020 (Exhibit 2, folios 452-595).

21 Resident concerns are summarised as follows in the Amended Statement of Facts and Contention prepared by the Respondent, marked Exhibit 1:

- Excessive height

- Excessive FSR
- Lack of on-site parking and additional traffic
- Overshadowing
- Privacy impacts
- Streetscape impacts
- Lack of compatibility with the character of the area
- Impact on the stability of the Illawarra Road bridge
- Lack of sufficient managers
- No assurance that the development will be used for affordable housing
- Lack of housing diversity
- COVID safety of the development
- Increase in antisocial behaviour
- Increased noise in the station and surrounds
- Wind tunnel effect
- The heritage report is for a different development
- Unsafe density in a flood zone
- Insufficient infrastructure
- Poor architectural design and use of colours

22 Two residents of the area provided oral submissions during the onsite view at the commencement of the proceedings.

23 Ms Karen Soo presented concerns as a resident of Schwebel Street and on behalf of South Marrickville Residents Group, said to represent more than 80 single storey homeowners, tenants and low-rise apartment dwellings (Exhibit 2, folios 552-558).

24 Ms Soo's concerns are set out under the following themes (Exhibit 4, folio 1):

- Height and bulk
- Floor space ratio
- Loss of amenity and safety
- Dangerous and unviable location

25 Ms Heather Davie also provided an oral submission in support of her written submission and on behalf of the 'Save Marrickville' group, whose written submission is at Exhibit 2, folio 587-588, seeking the application to be refused as the proposed development should be no higher than 3-5 storeys, is out of character with the area, and adversely impacts on the amenity of surrounding residents, and of the amenity of future occupants.

26

After hearing from residents, the Court, in the company of the legal representatives and the experts, viewed the site and the surrounding streets including Leofrene Avenue and Schwebel Street.

27 The Court was also taken to a recent development with a rear frontage to Frede Lane, close to the intersection with Grove Street, which the Applicant considers to have a similar interface between B2 and R2 zone as that of the subject site.

The effect of the State Environmental Planning Policy (Housing) 2021

28 On 26 November 2021, SEPP ARH was repealed and replaced by the Housing SEPP.

29 The Housing SEPP includes a savings provision at Sch 7 that is in the following relevant terms:

> 1 Definitions
>
> In this Schedule—
>
> ***commencement date*** means the day on which this Policy commenced.
>
> ***repealed instrument*** means an instrument repealed under Chapter 1, section 10.
>
> 2 General savings provision
>
> The former provisions of a repealed instrument continue to apply to the following—
>
> > (a) a development application made, but not yet determined, on or before the commencement date,
> >
> > …

30 According to Mr Norton, counsel for the Respondent, as the wording of the savings provision at cl 2(a) does not explicitly stay the provisions of the Housing SEPP, it should be assumed that the drafters of the savings provision intended for the terms of the Housing SEPP to operate from its commencement, in effect, alongside those of SEPP ARH.

31 So understood, the provisions of both the SEPP ARH and Housing SEPP are binding on the Court, and the Court should undertake the evaluation required of it by s 4.15 of the EPA Act by applying the applicable controls in both SEPPs, with regard to the provisions of both the SEPP ARH and the Housing SEPP.

32 While there is an inconsistency in the definition of ‘boarding house’ between the SEPPs, the definition of boarding house in SEPP ARH is identical to that in the MLEP.

33 Instead, the Housing SEPP provides for a form of development defined as ‘Co-Living housing’ that is consistent with the development the subject of the development application, and which is not identical but similar to the definition of boarding house in the MLEP.

34 As I understand the Respondent’s submission, given the proposed development finds a characterisation that is permissible under the SEPP ARH and the Housing SEPP, there is no inherent inconsistency between the SEPPs within the meaning of cl 8 of the Housing SEPP.

35

The Applicant's position is that the wording of the savings provision is clear when read in its plain terms, and has the effect of continuing the provisions of the SEPP ARH in respect of this development application, which was made, but not determined, prior to the commencement of the Housing SEPP.

36 Such a reading is consistent with the wording of cl 8 of the Housing SEPP, in which the relationship with other environmental planning instruments is set out.

37 Clause 8 is in the following terms:

> Unless otherwise specified in this Policy, if there is an inconsistency between this Policy and another environmental planning instrument, whether made before or after the commencement of this Policy, this Policy prevails to the extent of the inconsistency.

