



Land and Environment Court New South Wales

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| Medium Neutral Citation: | Toga Addison Pty Ltd atf Toga Addison Unit Trust v Randwick City Council [2021] NSWLEC 1580 |
| Hearing dates: | 31 August, 1-2 September 2021 |
| Date of orders: | 1 October 2021 |
| Decision date: | 01 October 2021 |
| Jurisdiction: | Class 1 |
| Before: | Walsh C |
| Decision: | The Court orders that: <ol style="list-style-type: none">(1) The appeal is dismissed.(2) Development application DA/428/2020 for a mixed-use development at 137-151 Anzac Parade Kensington is refused.(3) The following exhibits are returned: 2-9, M-R. |
| Catchwords: | DEVELOPMENT APPLICATION – question of statutory construction – use of extrinsic material to aid interpretation of environmental planning instrument – permissibility of residential flat building – street wall height – weight to be given to new development control plan – design quality – design excellence |
| Legislation Cited: | Environmental Planning and Assessment Act 1979, ss 4.15, 8.7 Interpretation Act 1987, ss 5, 33, 34 Randwick Local Environmental Plan 2012, cl 2.3, 4.1C, 4.1D, 4.3, 4.4, 6.11, 6.14, 6.17, 6.21 Standard Instrument – Principal Local Environmental Plan State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development |
| Cases Cited: | Cavanagh v Wollondilly Shire Council (No 2) [2019] NSWLEC 181 Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 250 CLR 503; [2012] HCA 55 Cranbrook School v Woollahra Municipal Council (2006) 66 NSWLR 379; [2006] NSWCA 155 DM & Longbow Pty Ltd v Willoughby City council (2017) 228 LGERA 342; [2017] NSWLEC 173 Saggers v Sydney Market Authority (1988) 66 LGRA 42 Stockland Development Pty Ltd v Manly Council (2004) 136 LGERA 254; [2004] NSWLEC 472 Taylor v The Owners – Strata Plan No 11564 (2014) 253 CLR 531; [2014] HCA 9 Tomasic v Port Stephens Council [2021] NSWLEC 56 Zhang v Canterbury City Council (2001) 51 NSWLR 589; [2001] NSWCA 167 |
| Texts Cited: | Apartment Design Guide, NSW Department of Planning and Environment, July 2015 |

D C Pearce and R S Geddes, Statutory Interpretation in Australia (9th ed, 2019, LexisNexis)
Kensington and Kingsford Town Centres Community Infrastructure Contributions Plan, December 2019
Randwick Comprehensive Development Control Plan 2013

Category: Principal judgment

Parties: Toga Addison Pty Ltd atf Toga Addison Unit Trust (Applicant)
Randwick City Council (Respondent)

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File Number(s): 2020/337515

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JUDGMENT

1 **COMMISSIONER:** This is an appeal brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by Randwick City Council (Council) of Development Application No. DA/428/2020 (DA) seeking development consent for a mixed use development and associated works at 137-151 Anzac Parade, Kensington (site).

Proposed development

2 The DA, with modifications incorporated into amending plans, seeks consent for demolition of existing structures on the site, site remediation, tree removal then construction of a mixed-use development comprising ground floor commercial/retail to Anzac Parade, 149 residential units, basement parking with vehicular access from Anzac Parade, certain flood mitigation works and associated landscape and public domain works.

Site and setting

3 I mostly rely on Council's Amended Statement of Environmental Effects (Ex 1) for the descriptive material which follows in this and the following section. The site is comprised of the following allotments: Lot 10 in DP828868 (147-151 Anzac Parade), Lot D in DP100646 (145A Anzac Parade), Lot C in DP100646 (145 Anzac Parade), Lot B in DP340818 (143 Anzac Parade), Lot 2 in DP554563 (141 Anzac Parade), Lot 1 in DP554563 (139 Anzac Parade) and Lot 10 in DP3897 (137 Anzac Parade).

4 The site is a regular shape and has an area some 3914m². The frontage to Anzac Parade is indicated as some 91m, with the site width varying between 42m and 44m (Ex 4 par 8-9). The site is relatively level.

5 The site comprises a mixed group of occupations at present. As will be explained (below), it is relevant to note that the property known as 137 Anzac Parade currently comprises a residential flat building. The remaining properties include shop top housing, a hotel, and semi-detached dwellings.

The site's setting is a factor in the evidence. Suffice to say here, nearby development is predominantly characterised by a mix of medium to high density residential development with some commercial development. The development form is varied, consisting of inter-war period flat buildings and contemporary mixed use residential developments.

Planning framework

- 7 The site and locality are zoned B2 Local Centre under Randwick Local Environmental Plan 2012 (RLEP). The permissibility of the proposal is a central question before the hearing.
- 8 The objectives of the B2 zone are as follows:
- 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 enable residential development that is well-integrated with, and supports the primary business function of, the zone.
 - To facilitate a high standard of urban design and pedestrian amenity that contributes to achieving a sense of place for the local community.
 - To minimise the impact of development and protect the amenity of residents in the zone and in the adjoining and nearby residential zones.
 - To facilitate a safe public domain.
- 9 There are two provisions in RLEP relating to the maximum permissible height of buildings for the site. I can say here that there is no dispute between the parties that the proposal, with its nominated contributions to community infrastructure (mindful of Kensington and Kingsford Town Centres Community Infrastructure Contributions Plan 2020), would be subject to a maximum building height control of 31m under cl 6.17 of RLEP. There is a minor exceedance to this height control (essentially related to lift overrun areas) which the experts providing evidence in these proceedings saw as supportable (Joint Expert Report Planning and Urban Design Ex 6 par 16). I am aware that cl 4.6 of RLEP provides a pathway which can allow approval of a proposal which contravenes a development standard.
- 10 The maximum permissible floor space ratio (FSR) for a building on the site is 4:1 also under cl 6.17 of RLEP, and again mindful of nominated contributions to community infrastructure. An FSR of 3.99:1 is indicated in the plans before the Court (Ex A DA760 Rev E).
- 11 Clause 6.11 of RLEP is concerned with design excellence and applies to the proposal.
- 12 Among other statutory instruments, State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65) and therefore the Apartment Design Guide (ADG) apply to the proposal and arose in evidence.
- 13 Randwick Comprehensive Development Control Plan 2013 (RDCP) also applies. Of particular note are the location specific provisions at Part E6 of RDCP concerned with “Kensington and Kingsford Town Centres”.

