



## Land and Environment Court New South Wales

Case Name: **Thunderbirds Are Go Pty Ltd v Council of the City of Ryde and Transport for NSW**

Medium Neutral Citation: [2024] NSWLEC 1558

Hearing Date(s): 26, 27, 28 and 29 February and 1 March 2024

Date of Orders: 11 September 2024

Date of Decision: 11 September 2024

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders:

- (1) Pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the applicant is to pay the costs of the respondent that have been thrown away as a result of the amendment of the application as agreed or assessed.
- (2) The appeal is dismissed.
- (3) Development consent is refused to development application LDA2021/0095 lodged on 30 March 2021 for alterations and additions to the existing garden centre and construction of an 18 storey office building including a multi-level car park and additional dining space at 307 Lane Cove Road, Macquarie Park, legally described as Lot 10 in DP 1071734.
- (4) All exhibits are retained.

Catchwords: DEVELOPMENT APPEAL – alterations and additions to existing garden centre – construction of office building – classified road – heritage –visual impact – development adjacent to National Park - orders

Legislation Cited: *Environmental Planning and Assessment Act 1979*, ss 4.15, 8.7, 8.14, 8.15, 9.1  
*Heritage Act 1977*, s 170

*Land and Environment Court Act 1979*, s 39  
*Roads Act 1993*, ss 7, 52, 87, 138, 145, 163  
*Rural Fires Act 1997*, s 100B

Environmental and Assessment Regulations 2021,  
s 55  
Ryde Local Environmental Plan 2014, Sch 5, cll 4.3,  
4.5, 6.9  
State Environmental Planning Policy (Transport and  
Infrastructure) 2021, s 2.119

Cases Cited:

*Australian Leisure and Hospitality Group Pty Ltd v  
Manly Council (No 4)* (2009) 172 LGERA 1; [2009]  
NSWLEC 226  
*Ballina Shire Council v Palm Lake Works Pty Ltd*  
[2020] NSWLEC 41  
*BGP Properties Pty Limited v Lake Macquarie City  
Council* (2004) 138 LGERA 237; [2004] NSWLEC  
399  
*Captive Vision Pty Ltd v Ku-ring-gai Council (No 3)*  
[2019] NSWLEC 1472  
*Chahda v Liverpool City Council* [2018] NSWLEC  
1371  
*Hoxton Park Residents Action Group Inc v Liverpool  
City Council* [2010] NSWLEC 242  
*Hoxton Park Residents Action Group Inc v Liverpool  
City Council* (2011) 81 NSWLR 638; [2011] NSWCA  
349  
*HP Subsidiary Pty Ltd v City of Parramatta Council*  
[2020] NSWLEC 135  
*Modern Motels Pty Limited v Fairfield City Council*  
[2013] NSWLEC 138  
*Mullaley Gas and Pipeline Accord Inc v Santos NSW  
(Eastern) Pty Ltd* (2021) 252 LGERA 221; [2021]  
NSWLEC 110  
*PC Infrastructure Pty Ltd v Wentworth Shire Council*  
[2024] NSWLEC 1139  
*Thunderbirds Are Go Pty Ltd v Council of the City of  
Ryde* [2023] NSWLEC 1401  
*Wehbe v Pittwater Council* (2007) 156 LGERA 446;  
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Texts Cited:

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did-phrase-red-herring-originate](https://www.mentalfloss.com/article/562812/where-did-phrase-red-herring-originate)  
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NSW National Park & Wildlife Service (NWPS)  
publication 'Developments adjacent to National  
Parks and Wildlife Service lands'  
Ryde Community Participation Plan

Category:	Principal judgment
Parties:	Thunderbirds Are Go Pty Ltd (Applicant) Council of the City of Ryde (First Respondent) Transport for New South Wales (Second Respondent)
Representation:	Counsel: A Galasso SC (Applicant) S Berveling (First Respondent) A Hemmings (Second Respondent)  Solicitors: Mills Oakley (Applicant) Council of the City of Ryde (First Respondent) Hunt and Hunt Lawyers (Second Respondent)
File Number(s):	2023/26469
Publication Restriction:	No

## JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act* 1979 (EPA Act) being an appeal against the refusal of development application LDA2021/0095 lodged on 30 March 2021 for alterations and additions to the existing garden centre and construction of an 18 storey office building including a multi-level car park and additional dining space (the Proposed Development) at 307 Lane Cove Road, Macquarie Park legally described as Lot 10 in DP 1071734 (the Site). The Site is also known by its current business name of Eden Gardens Centre.
- 2 This case is about whether consent should be granted for an 18 storey (approximately 80 m tall) commercial building on a Site with frontage to a classified road and the M2 Motorway (a privately operated tollway) and adjacent to the Lane Cove National Park (LCNP). There are many contentions which I distil into a main merit contention of visual impact and a traffic contention raising a jurisdictional prerequisite which needs to be satisfied in order for the Court to be able to grant consent to the Proposed Development.
- 3 The remaining merit contentions revolve around the visual impact of the Proposed Development from the LCNP and from the public domain and this visual impact is the main outstanding contention pressed by the First Respondent. I conclude that on undertaking the merit assessment, the Proposed Development warrants the grant of development consent. I give my reasons below.
- 4 In relation to satisfaction of the jurisdictional prerequisite raised by the traffic contentions, after careful consideration of all the evidence and submissions of the parties, I am unable to reach the required state of satisfaction that is a precondition to the exercise of power to grant the consent as sought by the Applicant. The First Respondent also presses, but defers to the Second Respondent in relation to jurisdictional prerequisite relating to the assessment of the impact of the Proposed Development and the certainty of proposed future works on the classified roads, namely the M2 Motorway and Lane Cove Road



in order to satisfy the terms of s 2.119(2) of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP).

5 There is much attention given to a possible future pedestrian bridge consent for which is not sought. I refer to the pedestrian bridge as a red herring at [29] and I observe, merely by way of comment, that none of the parties seem to have properly grappled with the status of the relevant roads adjoining the Site until very late in the proceedings including up to and during the hearing.

6 The parties rely on the contentions as particularised in the following:

(1) The First Respondent filed Amended Statement of Facts and Contentions (ASOFAC) on 3 October 2023 (Ex R1.1) which lists 8 contentions, the following of which are resolved as a result of additional material provided by the Applicant and the joint expert evidence:

- (a) Contention 5 Parking;
- (b) Contention 14 Acoustic Impacts;
- (c) Contention 16 Building Code of Australia;
- (d) Contention 17 Traffic Information, limited to particulars (g) and (k) only;
- (e) Contention 18 Preliminary Site Investigation;
- (f) Contention 19 Survey Information.

(2) There are other contentions or particulars of contentions which were resolved during the course of the hearing by way of either supplementary joint expert reports and agreed conditions of consent, such as light spill onto the LCNP, and the remaining unresolved contentions pressed by the First Respondent are dealt with in this judgment.

- (3) The Second Respondent filed Statement of Facts and Contentions (R2 SOFAC) on 11 October 2023 (Ex R2.1) and filed Amended SOFAC (R2 ASOFAC) on 27 February 2024 (Ex R2.5).
- (a) Contentions 1 and 3 both relate to the assessment, or ability to make an assessment of the impact of the Proposed Development on the traffic safety, efficiency and ongoing operation of the classified roads in accordance with the terms of s 2.119 SEPP Transport and Infrastructure. Contentions 5, 6 and 7 are all related to this jurisdictional prerequisite. Similarly, contention 2 relates to the public interest and site suitability because of the adverse impact of the Proposed Development on the classified roads.
- (b) The Second Respondent's traffic expert, Matthew McCarthy concedes that contention 4 falls away because the Applicant is no longer seeking advertising as part of the pedestrian bridge option (JER Traffic par 25 and 26, Ex R1.11). However, the Second Respondent's written submissions provides that
- "Notwithstanding the agreement reached between the parties' traffic experts, Section 5.6.4 of the Statement of Environmental Effects dated 5 June 2023 states that "it is anticipated that there will [be] some form of advertising signage on the proposed pedestrian bridge" (Ex DD p 32). It follows that, in assessing the likely impacts of the bridge, the Court must also consider the associated advertising signage. However, there are insufficient details for the Court to do so." (R2 written subs p 31)
- (c) I come back to the assessment of the pedestrian bridge later in relation to the assessment of the works required on the road and satisfaction of the jurisdictional prerequisite regarding the impact of the Proposed Development on the classified roads.
- (4) The Applicant filed Further Amended Statement of Facts and Contentions in Reply (FASOFAC in Reply) on 27 February 2024 (Ex LLL).