38 However, according to the Applicant, the relationship of the Housing SEPP to the SEPP ARH is 'otherwise specified' in the Housing SEPP, by virtue of the savings provision at Sch 7, cl 2, which instructs that the former provisions of the repealed SEPP ARH continue to apply in circumstances where a development application has been made, but has not been determined, as in this case.

39 While these are the primary submissions of the parties on the application of the SEPPs, the Respondent also submits, in the alternative, and with no objection from the Applicant, that the Housing SEPP should at the very least, be considered a draft instrument that is imminent and certain, given it has commenced, and will shape the desired future character of development in the area.

40 The parties agree that the proposal, as amended, meets the 'must not refuse' standards at cl 29 of the SEPP ARH in respect of the building height, landscaped area, solar access, private open space, parking and accommodation size.

41 Likewise, the parties agree that the proposal satisfies the standards required by cl 30 of the SEPP ARH.

42 The parties also agree that the proposed development achieves, or substantially achieves, conformity with the provisions of the Housing SEPP when the development the subject of the development application is characterised as 'Co-living housing'.

43 While I have some sympathy for the Applicant's submission at [35]-[38], as the wording of the savings provision does not expressly preclude operation of the provisions contained in the Housing SEPP, and because no inherent inconsistency arises from the operation of both SEPPs, being in similar terms, I reluctantly accept the Respondent's argument that consideration must be given to the provisions of both the SEPP ARH and the Housing SEPP.

The floor space ratio is exceeded

44 The Respondent contends, as do certain public submissions, that the proposed development should be refused as its visual bulk is excessive and is out of scale with surrounding buildings. Relatedly, the proposal exceeds the FSR applicable to the site at cl 29(1) of the SEPP ARH.

45 Clause 29(1) is in the following relevant terms:

> (1) A consent authority must not refuse consent to development to which this Division applies on the grounds of density or scale if the density and scale of the buildings when expressed as a floor space ratio are not more than—
>
> (a) the existing maximum floor space ratio for any form of residential accommodation permitted on the land, or
>
> (b) if the development is on land within a zone in which no residential accommodation is permitted—the existing maximum floor space ratio for any form of development permitted on the land, or
>
> (c) if the development is on land within a zone in which residential flat buildings are permitted and the land does not contain a heritage item that is identified in an environmental planning instrument or an interim heritage order or on the State Heritage Register—the existing maximum floor space ratio for any form of residential accommodation permitted on the land, plus—
>
> (i) 0.5:1, if the existing maximum floor space ratio is 2.5:1 or less, or
>
> (ii) 20% of the existing maximum floor space ratio, if the existing maximum floor space ratio is greater than 2.5:1.
>
> …

46 The applicable FSR identified at cl 4.4(2) of the MLEP is 3:1, and the Applicant proposes an FSR of 4.08:1.

47 The parties dispute the FSR applicable to the site, and so the quantum of its exceedance. That said, the parties also accept, on the evidence of the planning and urban design experts, that the contravention of the FSR standard is justified and should be upheld.

48 In summary, the Applicant relies on cl 29(1)(c)(ii) of the SEPP ARH for bonus FSR amounting to 20% of the existing maximum floor space ratio.

49 Where the development is characterised as 'Co-living housing' under the Housing SEPP, cl 68(2)(a)(ii) provides bonus FSR amounting to 10% of the maximum permissible floor space ratio if the additional floor space is used only for the purposes of co-living housing.

50 Further, the Respondent submits that as residential accommodation, defined in the dictionary of the MLEP to include residential flat buildings, is prohibited development in the B2 zone, the precondition for the bonus at cl 29(1)(c) is not met.

51 The Respondent also disputes the method adopted by the Applicant in calculating the FSR for two reasons. Firstly, the Respondent considers the breezeways on Level 3 – 6 to be properly characterised as internal spaces, and not external walls within the meaning of 'gross floor area' set out in the dictionary of the MLEP. Secondly, as the number of car parking spaces proposed exceeds the 'must not refuse' provision at cl 68 (2)(e) of the Housing SEPP, any floor space in excess of 17 spaces must be considered GFA, amounting to 311m^2 and resulting in a FSR of 5.14:1 on the site.

52 I accept the Respondent's argument that residential flat buildings are prohibited in the B2 zone, and so the proposed development does not qualify for the bonus FSR at cl 29 (1)(c) of SEPP ARH.