Issues

- 14 After plan amendments responding to certain contentions raised by Council (Ex A), the remaining real issues in dispute in these proceedings were essentially agreed by the parties to comprise four. The first two were seen as the major issues. These comprised: (1) the permissibility of the proposal, which required an interpretation of statutory construction in regard to RLEP, and (2) the proposal's street wall height to Anzac

Parade, which related to RDCP and required a merits consideration. The less major issues in the proceedings were also merits-based and were concerned with the internal circulation space and floor to ceiling heights of the proposal.

Permissibility

- 15 The centre of the permissibility issue (Contention 1 in Ex 1) was whether, and the extent to which, the proposal was affected by cl 6.14 of RLEP, which among other things relates to “residential flat buildings”.
- 16 While consideration of the issue started with the proper characterisation of the proposal, there was agreement on this question. There was no dispute, and I accept, that the proposal is correctly characterised as a mixed use development comprising both shop top housing and a residential flat building.
- 17 It is noteworthy that both shop top housing and residential flat buildings are permissible uses in the applicable B2 zone under the land use tables to RLEP.
- 18 Clause 2.3(4) of RLEP makes the land use tables (including their specification of land use permissibility within individual zones) “subject to the other provisions of (RLEP)”. This leads me to cl 6.14 which I reproduce in full below:

6.14 Certain residential accommodation in business zones

(1) The objective of this clause is to enable the use of an existing dwelling house or residential flat building in certain business zones.

(2) This clause applies to land in Zone B1 Neighbourhood Centre or Zone B2 Local Centre.

(3) Development consent must not be granted to a dwelling house or a residential flat building on land to which this clause applies unless—

(a) the development relates to a building that existed when this Plan commenced and was designed or constructed for the purposes of a dwelling house or a residential flat building, and

(b) the consent authority is satisfied that—

(i) the development will not detrimentally impact on the desired future character of the locality, and

(ii) the development will result in satisfactory residential amenity for its residents, and

(iii) the degree of modification to the footprint and facade of the building is minor.

- 19 Clause 6.14 comprises three structural elements, with: cl 6.14(1) prescribing the clause objective, cl 6.14(2) defining the land to which the provision applies and cl 6.14(3), as the operative component, effecting the statutory control itself. While, and with respect to the second element of the clause, it was agreed that the site comprised land to which cl 6.14 applied, the parties had markedly different views on how the first and third elements of the clause might be interpreted. In short here, were the Council correct in its interpretation, and given the proposal involves a residential flat building, the proposal would not be permissible on the site.
- 20 The parties made both written and oral submissions in regard to this permissibility issue raised as Contention 1 by Council. For reference purposes I describe the written submissions as follows: Applicant’s Written Outline Submissions on Permissibility (Contention 1) filed 11 August 2021 (AWS), Respondent’s Submissions on Contention 1 filed 25 August 2021 (RWS), Applicant’s Outline Reply Submissions provided 1 September 2021 (ARS).
- 21 In terms of the framing of the required statutory interpretation, there was a considerable degree of agreement between the parties on at least certain basic principles. These included that the task of statutory construction must begin and end with a consideration of the statutory text and that the statutory text must be considered in its context (*Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503; [2012] HCA 55 at [39]):

“39. “This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text” *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at 46 [47]; [2009] HCA 41. So must the task of statutory construction end. The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.”

- 22 In regard to context, and noting the explicit reference in the aforementioned authority to “extrinsic materials”, there was disagreement between the parties on whether and the extent to which the consideration of context should include such extrinsic materials in this instance (i.e. relating to a (subordinate) environmental planning instrument), which I will return to below. There was certainly agreement that extrinsic materials, were they admissible at all, should not be used to contradict clear words of a statutory provision. There was also agreement on the need to construe provisions having regard to the plan as a whole (*Cranbrook School v Woollahra Municipal Council* (2006) 66 NSWLR 379; [2006] NSWCA 155 at [36]).
- 23 So with the starting point as to look for a plain interpretation of the text itself in its context (something different from the quest of understanding the intention of statutory drafters), I will now outline the textual interpretation of cl 6.14 as argued by the parties.

Applicant’s submissions

- 24 The Applicant argued cl 6.14 was not engaged in the circumstances of this case (AWS pars 19-20):
- “Firstly, as the *chapeau* to clause 6.14(3) makes clear, the language of engagement of the clause is not applicable to the circumstances of the present case. In terms, the clause is concerned with a development consent being granted “to a residential flat building”, but not “for a residential flat building”. Thus, according to the clear language of clause 6.14(3), the clause is concerned only with a development consent as related to a residential flat building.
- The subject application is no such application. It comprises an application for consent to demolish the buildings on the site (which, it is accepted, include a residential flat building), but in so far as consent is sought with respect to a residential flat building, it is an application for consent for the erection of a residential flat building.”
- 25 This construction was seen to be supported by the (cumulative) subclauses to cl 6.14(3) in that each “contemplate a circumstance in which there is a development application for works related to an existing residential flat building” (AWS par 23). Two particular “contextual indicators”, within cl 6.14(3)(b), indicating that the clause is only concerned with “a development application for development consent to a residential flat building in existence, but not a new one”, were cited. The first concerned the reference to “not detrimentally (impacting) on the desired future character” at cl 6.14(3)(b)(i). While I had some difficulty interpreting the point as documented (AWS par 27, in particular), what I took from this text (*ibid* pars 25-28) was: (1) the fact that a “new” residential flat building development would already (commonly) need to engage with the provisions of cl 4.3 and 4.4 of RLEP (height of buildings and FSR respectively), which already raise objectives relating to desired future character compatibility, and (2) works on an existing residential flat building (at least minor works) would not necessarily have any particular calling into consciousness of the need to harmonise with desired future character otherwise (i.e. without cl 6.14(3)(b)(i)). The second suggested contextual indicator concerned the reference to “satisfactory residential amenity for its residents” at cl 6.14(3)(b)(ii). The point made was that SEPP 65 (and the ADG) already called on this requirement (generally) for new residential flat buildings, such as that proposed here, and in turn that the clause “only has work to do insofar as the development is concerned with an existing residential flat building, which is the fundamental premise in any case of clause 6.14(3)(a)” (AWS, par 28).
- 26 The Applicant submits the reference, in the clause objective, to the enabling of the use of an “existing residential flat building” is consistent with this construction. That is to say, the balance of the clause, including the operative parts, would reasonably be

thought of as applicable to “the enabling of the use of an existing residential flat building”. In turn, and entirely mindful of cl 2.3(4), cl 6.14 in no way would alter the fact that development for the purposes of a new residential flat building is permissible within the B2 Zone.