7 I will deal with the contentions as pressed by the First and Second Respondents under two headings the first being visual impact, being a merit assessment, and the second being traffic which is a jurisdictional prerequisite to being able to grant consent to the Proposed Development. I will deal with these two headings as follows:

(1) Visual impact of the Proposed Development:

- (a) Urban Design (Visual Impact) (ASOFAC Contention 2 Scale and Urban Design, JER Town Planning and Urban Design, Ex R1.12 and oral evidence) at [51] and the context of the Site relative to the Macquarie Park Innovation Place/Precinct (Ex R1.15 and Ex R1.16) Stage 1 Rezoning purpose and height of buildings maps at [59];
- (b) Visual impact from the public domain at [62];
- (c) Landscaping/arborists (ASOFAC Contentions 7, 9 and 10 – dependant on pedestrian bridge, JER Landscape and Arborists, Ex R1.6, and oral evidence) at [70]; and
- (d) Interface with and impact of the Proposed Development on LCNP (ASOFAC Contention 3 Impact on LCNP and Contention 11 Ecology, JER Ecology, Ex R1.9 and JER Ecology and Lighting Issues, Ex R1.17, and oral evidence) at [75]

(2) The traffic contentions raise the jurisdictional prerequisite to the grant of consent because the Site has frontage to classified roads and works will be required to the intersection providing access to the Site from those classified roads. The jurisdictional precondition is set out in s 2.119(2) of the Transport and Infrastructure SEPP, requiring satisfaction that the Proposed Development does not adversely affect the safety, efficiency and ongoing operation of the M2 Motorway or Lane Cove Road as a result of the design of the vehicular access or the nature, volume or

frequency of vehicles using the classified road to gain access to the land. (ASOFAC Contentions 6 and 17, JER Traffic, Ex R1.11 and Ex R1.19, and oral evidence, R2 ASOFAC Contentions 1 - 3) at [100]. I will look at the legal framework, consider the evidence and make a finding as to whether there is an adverse affect on the safety efficiency and ongoing operation of the classified roads. I give my reasons for reaching the conclusion that as the evidence shows all models considered discloses adverse affect and as there remains an element of uncertainty of the extent and nature of works required at the intersection for vehicular access to the Site, the Court is not satisfied that the jurisdictional hurdle is overcome in order to have power to grant consent to the Proposed Development.

- 8 Before embarking on the contentions, I first describe the Site because its context is highly relevant to the merit assessment as well as to the satisfaction of the jurisdictional prerequisite. I then set out what the various elements or components of the Proposed Development as a result of the Notice of Motion moved by the Applicant during the proceedings to further amend the development application. As part of my consideration of the various components of the Proposed Development, I set out the background and context of the attention given to the pedestrian bridge in an attempt to conclude on its status and relevance to the determination of these proceedings. Finally, I list the extensive expert evidence by reference to their discipline and exhibit number. As there are two respondents I have prefixed the exhibits tendered by the First Respondent with R1 and the exhibits tendered by the Second Respondent with R2.