53 However, I do not accept that the breezeways contribute to GFA, as defined by the MLEP, and for the reasons helpfully set out by O'Neill C at [34]-[38] of *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243 ('*HPG*'). In my view, the detailed section at Drawing No 902 (Exhibit D) supports a conclusion that the

walls between boarding rooms and the corridor breezeways act as a threshold between an internal room and an external space (*HPG* at [35]), and so the walls of the corridors are external walls and the area of the corridors therefore does not contribute to the GFA (*HPG* at [36]).

54 The walls bounding the corridors have the characteristics described by the Commissioner in *HPG*, including an outer skin that is able to withstand inclement weather, and a cavity that separates the 'wet skin' from the internal skin of studwork and plasterboard. Furthermore, a setdown in the slab between boarding rooms and the breezeway supports this separation of 'internal' and 'external' spaces, as does provision of waterproof membrane to drainage below elevated external pavers in the breezeway.

55 The Applicant's written request, prepared in accordance with cl 4.6 of the MLEP by Planning Ingenuity dated 16 December 2021 (Exhibit E):

- describes the applicable FSR development standard (section 2);
- describes the proposed variation to the FSR development standard (section 3);
- set out the objectives and provisions of cl 4.6 (section 4);
- seeks to demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, as required by cl 4.6(3)(a) (section 5);
- seeks to demonstrate that there are sufficient environmental planning grounds to justify contravening the development standard, as required by cl 4.6(3)(b) (section 6);
- seeks to satisfy the Court that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3), as required by cl 4.6(4)(a)(i) (section 7);
- seeks to satisfy the Court that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, as required by cl 4.6(4)(a)(ii) (section 8); and
- explained why the concurrence of the Planning Secretary can be assumed to have been obtained, as required by cl 4.6(4)(b) (section 9).

56 The written request considers compliance with the FSR standard to be unreasonable or unnecessary as the objectives of the standard are achieved notwithstanding the non-compliance.

57 The objectives of cl 4.4 of the MLEP are:

> (a) to establish the maximum floor space ratio,
>
> (b) to control building density and bulk in relation to the site area in order to achieve the desired future character for different areas,
>
> (c) to minimise adverse environmental impacts on adjoining properties and the public domain.

58 The first objective is said by the written request to be achieved by the setting of a FSR

on the site by virtue of the FSR Map at cl 4.4(2) of the MLEP.

59 The second objective is achieved by virtue of the proposed development being compatible, which is different to sameness, with adjoining development when the desired future character of the Marrickville Town Centre (Commercial) precinct in Part 9.40.2 of the Marrickville Development Control Plan 2011 (MDCP) is understood.

60 I note here that Part 9.40.2 of the MDCP contains descriptions in text, plan and section diagram of the desired future character of the subject site. (Exhibit 2, folio 292-295)

61 The site is within an area agreed by the experts to be undergoing transition, and the proposed development is consistent with the desired future character set out at Part 9.40.2 for the following reasons:

(1) The proposal provides affordable housing at a scale appropriate to its location and proximity to shops in the area (point 4), in a high quality development that is architecturally unique and compatible with the streetscape character due to its siting, scale, form, proportion, rhythm, pattern and the like (points 5 and 6).

(2) The proposal includes commercial tenancies to the ground level to active street frontages (points 8, 9 and 10).

(3) High levels of solar access to boarding rooms, proposed communal open spaces, and proposed balconies result in high levels of amenity for occupants (point 11), while the exceedance of FSR does not result in any additional impacts on the amenity of adjoining and surrounding properties that continue to receive 5 hours solar access in mid-winter (point 12).

62 I also note that the Respondent accepts the diagram at Figure 40.7b to be obsolete for 2 reasons. Firstly, a 3m setback depicted to the eastern boundary of the site was initially proposed to allow widening of the lane for two-way traffic. However, as the setback, and so the widening, does not continue for the full length of this part of Station Street, widening is not possible and so provision for two-way traffic is no longer considered to be required. Secondly, an elevated public square to the north west of the site, extending to the Illawarra Road bridge, is also no longer proposed by the Respondent.

63 To this end, the Respondent effectively acknowledges departure is necessary from the diagram at Figure 40.7b that is otherwise intended to depict, in part, the desired future character of the site.