- 27 The Applicant also submits that, and having regard to cl 4.1D(2) of RLEP, were cl 6.14 to operate to “delimit permissibility”, then the opening language “despite any other provisions of the plan” would have been used (ARS par 13).
- 28 The conclusion of Applicant is that cl 6.14 is not engaged in this matter and is not relevant in the appeal.

Council's submissions

- 29 Here I provide an outline of Council's written submissions, which came after, and in part at least provided a critical response to, those of the Applicant outlined above. The Applicant was also provided with the opportunity to provide a written submission in reply on this question. For convenience, here I also provide a brief outline of the Applicant's response submissions on Council's main points, relevantly.

- 30 It is the Council's position that the chapeau to cl 6.14 draws in “any application for consent for a dwelling house or a residential flat building within the B1 or B2 zones under the LEP” (RWS par 7), and that the Applicant's argument that the clause is only concerned with a development application for consent to a residential flat building (or dwelling house) in existence, but not a new one, should be rejected. Four points are argued.

- 31 Council's first argument is based on what it calls a “clear and unambiguous reading” of the provision. Council submits that “it is of no moment that the language of the chapeau to cl 6.14(3) uses the words ‘granted to’ rather than ‘granted for’ suggesting “the LEP in fact uses those expressions interchangeably”, citing example provisions within RLEP (RWS footnote to par 14):

“See the references to “granted to” in cls 4.5(9), 5.3(4), 5.6(3), 5.21 (2), 6.4(3), 6.5(4), 6.10, 6.11 (3), 6.13(3), 6.14(3), 6.20(3) and (4), 6.21(3) and (5) and “granted for” in cls 2.6(2), 2.8(2), 4.1C(2), 4.10(2), 4.6(2), (3), (4) and (8), 6.6(2), 6. 7(3), 6.12(3) and 6.19(2).”

- 32 It follows that the chapeau to cl 6.14(3) is not expressed so as to be limited to apply only to existing dwelling houses or residential flat buildings. In its reply submission, the Applicant provided a conceptual framing, related to the use of the terms “granted to” or “granted for” within RLEP, supportive of its case.

- 33 Council's second argument is that the Applicant's interpretation requires an impermissible (*Taylor v The Owners - Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9) “reading in” of words to the clause. The argument is that I need to read in “existing” as a prefix to the reference to “dwelling house or residential flat building” in the chapeau to cl 6.14(3). Council was arguing that “clear language” would not draw the distinction raised by the Applicant (RWS par 18):

“...it would not make any sense to read in that sort of limitation into the chapeau to cl 6.14(3), given that cl 6.14(3)(a) deals with that express matter in a manner that makes it clear that the redevelopment of existing dwelling houses and residential flat buildings is the only form of dwelling house or residential flat building development permitted within the B1 or B2 zones.”

- 34 The Applicant saw its own construction as representing clear language.

- 35 Council's third argument is that the Applicant's construction defeats the “self evident” purpose of cl 6.14. Council saw this purpose as (RWS par 19-20):

“... to encourage the re-development of existing dwelling houses and residential flat buildings within the B1 and B2 zones (subject to satisfaction of the cl 6.14(3)(b) matters) by precluding the development of new dwelling houses or residential flat buildings within those zones...”

...The provision enables or encourages that form of development by effectively precluding new dwelling houses or residential flat buildings by dint of the limitation in cl 6.14(3)(a)."

- 36 Council's fourth argument is based on extrinsic material. Under objection, I admitted into evidence an affidavit filed on behalf of Council and prepared by V L McGrath and sworn 25 August 2021 (McGrath affidavit) which included certain background material prepared by Council in the lead up to the making of RLEP. There was a legal argument as to the admissibility of this material which I will turn to first.
- 37 There was agreement from the parties that extrinsic materials may not be used to contradict the clear words of a statutory provision. The use of such material in instances of ambiguity was disagreed. I understood the Applicant's principal point to relate to the provisions of the *Interpretation Act 1987* (Interpretation Act), itself (ARS, par 2):
- "... whilst s.33 (purpose) is relevant to construction, s.34 (extrinsic materials) is specifically not extended to environmental planning instruments: see Interpretation Act s.5(6)".
- 38 There was no disputing the particular provisions of the Interpretation Act and that s 34, which is concerned explicitly with the use of extrinsic materials in the interpretation of statutory provisions, is not one of the sections of the Interpretation Act that is nominated as applying in the case of interpretation environmental planning instruments (as per s 5(6)). A distinction is drawn with s 33 of the Interpretation Act, concerned with having regard to purposes or objects of Acts and statutory rules which, explicitly under s 5(6), is to apply to environmental planning instruments.
- 39 While I note the Applicant's point, which is that distinctions, such as this, in the relevant statute law (ie the Interpretation Act) should be thought of as having some significance, I am more inclined to the Council's arguments. These involved two principal points for me: (1) s 34 of the Interpretation Act is a "permissible provision", that is, it doesn't prohibit the use of extrinsic material of itself; leaving the interpretation of the use of extrinsic material to the common law and (2) in regard to the common law, the authorities would favour an openness to the use of extrinsic material in instances that apply here.
- 40 The second point warrants some further commentary. Council pointed to the publication "Statutory Interpretation in Australia" [1], which at [3.16] references the Interpretation Act, and directly concludes, in regard to the use of extrinsic aids to the interpretation of environmental planning instruments and the like, that it is governed by the common law (citing *Saggers v Sydney Market Authority* (1988) 66 LGRA 42 (*Saggers*) at [44]). While I saw *Saggers* as providing mixed support for the Council's arguments, on the whole, my conclusion based on the more recent authorities provided to me in the proceedings were well summarised by Justice Robson in *Cavanagh v Wollondilly Shire Council* (No 2) [2019] NSWLEC 181 at [31]. This was that "general principles relating to the interpretation of primary legislation are equally applicable to the interpretation of environmental planning instruments". Differing principles of statutory construction should not be applied to environmental planning instruments when compared to statute law (*DM & Longbow Pty Ltd v Willoughby City Council* (2017) 228 LGERA 342; [2017] NSWLEC 173 at [19]), and as there is no dispute that extrinsic materials should be available as an aid to the interpretation of primary legislation there is no reason to exclude the reports provided within the McGrath affidavit for use as an aid available to the interpretation of RLEP here.
- 41 The McGrath affidavit annexes a number of documents: (1) a Council-prepared "Business Centres Discussion Paper" marked as on public exhibition between 23 August and 14 October 2011 (Discussion Paper), (2) the exhibition version of draft

Local Randwick Environmental Plan 2012 (Exhibition Draft RLEP), (3) Council's letter to the then Department of Planning and Infrastructure under then s 68 of the EPA Act (Section 68 submission).