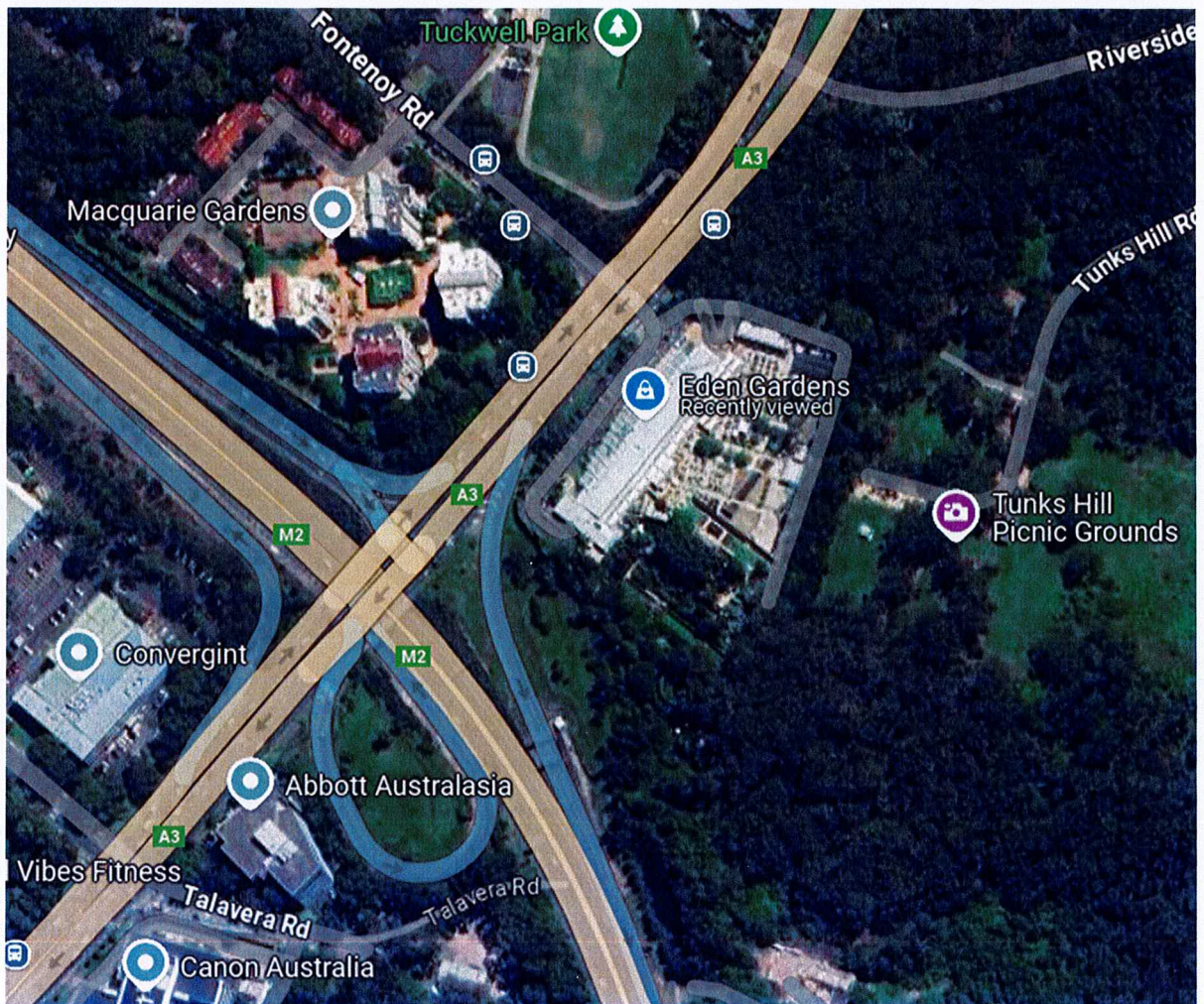
## **The Site**

- 9 A description of the Site will give necessary physical and planning context to the consideration of the contentions and my findings.