64 The written request also states that the variation in the proposed development from that depicted in the plan diagram at Part 9.40.2 of the MDCP limits the perceived visual and physical impact of the non-compliance by responding to the massing of built form in the immediate vicinity. To this end, ground level setbacks and recessed upper levels, described as resulting in ‘a defined base, articulated middle and recessed top’ limit the impact on, and ensure harmony with, the R2 low density residential development to the east of the site.

65

Secondly, the future redevelopment of land immediately south of the subject site, to which a height standard of 20m and 17m applies, will result in a built form of bulk and scale to appropriately transition to the scale anticipated in the locality, such as that demonstrated by the seven-story building opposite the rail line to the north of the site at No 259 Illawarra Road, known as the Revolution Apartments.

66 In respect of the third objective, the proposal minimises adverse environmental impacts by setting back the upper levels of the proposal to the east, facing the R2 zone and by ensuring 5 hours solar access in mid-winter to properties in the R2 zone.

67 Next, the written request advances a number of environmental planning grounds it considers to be sufficient to justify the contravention of the FSR standard. The grounds may be summarised as follows:

(1) The proposed development is an appropriate scale and form that reflects the desired future character for development on the site. It complies with the height standard, and with relevant street setbacks, and the additional floor space contributing to the exceedance of FSR will not be readily perceived from the public domain.

(2) The building massing and envelope is compatible with the streetscape and neighbouring properties when compared to the building envelope the object of Part 9.40.2 of the MDCP.

(3) The non-compliance will not adversely impact the density or intensity of use within the site as the additional boarding rooms are designed to protect the amenity of neighbouring properties so strict compliance will not improve the amenity of neighbouring properties.

(4) The density proposed for the site is said to be consistent with discussions and submissions to the Respondent's Design Excellence Panel, outlined in the Statement of Environmental Effects prepared by Weir Phillips dated 29 June 2020, indicating strategic planning work to support change in the context and character of the area in the short to medium term.

(5) Despite the non-compliance, the form of the development on the site is not noticeably larger than anticipated by the controls, demonstrates an envelope with appropriate transition to developments in the south, greater streetscape articulation and is a superior result when compared with the building envelope the object of Part 9.40.2 of the MDCP.

(6) The area is undergoing change with development standards encouraging development of greater scale than existing development in the immediate vicinity. That said, the proposed envelope conceals the additional FSR within setbacks that are in context with development of similar typology in the area.

(7) The exceedance does not impose adverse impacts on the local area when the extent, orientation and duration of overshadowing are compared to a complying envelope, and when the direction of outlook from primary living areas of the proposal is considered in context with surrounding properties.

(8) The proposal is for affordable housing in a highly accessible area in a manner that achieves the objects of s 1.3 of the EPA Act, the aims of the SEPP ARH, and the objectives of the B2 Local Centre zone.

68 As shown by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 ('*Initial Action*'), at [14], the Court must form two positive opinions of satisfaction under cl 4.6(4)(a) of the MLEP to enliven the power of the Court to grant development consent. I must be satisfied that:

(1) the Applicant's written request has adequately addressed the matters required to be demonstrated by subcl (3) and;

(2) that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objective of the zone in which the development is proposed to be carried out.

69 I am satisfied that the Applicant's written request has adequately addressed the matters at cl 4.6(3) of the MLEP. By way of demonstrating that compliance with the standard is unreasonable or unnecessary in the circumstances of this case as required by cl 4.6(3)(a), I accept that the density and bulk of the proposed development substantially conforms to the desired future character of the area when Part 9.40.2 of the MDCP is considered. Where the built form departs from desired future character depicted in Figure 40.7b, it does so in response to the scale and character of the existing dwellings fronting Leofrene Avenue to the east of the site.

70 In respect of the environmental planning grounds advanced under cl 4.6(3)(b) of the MLEP, I am satisfied there are sufficient grounds to justify the contravention of the FSR standard. Firstly, I accept that the exceedance does not result in a density or scale that is at odds or out of character with recent development in the B2 zone. Secondly, I give considerable weight to the agreement of the experts that the form of the development depicted in the Exhibit D plans is acceptable when considered alongside that desired by Part 9.40.2 of the MDCP which, in my view, supports twin assertions made in the written request that the form of the development on the site is not noticeably larger than anticipated by the controls, and relatedly, imposes no greater impact on the local area than would a complying envelope. Thirdly, I accept the Applicant's submission that to the extent basement car parking exceeds that required by the 'must not refuse' provision at cl 29(2)(e) of the SEPP ARH and so may be included in the calculation of FSR, the additional area is limited to a basement that does not contribute to visible bulk.