- 42 When I examine the Discussion Paper text, a logic of adding cl 6.14 is explained (McGrath affidavit Annexure A p 91):

"To enable the continue permissibility of purely residential development within centres and to reduce reliance on existing use rights a new clause should be introduced in the comprehensive LEP. The clause will essentially allow the refurbishment or minor alterations and additions to be undertaken on buildings that have an existing residential function, despite the application of the new standard instrument business zoning."

- 43 The logic, as explained in this text, seem to me to be centred on acknowledging and following (or undertaking the "application of") the position adopted in the Standard Instrument—Principal Local Environmental Plan (Standard Instrument) which does not, in a default sense, nominate residential flat buildings and dwelling houses as permissible uses within the B2 zone (ibid pp 64, 69).
- 44 I see a lack of coherence in the Council strategy as far as it might be gleaned from this and the other annexures to the McGrath affidavit. The difficulty is that in the Exhibition Draft RLEP (and the current RLEP), both residential flat buildings and dwelling houses were/are listed as permissible uses in the B2 zone. This is something other than applying the default position of the Standard Instrument with respect to this zone. It is also notable that the cl 6.14(3) provisions in the Exhibition Draft RLEP, insofar as the B2 zone was concerned, did not actually call up residential flat buildings. Rather, cl 6.14(3) was limited to dwelling houses (McGrath affidavit Annexure B p 52). For me, the Section 68 submission did not elucidate things further in its, seeming, setting aside of the fact of the permissibility of these two uses already within the B2 zone. The point of attention is the table at McGrath affidavit Annexure C p 54. Were the intention to "only" allow residential flat buildings under the said circumstances, notwithstanding the already permissibility of this use, it would be expected to have said so.
- 45 To be useful in statutory interpretation in instances of text ambiguity, the extrinsic material provided with the McGrath affidavit would be expected to provide a coherent line of site between intention and statutory inclusions. I do not see this here. This leaves me to interpret the operative provision in cl 6.14(3) in the context of RLEP.

Finding

- 46 While there is some ambiguity in the clause, my preference is the interpretation of the Applicant. There are three points to this finding.
- 47 The first point is in regard to context and starts with the consideration of purpose. I am not satisfied that either of the parties have provided a coherent argument as to the thread that may be drawn between the words of the clause objective and the operative provisions. Indeed I am not certain that there is one.
- 48 Council notes that the objective indicates the clause to be "facultative", through its use of the term "enable". Council then extends the meaning of "enable" to include, or even mean, "encourage". The argument is, I think, that minor changes to existing dwelling houses and residential flat buildings would be encouraged, in the sense of encouraging continued use, because new dwellings and residential flat buildings are prohibited. I believe the point is that there is something of a captured market so to speak. I am not sure that this follows, in any event, in a setting where other forms of redevelopment are permissible (with shop top housing the most relevant).
- 49 I see an artificiality in the logic connecting the objective to the operative provision as constructed by Council. That is, I do not see why it would enable (or encourage) the use of an existing dwelling if there were to be some restriction on these two land uses into the future. The clause would be more readily seen as facultative, and have good

alignment between its objective and its operative provisions were dwelling houses and residential flat buildings not otherwise permissible in the B2 zone. But this is not the case.

50 I was not able to glean a better understanding of how the objective of the clause might be achieved under the interpretation of the Applicant. The point was made that the objective was directed to the use of an existing residential flat building (or dwelling) as a built form, and enabling it, but in the sense of “delimiting” the use into the future. But minor changes to dwellings and residential flat buildings are permissible already mindful of the land use table. So how the restrictions in both the chapeau and pre-requisites at cl 6.14(3)(b) might “enable” the use of these built forms escapes me. While noting the capacity to turn to cl 6.14(1) to interpret the operative provisions of cl 6.14(3), mindful of s 33 of the Interpretation Act, in this instance I am not seeing the nominated purpose as particularly useful.

51 Second, in regard to the direct interpretation of the chapeau to cl 6.14(3), I give some weight to the Applicant’s submissions on the conceptualisation of the choice of wording within it (“granted to” vs “granted for”, and the non-inclusion of a “despite” provision with respect to the land use tables) mindful of RLEP more generally. It is a not uncommon occurrence within RLEP to introduce a provision, otherwise clashing with another provision, with the preface “despite clause X”, or “despite any other provisions of the plan”. Two examples which happen to have relevance to this matter, cll 6.17 (“Community infrastructure height of buildings and floor space at Kensington and Kingsford town centres”) and 6.21 (“Design excellence at Kensington and Kingsford town centres”), each adopt such an approach. While I agree with Council that there is no sense that such a preface is mandatory in instances of conflict, the lack of such a provision in cl 6.14 is notable and a point that favours the Applicant’s argument. The second factor here is more tenuous again, and involves a direct competition of interpretation. Council says that “granted to” and “granted for” are entirely interchangeable. The Applicant argues that there is a sense to the different use of the terms within RLEP (AWS par 12):

“In the instances identified in all of the clauses identified by the Council, it is only in the instance of the subject clause (clause 6.14(3)) in which a specific type of development is identified, and in that instance by reference to the indefinite article. In contrast, clause 4.1C(2) is concerned with consent “for development for the purpose of dual occupancy”. On the Council’s case (being one in which it is said clause 6.14 applies to an application for any form of residential flat development), the language of clause 4.1C(2) would be more apt to constrain the permissibility afforded by the land use table to the circumstance of clause 6.14; but such constraining language is not used.”