10 The physical, or geographic context is that the Site is located in a prominent location being bounded by the following which is illustrated in the aerial image below extracted from Google Maps:

- (1) Lane Cove Road to the west (a classified road and declared a main road under s 46 of the *Roads Act 1993*);
- (2) the M2 Motorway to the south and relevantly, part of the west (a tollway, being a classified road but not a public road under s 52(2) of the *Roads Act 1993*, and declared as Freeway No. 6002 under the *Roads Act 1993* and identified as a privately operated tollway in the Schedule of Classified Roads and Unclassified Regional Roads, prepared and published by Transport for New South Wales (TfNSW), pursuant to s 163 of the *Roads Act 1993* and last updated in February 2023, R2 ASOFAC at par 7); and
- (3) Lane Cove National Park (LCNP) to the north and east.



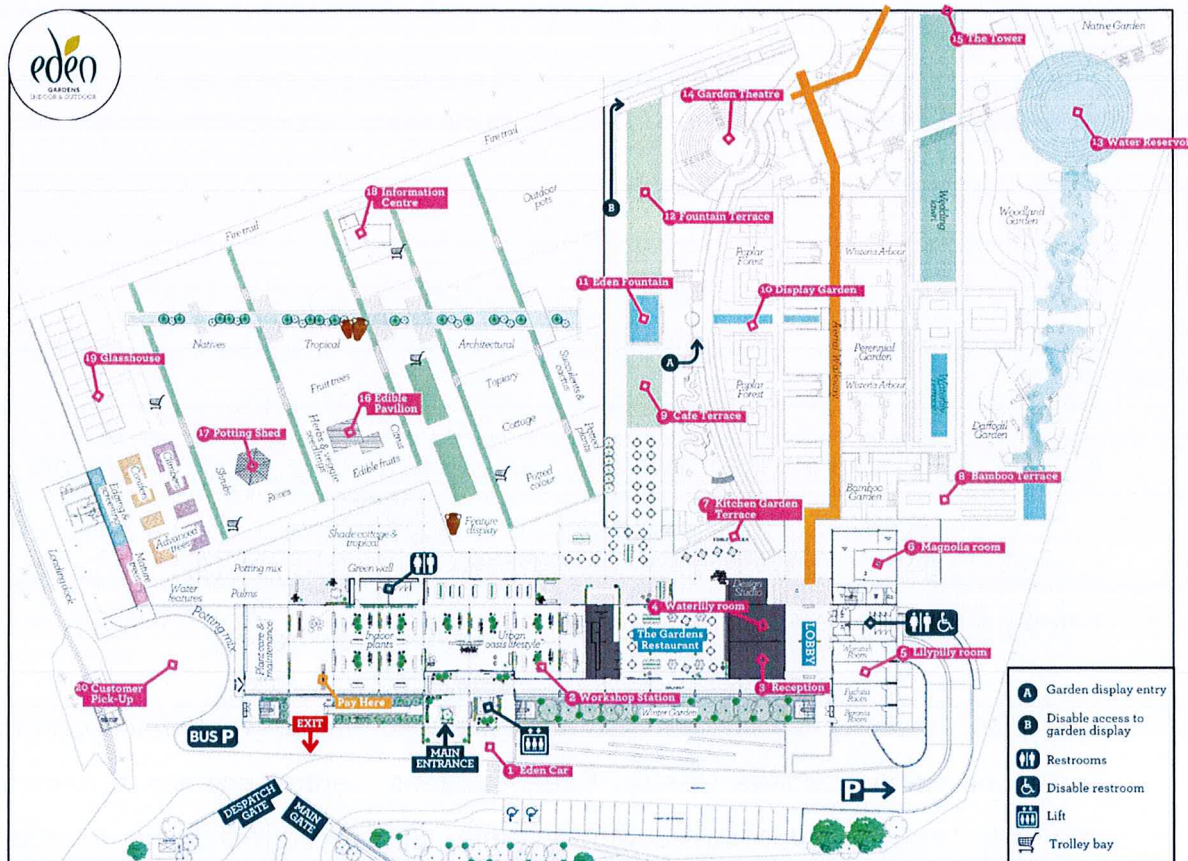


11 It is relevant to note that Aboriginal heritage is resolved between the experts and that LCNP is not a heritage item. At p 14 of JER Heritage (Ex R1.7) and in oral evidence, Mr Joshua Symons for the First Respondent provides evidence that LCNP is:

- (1) Not listed as an Item of local heritage significance pursuant to Ryde Local Environmental Plan 2014 (RLEP) Sch 5, Environmental Heritage; and
- (2) Not included in any s 170 of the *Heritage Act 1977*, the Heritage and Conservation Register, or put another way, National Parks and Wildlife Service has not put the Lane Cove National Park or any aspect of it adjacent to the Site on the s 170 Register (Tcpt: 28 February 2024, p 9 at 26)

- 12 The Site is legally identified as Lot 10 within DP 1071734 and is located at 307 Lane Cove Road, Macquarie Park. The Site is irregular in shape with an area of 24,680m<sup>2</sup>. The Site has a frontage of 124.325m 145.035m to Lane Cove Road (western boundary). The Site has a 100.935m northern boundary and a 176.49m 242.325m eastern boundary adjoining the Lane Cove National Park (LCNP). The southern side boundary is adjacent to the M2 Motorway and has a length of 176.49m. The Site is located at the north-eastern corner of the intersection of the M2 Motorway and Lane Cove Road and access to the Site is provided through the intersection as can be seen at Fig 7 and Fig 8 below.
- 13 It is agreed that the only possible access to the Site is from the classified roads, namely the M2 Motorway and Lane Cove Road.
- 14 The Site presently accommodates an integrated horticultural development known as Eden Gardens Centre. Eden Gardens Centre includes a garden centre and service areas, café comprising internal and external dining, function hire centre, display gardens, administration office and an existing underground and above ground car park. I reproduce below the Eden Gardens Map from the business website at Fig 1.







- 16 Since 26 April 2023, the zoning of the Site is E3 Productivity Support. Prior thereto, the Site had been within the B7 Business Park zone. Development permissible with consent in the E3 Productivity Support zone includes, relevantly development for the purposes of:
- (1) function centres;
  - (2) garden centres (the definition of which in the LEP's Dictionary provides that a garden centre "may include a restaurant or café"); and
  - (3) office premises.
- 17 The Site is identified on Ryde Council's Bush Fire Prone Lands Map as being affected by the Vegetation Buffer and Vegetation Category 1 at the south-eastern corner and along the northern boundary adjoining the LCNP. (R1 ASOFAC at par 18)
- 18 The RLEP contains the standard instrument's cl 4.3 (height of building) and cl 4.5 (Floor Space Ratio). Its HOB map does not prescribe a maximum HOB development standard for the Site. The FSR map shows a maximum FSR development standard for the Site of 1:1. The Proposed Development does not exceed that maximum FSR. The First Respondent's town planner, Mr Tesoriero, has agreed that the Proposed Development has a floor space ratio of 0.996:1, which means the proposal is within the 1:1 maximum that is set for the Site under the RLEP (JER Town Planning and Urban Design, page 34 at par 167 (Exhibit R1.12)).
- 19 The Proposed Development is permissible on the Site with consent. As McClellan CJ noted in *BGP Properties Pty Limited v Lake Macquarie City Council* (2004) 138 LGERA 237 at 262-263, *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399 revised - 05/05/2005 at [118]:

"118 In most cases it can be expected that the Court will approve an application to use a site for a purpose for which it is zoned, provided of course the design of the project results in acceptable environmental impacts."

- 20 In the present case, despite the permissibility of the proposed uses, the First Respondent submits that the design of the Proposed Development results in significant unacceptable environmental impacts and it should be refused.
- 21 On 8 August 2023 the Court, constituted by Moore J, exercising under s 39(2) of the *Land and Environment Court Act 1979* (LEC Act) the function of the consent authority under cl 55(1) of the Environmental Planning and Assessment Regulation 2000 agreed to the Applicant's application for an amendment to the Proposed Development to rely on documents listed at items (a)-(gg) in the Schedule to the Applicant's notice of motion filed on 7 June 2023 and granted leave for the Applicant to rely on the drawings and documents listed at items (hh)-(qq) in the Schedule to the Applicant's notice of motion filed on 7 June 2023 as evidence in the proceedings. I come back to this decision in the context of the pedestrian bridge at [31] and [33].
- 22 The proceedings commenced on site and a number of objectors gave evidence as to their concerns regarding the potential impacts of the Proposed Development including a presentation and written submissions by representatives of the National Parks and Wildlife Service at the location within the Lane Cove National Park (LCNP) being Tunks Hill Picnic Area (Ex R1.14). A copy of objector written submissions is included at Tab 18 of the First Respondent's Bundle of Documents (Ex R1.2).