71 As I am satisfied that the matters in cl 4.6(3)(a) and (b) are adequately addressed, I must now consider whether the proposed development is in the public interest for the reasons set out at cl 4.6(4)(a)(ii) of the MLEP.

72 I am satisfied that the objectives of the FSR standard are achieved for the reasons summarised at [58]-[66]. The written request considers the objectives of the B2 zone, set out at [18], to be achieved for the reasons that follow:

- The size and location of ground floor commercial tenancies have been maximised to activate the street frontage with suitable uses serving local residents that will generate employment opportunities.
- As the site is located directly opposite Marrickville railway station, residents will be able to maximise use of public transport, walking and cycling.
- Boarding houses are a permissible form of development on the site, likely to accommodate a cross section of the community in a highly accessible location.
- The proposed development is consistent with the applicable building height standard for the site, and is comparable to the likely scale of development to the south of the site.
- Provision of 42 residential and 3 commercial car parking spaces, 26 motorcycle and 28 bicycle parking spaces constrains parking provision and reduces car use, while being located adjacent to rail services.

73 I am satisfied that the proposed development is consistent with the objectives of the B2 zone, and so because I consider the objectives of the FSR standard and the objectives of the zone to be achieved, I am also satisfied that the public interest is served in upholding the non-compliance with the FSR standard. In arriving at this opinion of satisfaction, I consider the eastern setback to Levels 3 – 6 of 7.9m, when measured along the south eastern boundary, to appropriately respond to the amenity of properties within the R2 zone to the east of the subject site. The dimension of 7.9m is measured from the property boundary, beyond which is Station Lane providing further separation of 4.3m between the B2 zone, and the R2 zone.

74 While this setback does not strictly conform to the design criteria set out at Objective 3-F of the Apartment Design Guide (ADG), and the guidance at Figure 3F.5, which deals with separation between adjacent zones, I consider the non-conformance acceptable for two reasons. Firstly, while the provisions of the ADG do not apply to boarding house development, cl 69(2)(b) of the Housing SEPP requires consideration of, but not strict compliance with, the ADG. Secondly, the urban design experts agree that visual separation is achieved by including screening the subject of agreed conditions of consent (Exhibit 9, pars 9-10).

75 I have also considered resident submissions that express concern at local streets already being at maximum foot and car traffic capacity, with hazardous impacts on safety, public access and local traffic arising from the proposal, resulting in damage to the public domain (Exhibit 4, folio 1). As stated above, I have formed the view that the proposed development maximises public transport usage, encourages walking and cycling, and is of a type and scale commensurate with the accessibility and function of the area. The area is highly accessible. Local signage nominates Station Street as a ‘Kiss & Ride’ zone. The street is narrow, one-way and is paved. This is generally regarded, whether signed accordingly or not, as a ‘shared street’ that is unchanged by the proposal, other than the potential for upgrade and activation of the street frontages by the scale of the commercial tenancies proposed.

76

Having also considered those matters at cl 4.6(5) of the MLEP, I also find there are no grounds on which the power of the Court should not be exercised by reason of s 39(6) of the *Land and Environment Court Act 1979*, and so the written request to vary the FSR standard should be upheld.

The character of the proposed development is compatible with the local area

77 Clause 30A of the SEPP ARH requires a consent authority, or the Court exercising the functions and discretions of the consent authority on appeal, to consider whether the design of the development is compatible with the character of the local area.

78 The planning experts agree that as the area is undergoing transition, the desired future character, and not the existing character of the area alone, is to be taken into consideration (Exhibit 6, par 2.1).

79 As stated at [70], I consider the proposal to be consistent with the desired future character as described in the MDCP.

80 However, as shown by Dixon C, as she was then, in *Gregory v Central Coast Council* [2017] NSWLEC 1400, at [18], “A plain reading of the text of cl30A, in context, illustrates that the comparative character test required involves the “design of the development” in its entirety…there is no limitation in the text as to what I may have regard to in considering ‘the design of the development’ for the comparative exercise under cl30A”.

81 To this end, the parties consider the provisions of cl 6.20 of the MLEP a relevant consideration. Clause 6.20 requires a development involving the construction of a new building of, or greater than, 14m in height, to exhibit design excellence by reference to those aspects set out in subcl 6.20(4).