52 I can see that the use of the phrase “granted to” in RLEP has been applied in the many instances cited by Council, except for cl 6.14, for the purposes of a reference to more general forms of development, rather than specific land uses. I can also see that cl 4.1C(2) uses the phrase “granted for” and it, like cl 6.14, refers to a specific type of development. The references to a more specific type of development (i.e. cll 4.1C and 6.14) both use the indefinite article in prefacing the applicable development types. The point of the Applicant is that were the Council’s interpretation to be correct, the drafters would have followed the pattern of cl 4.1C, and they did not. Some weight goes to this argument, but it is weakened by the fact (as acknowledged by the Applicant) that there are other instances of use of the phrase “granted for” which apply to more generalised forms of development (AWS par 10(b)).

53 Third, I also give some weight to the Applicant’s submissions on the “contextual indicators” at cll 6.14(3)(b)(i) and (ii). For me, there is a sense that, were the clauses to be targeting new residential flat buildings, then there would be unlikely to be need for such clauses given the otherwise requirements of the RLEP and SEPP 65 with respect to this form of development. I note Council’s submission that cl 6.14(3) would apply to both new and existing residential flat buildings, and that this follows in terms of

Council's interpretation. This point of Council does not detract, of itself, from the Applicant's argument on this point. But the fact that cl 6.14(3) applies, as well, to dwelling houses does somewhat.

- 54 The three factors I outline above, and reading the plan as a whole, collectively draw me to Applicant's position. The Council's argument seems to me centred on the direct reading of the words in the chapeau to cl 6.14(2), but I find there to be two alternatives to the reading. While the Applicant provides a number of contextual arguments (from elsewhere in RLEP) which give at least some support, the Council seems to rely principally on drawing a link between the clause objective (cl 6.14(a)) and the operative provisions, something I am not convinced of. While Council calls up the evidence in the McGrath affidavit, I have found above that this extrinsic material is of limited assistance.
- 55 My interpretation is that residential flat buildings are permissible in the zone, and cl 6.14 does not engage in this instance. Clause 6.14 is concerned with the granting of development consent to an existing dwelling house or residential flat building for development relating to that building. This proposal does involve demolition of an existing residential flat building but otherwise it comprises construction of a new development and all relevantly associated with that.

Street wall height

Policy

- 56 The point of attention here is the street wall height to Anzac Parade. The relevant controls fall within RDCP. There is a location specific section at Part E6 of RDCP concerned with Kensington and Kingsford Town Centres. Chapter 6 to Part A of this section provides for a series of objectives and built form controls which, in a sense, set the scene. Then Chapter 10 (within Part B) establishes building envelope controls for individual blocks. Relevant provisions within RDCP were provided in Council's bundle (Ex 2). I found some of the section referencing in RDCP confusing and when referring to particular provisions I will cite with respect to the pagination in Ex 2. I also note that RDCP uses the terms "block" and "site" interchangeably, I will henceforth adopt the term "block", to say, for example, the site is located within Block 21 under RDCP. A relevant excerpt from the block location map is provided below; with the subject site (comprising the bulk of Block 21) highlighted.

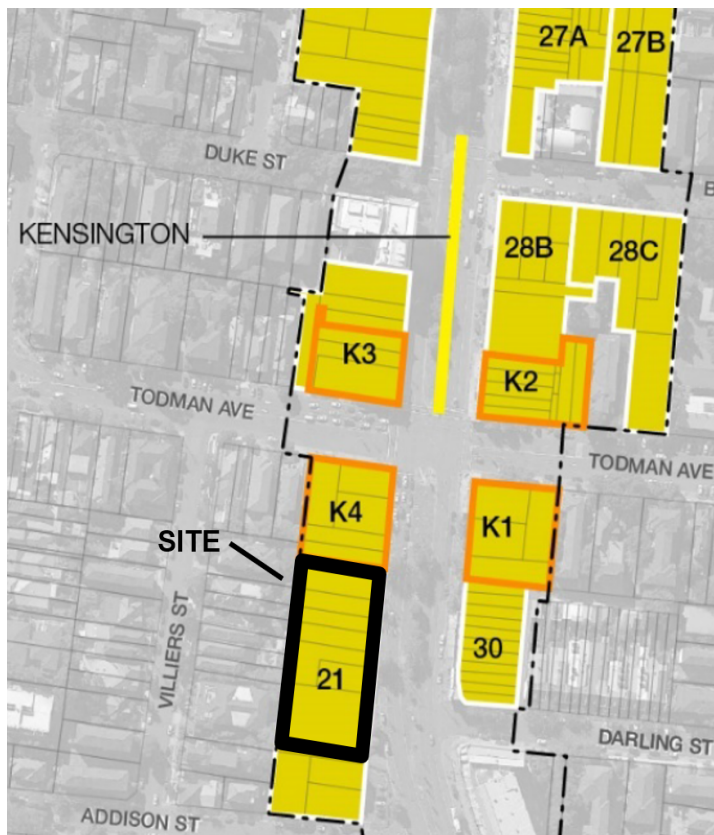


Figure 1- Excerpt from “Block Location Map for Kensington Town Centre” (Source RDCP (Ex 2 p 440))

- 57 Quite detailed block-level provisions are included in RDCP which provide a statement on “Desired Future Character” and dimensioned building envelopes. A pertinent excerpt from the desired future character provision is reproduced below (Ex 2 p 489).

“... Redevelopment of the block will reinforce a 9 storey cohesive built form outcome envisaged for the town centre with a four storey street wall providing a civic scale to both Anzac Parade and Addison Street. A flexible zone is included on the western side to enable built form to be suitably distributed across the site whilst achieving ADG requirements for building separation to the residential areas and minimising amenity, bulk and scale impacts.”

- 58 The block plan for Site 21 is reproduced below.



Figure 2 – Excerpt from Site 21 Block Plan. (Source: RDCP (Ex 2 p 490))

- 59 The block plan indicates a building height of 9 storeys and a street wall height of 4 storeys on Block 21. There is a share way/laneway to be provided at the rear of the site. Because of its future relevance, I note that the block plan for the “strategic node”

sites, at the corner of Anzac Parade and Todman Avenue and highlighted in red (referenced as K1, K2, K3 and K4 in [Figure 1](#)), show street wall heights of 4 storeys but building heights of 18 storeys. There is an exception in regard to site K3 which involves the retention of a “contributory building” in heritage terms. Further details of the controls, in particular in regard to intent beyond the block diagrams, arise in the evidence.

- 60 As it is significant to the evidence, I will cite some material from RDCP suggested as background to Kensington and Kingsford town centres content (Ex 2 p 411):

“The Kensington and Kingsford town centres located along Anzac Parade, comprise an important urban renewal corridor in the Randwick City local government area. The town centres have been subject to a comprehensive planning review undertaken over 2016-2019 to address projected population growth and expected demographic changes, improve the quality of building design and the public realm, and accommodate the Sydney City to South East Light Rail infrastructure along Anzac Parade.”

Proposal

- 61 Relevantly, the proposal provides for a six storey street wall height along Anzac Parade. The overall building height satisfies the nine storey control. I will mention here that the proposal otherwise meets various other important provisions such as: ground floor active frontages along Anzac Parade, a 3 m building setback to the northern boundary, and provision at least for a future share way/laneway at the rear of the site in accordance with RDCP requirements.

Evidence

- 62 It seemed to me the Applicant argued two principal grounds to justify the six storey street wall height as proposed (ie exceeding the four storey RDCP provision). The first ground was concerned with character compatibility and relied on existing built form context along with certain approvals for nearby sites. The second ground was that a six storey street wall height was preferable to a four storey street wall height on urban design or urban quality grounds, generally, and including in relation to RDCP principles.

Built form context argument

- 63 Mr Smith, the Applicant’s urban design expert, was appreciative of the fact that RDCP made reference to desired future character. But he did not believe this was entirely established by development control plan level controls (Ex 6 par 75):

“The desired future character of the locality should be evaluated by reference to existing development that forms the built context of the site. The desired future character of an area is not determined and fixed by the applicable development standards or controls within a development control plan. These controls only contribute to shaping the character of the locality. This is particularly the case where a substantial portion of the built context has realised it’s maximum development potential, and is recently constructed and / or approved.”

- 64 Photographic evidence was provided in Ex 6 showing buildings in the visual catchment of the site which exceeded a four storey street wall height. Two existing sites were subject to particular attention:
- A large development site diagonally across Anzac Parade and to the south of the site on the southern side of the corner of Darling Street (described in evidence as 214 Anzac Parade) which reads as 7 storey street wall with one level set back, and 8 storeys on the corner.
 - 105-109 Anzac Parade (immediately to the south of Addison Street which forms the boundary of Block 21) with a six storey street wall height at the corner with an elevated roof structure above and otherwise five storey street wall height.
- 65 Reference was also drawn to the approved development to the immediate south of the site (153-157 Anzac Parade). It was agreed by the experts that this development comprised a seven storey structure on the corner with a four story wall height for the

built form abutting the proposed development, albeit with some balcony structures projecting on the fifth story and above.

- 66 More generally, existing and recently approved development (under the previous development control plan) had no real alignment, in the broad, with a four storey street wall height, according to Mr Smith.
- 67 Ms Morrish (urban design expert for Council) noted that none of the existing developments referred to by Mr Smith were in the subject block and each had been at least in part responsive to the then existing controls, especially in regard to provisions relating to taller corner structures. It was noted that none of these developments involved a continuous wall height, in the sense that there was a breaking up or variation of the massing to an extent beyond that proposed with the subject application now before the Court. The four storey street wall height at 153-157 Anzac Parade adjacent to the site, and within Block 21 under RDCP, was noted, and a height difference of 5.5m between the wall height at 153-157 Anzac Parade (as approved) and the subject proposal's street wall height was agreed between the experts (revised Annexure E to Ex 6).
- 68 In response to Mr Smith's reference to existing built form context, Mr Morrish pointed to the direct reference to "desired future character" in RDCP citing the objectives listed in Chapter 6 - Built Form (Ex 6 par 102):

"The objectives for built form require new development to be '*compatible with the desired future character of each centre*'. It does not mention continuing the existing character, it talks about compatibility – again a similar vein to '*transition*' to recent development. The applicant justifies the non-compliance with the required street wall height on the basis of existing development along Anzac Pde and considers that this existing development, created under different and now superseded controls, should be given greater weight than the new controls."

Urban quality argument

- 69 Mr Smith's arguments that the proposal is preferable on urban quality grounds are summarised in pars 93 and 94 of Ex 6:
- "93. The six storey street wall is the appropriate height of the lower street wall on this site as:
- o It reinforces the boulevard character and provides a 'civic' scale as required by the Desired Future Character statement
 - o It reduces visual bulk by enabling the upper levels to be more recessive and less dominant
 - o It provides a lighter feel to the upper level setbacks
 - o There are no adverse impacts on the public domain
 - o It provides a more balanced and pleasing proportion being 2:1 vs almost 1.25:1. It provides consistency with the height street wall of other buildings that inform the built context.
94. A four storey street wall may be consistent with the controls in the DCP, however it would result in a poorer outcome in that:
- o The height is too low to define the street and exposes the upper levels
 - o It results in a built form proportion that is disproportionate and top heavy
 - o It does not strengthen the existing built form character in this part of Anzac Parade."
- 70 I note it was not in dispute, in my understanding, that all of the existing or approved developments provide for a "lower to higher" street wall proportion. That is, the lower street wall is of greater height than the higher (more setback) building wall for individual buildings (under RDCP the street wall height is four storeys allowing for a nine storey form, that is, with the higher wall beyond the streetwall providing for a further five storeys). Mr Smith believed the proposal's configuration (six storeys with an additional three storeys behind) allow the upper levels to be "read as being more recessive" (Ex 6 par 85).

It was also noted that in a peer review of the work related to the ultimate conclusions contained in RDCP with respect to the Kensington Centre, undertaken by Allen Jack and Cottier, there was a finding in agreement with Mr Smith's point of view. That is, recommending the four storey street wall be increased to six storeys so as to "reduce the appearance and scale of building from the street" (Ex M Tab 5 Table 5.1).