82 While I note a requirement to demonstrate compatibility of the design of a development with the character of the local area is different to a requirement for a development to exhibit design excellence, the Respondent acknowledges that the form and external appearance of the proposed development, as amended, will improve the quality and amenity of the public domain (subcl (4)(b)), that the relationship of the development with other development in the R2 zone is acceptable in terms of separation, setbacks, amenity and urban form (subcl 4(f)(iv)), as is the bulk, massing and modulation of the proposed development (subcl (4)(f)(v)), and the street frontage heights (subcl (4)(f)(vi)).

83 On the basis of the agreement between the experts, and the agreed position of the parties that there is no material departure from the provisions of cl 6.20 of the MLEP, I conclude the character of the proposed development demonstrates compatibility with the local area in accordance with cl 30A of the SEPP ARH.

84 Likewise, I accept that the standards for boarding house development at cl 30 of the SEPP ARH are achieved, as are the standards for co-living housing set out at cl 69(1) of the Housing SEPP or, in the case of those matters to be considered at cl 69(2), are not sufficient in their departure to warrant refusal.

85

The relevant non-discretionary development standards at cl 68(2) of the Housing SEPP, not otherwise cited at [49], deal with communal living area (subcl (c)), and communal open space (subcl (d)). In their supplementary joint report (Exhibit 7), the expert planners agree:

(1) subcl (c) requires communal living area of 190m^2, while 140m^2 is provided (or I note, 153m^2 as shown on the architectural plans), and

(2) communal open space of at least 20% of the site area is required by subcl (d), while 59m^2 is provided (or I note 29m^2 as shown on the architectural plans).

86 While the communal living area fails to achieve the numerical standard at subcl (c), I note there are two communal living areas provided, and each provides some communal open space adjoining. Additionally, the communal living area on Level 1 is a double height space of between 5.5-6m in height, with full height glazing shown in the West Elevation (Drawing 301). On this basis, I consider the amenity of the communal living area provided to be reasonable.

87 While the communal open space fails to achieve the numerical standard at cl 68(2)(d) of the Housing SEPP, the Respondent acknowledges in submissions that the 'must not refuse' provisions of cl 29(2)(d) of the SEPP ARH are achieved, and so cannot be a basis of refusal.

The provisions of the MLEP are further considered

88 As the site is not identified as a heritage item, and is also not within a heritage conservation area, but is within the vicinity of a heritage item, the application of cl 5.10 of the MLEP is limited to an assessment of the extent to which the carrying out of the proposal would affect the heritage significance of that heritage item, in accordance with cl 5.10(5)(c).

89 I accept the conclusion contained in the letter prepared by Mr James Philips dated 15 October 2021 (Exhibit C, Tab 6), that the proposed development will have no impact on the ability to understand the historic, social and aesthetic significance of the Marrickville railway station or the characteristics of the streetscape group at [17]. Relatedly, I also accept the ground level tenancies will have a positive impact on the sites relationship with the Marrickville railway station, particularly when coupled with public domain improvements as proposed by the Respondent at condition 42 (see [101]).

90 Clause 6.2 of the MLEP requires consideration of certain matters in respect of the earthworks proposed by the development. On the basis of the following, I consider the earthworks acceptable in respect of those matters set out at cl 6.2(3):

- Geotechnical Investigation prepared by Environmental Investigations dated 21 June 2012 (Exhibit B, Tab 15) (2012 Report), and the assessment of current site conditions of the same author dated 16 June 2020 (Exhibit B, Tab 14), that states the 2012 Report remains applicable.

- The terms of condition 20 of the agreed conditions of consent provided by Sydney Trains, as the relevant rail authority, requiring, inter alia, the supervision of excavation by a geotechnical engineer, written notice of works associated with site investigations, excavation and the like.
- Amended Stormwater Plans, prepared by Romanous & Associates dated 12 October 2021 containing drainage to avoid a detrimental effect on existing drainage patterns and soil stability in the locality.
- Assessment of the quality of the soil to be excavated, as set out in the Detailed Site Investigation prepared by EIAustralia dated 19 October 2021, and in the Remediation Action Plan prepared by EIAustralia, dated 19 October 2021.