- 72 Ms Morrish did not believe the proposal would achieve a quality urban design relationship. Ms Morrish's written evidence focused on the particulars of the proposal in its context. That is to say, even if a four storey wall height for a nine storey form is inferior to what is proposed with the application, in principle, this particular proposal would be unsatisfactory, or at least not provide for a "quality outcome" otherwise. There seem to be two points here.
- 73 The first point was in regard to the proposal's relationship with its neighbours to the north and south along the Anzac Parade streetscape. The site to the south has an approval for a four storey street wall and the 5.5m street wall height difference does not provide an appropriately sensitive transition. The site to the north would also be expected to accommodate a four storey street wall under RDCP. Mr Morrish indicated her opinion might be different if the proposal abutted existing development that accommodated six storey street wall heights. I also took it that Ms Morrish believed Mr Smith's arguments as stronger in regard to corner sites, as points of physical and perhaps civic emphasis as already established on some corner sites under previous controls (this site is not located on a corner).
- 74 Mr Morrish's second point here was in regard to the streetwall presentation of the proposal of itself, and the suggestion that the proposal offers no articulation to the street wall "it is a continuous 6 storey form defined only by projected bays" (Ex 6 par 138).
- 75 In oral evidence, I queried both Ms Morrish and Mr Smith looking for further clarity on the appropriateness of a four storey wall height for otherwise nine storey building as applying to the site and Kensington centre more generally under RDCP. I made reference to the use of the term "human scale" and "civic scale" in the controls, seeking assistance in interpretation. Mr Smith linked these terms to general principles about "pleasing" proportionality for building design as experienced at human scale in the street. These principles included perceptions of buildings as having three elements: base, middle and top. In this case the street level base was appropriate given his retail frontage. Building proportionality was seen to be more pleasing when the middle level was dominant rather than the top. Under RDCP, the proportionality would be seen as inappropriate at the street level. The building would be seen as top-heavy, defeating the quality urban design ambitions of RDCP otherwise.
- 76 Ms Morrish suggested emphasis needs to go to the human-level experience in the street. The "civic" reference was seen to associate more with the corner sites, subject to tower developments, with four storey presentation otherwise allowing highlighting of the civic corners. A lower four storey street wall was seen as more of a human scale, "more intimate", "more comfortable", than the higher six storeys, but the questions also had an association with the architecture of the building. In this case six storeys for the full length of the proposed development would be too dominant and not capture the human scale or the civic scale as intended by RDCP.

Consideration

- 77 Firstly I provide some analysis of certain interpretive aspects of RDCP raised in evidence and submissions. Then I turn to the consideration of merits arguments.

Interpretation of and weight to RDCP

There were points raised by Council which called on me to relate RDCP to the well-known statutory provisions at s 4.15(3A) of the EPA Act, which provides relevantly as follows:

(3A) **Development control plans** If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority—

(a) if those provisions set standards with respect to an aspect of the development and the development application complies with those standards—is not to require more onerous standards with respect to that aspect of the development, and

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

(c) may consider those provisions only in connection with the assessment of that development application.

79 First was the emphasis given in Council's evidence and submissions to certain provisions at the "explanation" to the Block Controls at Part 10 to this element of RDCP (Ex 2 p 438), which provide, relevantly, as follows:

"Alternative design solutions may be considered only where it can be suitably demonstrated that the proposal would result in an improved urban design, amenity and sustainability outcome and meets the identified desired future character for the block."

80 I note that some exceptions were cited in regard to contributory buildings (in heritage terms) and in relation to "flexible zones", neither of which are relevant to the topic at hand (street wall height).

81 While, by its language, this RDCP provision might be seen as indicating the seriousness of the point for those drafting the plan, it is in conflict with the provisions of s 4.15(3A)(b) of the EPA Act in that it raises a higher bar, in regard to alternative design solutions, than that required by statute and does not have any effect in my evaluation.

82 Second was a more general point and concerns the emphasis to the extent of background research and community consultation involved in the development of the provisions applying to Kensington (and Kingsford) centre in RDCP, and the newness of the plan.

83 Council also usefully referred to the recent findings of *Tomasic v Port Stephens Council* [2021] NSWLEC 56 (*Tomasic*) [34]-[36], where Preston CJ summarised the weight to be given to a development control plan. Reference was made to *Zhang v Canterbury City Council* (2001) 51 NSWLR 589; [2001] NSWCA 167 (*Zhang*) where findings included that in determining a development application, development control plans need to be taken into consideration, as a "fundamental element" in or a "focal point" of the decision-making process (*Zhang* [75], [77]). The finding that a "directly pertinent" development control plan provision was entitled to "significant weight" but "was not, of course, determinative" (*Zhang* [75]) was also referenced.

84 Justice Preston, in the summary provided in *Tomasic*, also referenced the three factors relating to the weight to be applied to development control plans as found in *Stockland Development Pty Ltd v Manly Council* (2004) 136 LGERA 254; [2004] NSWLEC 472 at [87]:

"- A development control plan adopted after consultation with interested persons, including the affected community, will be given significantly more weight than one adopted with little or no community consultation.

- A development control plan which has been consistently applied by a council will be given significantly greater weight than one which has only been selectively applied.

- A development control plan which can be demonstrated, either inherently or perhaps by the passing of time, to bring about an inappropriate planning solution, especially an outcome which conflicts with other policy outcomes adopted at a State, regional or local level, will be given less weight than a development control plan which provides a sensible planning outcome consistent with other policies."

85 Finally, Justice Preston highlighted the fact that "there may be alternative solutions to achieve the objects of development control plan provisions" (*Tomasic* [36]), while directly referencing the provision of s 4.15(3A) of the EPA Act (see [78]).

- 86 So in terms of the evidence of background work, including community consultation associated with the preparation of RDCP, I note that mindful of Stockland's first factor, significantly more weight can be applied compared to a situation where the planned did not have such consultation, at least. It does not seem to me that the other two factors come into play in this instance given the relatively brief life of the relevant aspects of the plan to date (the Kensington and Kingsford Town Centre provisions to RDCP were made 20 November 2020 according to the parties). Beyond this case law, I again need to be very conscious of the provisions at s 4.15(3A) of the EPA Act, especially given that they were introduced subsequent to the findings of *Stockland* and *Zhang*.
- 87 I will also mention here the point raised by the Applicant that RDCP is incorrect in its statement that "building envelopes have been determined by taking into account localised site characteristics (et al)" (Ex 2 p 423). I understood the Applicant's point to be that RDCP could not have done so given the street wall height's which had been adopted, which were often at odds with "localised site characteristics". It is quite valid to assume that RDCP did as it says, on this point, and was of the view that it sought to adopt different street wall heights, as a conscious departure from that which existed and, relevantly, the previous development control plan.

Merits consideration

- 88 Clearly the proposal is contrary to the numerical four storey street wall height provision indicated in the applicable Block controls under the local provisions of RDCP. Having regard to the findings of *Zhang*, this development control plan should be seen as a "fundamental element" in or a "focal point" of the decision-making process. As a "directly pertinent" development control plan provision the street wall height control, but also seen in the context of the rest of the Block 21 controls, is entitled to significant weight but should not, of course, be seen as determinative.
- 89 Mindful of s 4.15(3A) of the EPA Act, there is a need for me to be flexible in applying the street wall height control, and RDCP generally, and particularly, to allow reasonable alternative solutions that achieve the objects of the street wall height control as an element of the applicable block controls in RDCP.
- 90 There are a number of objectives nominated for the block controls (such as street wall height) as provided at Part 10.3 of RDCP (Ex 2 p 456). Those of most particular relevance are:
- "...
 - To facilitate high quality built form outcomes that demonstrate design excellence and amenity
 - To establish an appropriate scale, dimensions, form and separation of buildings
 - ...
 - To ensure new development presents a human scale urban edge to the public realm."
- 91 I commence with the third bullet point above. While no definition was provided of what "(presenting) a human scale" meant under RDCP, I agree with Ms Morrish that the street level experience by individuals is the point of attention here. It makes sense to me that the wall height that one might be aware of standing or walking along the street is an important factor in that experience, and that, in the broad, a lower wall height keeps the scale down more to a human level, and scale presentation, than a taller street wall height, allowing more of a sense of relationship than a sense of the building dominating the street level experience of pedestrians. The point can be practically applied in this setting. It is straightforward to conclude that the human-scale perception or presentation of a four storey street wall as one walks along Anzac Parade (noting the widening pedestrian path and landscaping intentions in the site environs), and when the taller building element would not be visible or at least prominent, would be preferred to

a six storey street wall, when ensuring human scale presentation is the quest. I am aware that proposed awnings may impede the visual experience when walking very close to the street wall only. I do not see Mr Smith's arguments in regard to the scale and proportion of buildings as addressing the point of ensuring presentation of a "human scale".

- 92 The first and second (bullet point) objectives at [90], are more related to Mr Smith's arguments on proportionality and scale. But the points also introduce ambitions for "high quality built form outcomes that demonstrate design excellence". I generally agree with the arguments of Ms Morrish in regard to the lack of quality in the streetscape presentation of the proposed building: this in regard to its lack of acceptable transition to (future) neighbouring development, and the continuous massing to Anzac Parade for its considerable length. While I believe I understand Mr Smith's concern that buildings may appear top heavy with the street wall height proportionality required under RDCP, I am not sure how much of a real concern that might be to the ordinary citizen. On the evidence presented by the experts, I was not convinced that RDCP's objectives would be better achieved, generally, by six storey street wall than four storeys.
- 93 I would conclude that the proposed street wall height is excessive. It contravenes RDCP's block controls to which I give considerable weight. The proposal does not achieve a human scale urban edge to the public realm an important objective of the block controls. In addition, the proposed six storey street wall does not achieve a high quality built form outcome in regard to its massing along Anzac Parade for its considerable length, and its lack of suitable height transition to approved or otherwise future neighbouring development, mindful of RDCP ambitions.
- 94 I would further note that I do not believe that the Applicant's drawing-in of the approved development to the immediate south of the site (153-157 Anzac Parade), or for the K3 site across Todman Avenue to the north (accepting submissions that Ex 9 represented this approval), assist in justifying the proposed six storey wall height on contextual grounds. This is because each of these developments would in a fundamental way adopt a four storey wall height.

Other merits considerations

- 95 It will be seen in my conclusions that this matters little here, but I favour the Applicant's position in regard to the common circulation space, preferring Mr Smith's evidence of the proposal's alignment with relevant provisions of the Apartment Design Guide. I note that the parties agreed that the contention relating to floor to ceiling heights was a matter that could be addressed by way of conditions.
- 96 While I refer to it here given its relationship to merits, cl 6.11 of RLEP is concerned with design excellence, and provides that power to grant consent is only available if the consent authority is of the opinion that the proposed development exhibits it. I will refer to this in my conclusions.
- 97 It is not necessary for me to take the proposal's relatively minor height of buildings contravention further given my other findings.

Conclusion

- 98 I agree with the Applicant that the street wall height is only one aspect of the controls applying to the proposal but I believe it is a major one, having a mind to the comprehensive plans for Kensington Centre as now embodied in RDCP, which have ambitions to improve the quality of building design and the public realm (Ex 2 p 411). As indicated above, the proposed street wall is too high, provides inappropriate massing given the building length and deals inadequately with relationships to

approved and future neighbouring development. I am aware that the proposal also brings some positive aspects in terms of the plans for Kensington centre. These include the provision for ground floor active frontages along Anzac Parade, a street frontage setback to Anzac Parade, a 3m building setback to the north boundary and allowance, at least, for a future share way/laneway at the rear of the site in accordance with RDCP requirements. There is also the provision of more accommodation to address projected population growth. In this instance these positives do not overcome the factors against the proposal, and the proposal fails on merits.

99 As indicated earlier, cl 6.11 of RLEP applies to this development application and provides that consent must not be granted to the development unless the consent authority is satisfied that the proposed development exhibits design excellence. I have had a mind to the considerations at cl 6.11(4), although I am not bound by those alone. I do not believe the proposal exhibits design excellence in regard to its appropriateness to its location as an important frontage element to a main pedestrian street into the future, its form and external appearance is appreciated from the public domain, again given its frontage to Anzac Parade, and its relationship with anticipated future buildings on immediately neighbouring sites. Mindful of this finding, and notwithstanding my merits finding against the proposal in any event, there is no jurisdiction to approve the proposal.

100 The Court orders that:

- (1) The appeal is dismissed.
- (2) Development application DA/428/2020 for a mixed-use development at 137-151 Anzac Parade Kensington is refused.
- (3) The following exhibits are returned: 2-9, M-R.

.....

P Walsh

Commissioner of the Court

Endnote

1. While some extracts only were provided to the Court by Council, I have sourced directly from the Law Courts Library and cite the reference as follows Pearce D, Statutory Interpretation in Australia, 9th edition, LexisNexis.

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Decision last updated: 01 October 2021