91 Clause 6.15 of the MLEP, at subcl (3), precludes the grant of consent to boarding house development on land in the B2 zone if any part of the boarding house (excluding access, car parking and waste storage) is located at street level. On the basis of Drawing No 201 (Exhibit D) prepared by Tier Architects, I am satisfied no part of the boarding house, other than the areas nominated for exclusion and essential electrical infrastructure, is located at street level.

State Environmental Planning Policy (Infrastructure) 2007

92 As the site is in close proximity of the Marrickville railway station, the provisions of State Environmental Planning Policy (Infrastructure) 2007 (SEPP Infrastructure) apply.

93 Relevantly, cl 85 requires the consent authority to notify the rail authority of the proposed development adjacent to the rail corridor, and cl 86 is in similar terms in respect of proposed excavation.

94 Sydney Trains, as the relevant rail authority, has confirmed its concurrence, contained in the agreed conditions of consent at Condition 20.

95 Clause 87 of SEPP Infrastructure, requires the Court to be satisfied that appropriate measures are taken to ensure that certain noise levels are not exceeded.

96 The Acoustic Report prepared by West & Associates, dated 15 June 2020, concludes that rail noise intrusion requires the closure of windows, and use of mechanical ventilation to comply with the terms of cl 87. On the basis of 1:50 scale section drawings at Dwg Nos 392 and 394, I note that both natural and mechanical ventilation is possible and so the levels required to be not exceeded by cl 87 of the SEPP Infrastructure will not be exceeded.

State Environmental Planning Policy – No 55 – Remediation of Land

97 On the basis of the conclusions contained in the Detailed Site Investigation prepared by EIAustralia dated 19 October 2021, and the remediation works proposed in the Remediation Action Plan prepared by EIAustralia, dated 19 October 2021, I am satisfied that the site will be made suitable in accordance with cl 7 of the State Environmental Planning Policy No 55—Remediation of Land.

Conclusion

98 At the conclusion of the hearing, I directed the parties to lodge the amended application on the NSW Planning Portal. I directed the Applicant to file and serve an amended Plan of Management, and amended architectural plans with eastern setback at levels 3-6 clearly dimensioned.

99 The parties have complied with the directions. Accordingly, for the reasons set out earlier in this judgment, I find the proposed development warrants the grant of consent, subject to the imposition of conditions in accordance with s 4.16 of the EPA Act.

100 In arriving at this conclusion, I have considered the public submissions made in respect of the proposal contained in Exhibits 2, 4 and 5 as well as those provided orally at the onsite view. I consider those reasonable concerns raised by the submissions to have been addressed, either in the consideration set out above, or in the documents in support of the proposed development, such as the amended Plan of Management that contains procedures for safety and security, community liaison, complaints management and the like, or finally in the conditions of consent at Annexure A.

101 The parties agree the conditions of consent to be imposed, but for the following two conditions that are disputed:

(1) Condition 23B proposes screening that I accept is consistent with the agreement of the experts at [74], and so the Respondent's preferred wording is adopted.

(2) Condition 42 requires the preparation of a public domain works design to define certain upgrade works to the public domain that are consistent with the Street Tree Master plan and the Public Domain Design Guide. While the Applicant submits that the Court would not impose a condition absent the documents cited, I consider reference to those documents to provide an appropriate framework for works in the public domain, on which a public domain works design may be based. The alternative is an indeterminate framework on which to base works in the public domain. The Respondent's proposed wording is adopted.

Orders

102 The Court notes that:

(1) The Respondent, as the relevant consent authority, agreed to the Applicant amending the application before the Court in accordance with cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation).

(2) The Applicant lodged the amended application on the NSW Planning Portal on 22 December 2021.

(3) The Applicant filed the amended architectural plans in accordance with my directions on 22 December 2021.

103 The Court orders that:

(1)

The Applicant's written request to vary the floor space ratio standard at cl 4.4 of the Marrickville Local Environmental Plan 2011, pursuant to cl 4.6 of the Marrickville Local Environmental Plan 2011, is upheld.

(2) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.

(3) The appeal is upheld.

(4) Development consent is granted to development application No. DA/2020/0578 for the demolition of existing structures and construction of a mixed-use development comprising a boarding house, and ground floor commercial tenancy, with basement parking, at 2-18 Station Street, Marrickville, subject to conditions of consent at Annexure 'A'.

(5) All exhibits are returned except for Exhibits B, 4 and 5.

……..

T Horton

Commissioner of the Court

Annexure A (388465, pdf)

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Decision last updated: 01 February 2022