#### **Applicant's Notice of Motion moved 26 February 2024**

- 23 On the first day of hearing, 26 February 2024, the Applicant moved on its Notice of Motion filed 21 February 2024 and read the affidavit in support prepared by Alexander Kingsbury. After hearing submissions from all the parties on the second day of the hearing, the following orders and directions were made:
- 24 The Court ordered on 27 February 2024 that:

(1) The Court exercising its power under s 39(2) of the Land and Environment Court Act 1979, the function of the consent authority under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, agrees the applicant amending or varying the development application LDA 2021/0095 to

rely on the drawings and documents listed in sch 1 to the motion with the following exceptions and changes: sch 1, item D is not included but replaced or leave is granted to rely on exhibit B to the motion, and from sch 1 I am excluding items E, which I understand to be tab 5, in exhibit A2 in the motion, item F, which I understand to be tab 6 in exhibit A2 of the motion, and item K, which I understand to be tab 11 in the motion.

(2) The Court grants leave to the applicant to rely on the drawings and documents listed in sch 2 to the motion as evidence in the proceedings.

(3) The Court grants leave to the applicant to file a Further Amended Statement of Facts and Contentions in Reply (FASOFAC in Reply) set out in tab 18 of the affidavit of Alexander Kingsbury, affirmed 21 February 2023, and the Court directs the applicant to do so by 5pm today, 27 February 2024.

(4) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act, the applicant is to pay the respondents' costs thrown away as a result of the amendment to the application for development consent as agreed or assessed.

(5) The Court grants leave for the Second Respondent to file and serve an Amended Statement of Facts and Contentions (R2 ASOFAC) by 5pm today, that is, 27 February 2024.

25 The Court made the following directions on 27 February 2024:

(1) The civil engineering experts Mr Steven Hazelwood, Mr Daniel Pearse and Mr Justin Byrne are to proceed to a joint conference in relation to the revised stormwater report dated 28 November 2023, which I understand to be tab 8 in exhibit A2 to the motion, and in response to the ASOFAC filed by the Second Respondent, and are to file and serve an addendum to their joint expert report on or before 5pm Wednesday, 28 February.

(2) The traffic experts are to proceed to a joint conference in relation to the letter dated 20 February 2024 and the attachments prepared by Mr Bitzios, which I understand to be at tab 15 of exhibit A2 to the motion, and in relation to the proposed condition of consent included in the applicant's further amended statement of facts and contentions in reply, which appears at Tab 18 of Ex A2 to the motion, and in response to the ASOFAC filed by the Second Respondent, and they are to file and serve an addendum to their joint expert report on or before 5pm Wednesday, 28 February 2024.

26 As a result of the above directions, the experts provided the JER Civil and Stormwater Addendum (Ex R1.20) and the JER Traffic Supplementary (Ex R1.19) both filed 29 February 2024.

27 Draft/Proposed Conditions of Consent in accordance with directions on 1 March 2024 (Tcpt 1 March 2024 p 73) were filed as follows:

(1) Filed by First Respondent on 4 March 2024 (Ex R1.3);

- (2) Filed by Second Respondent on 5 March 2024 (Ex R2.7);
- (3) Filed by Applicant on 7 March 2024 (Ex QQQ). This version consolidates the previous two and includes submissions by the Applicant. I come back to the conditions in relation to the satisfaction of the jurisdictional prerequisite.

### **The Proposed Development**

- 28 The Proposed Development has a number of components, which I have summarised into 9 components, which have different impacts and I separate and describe those components below.
- 29 At the outset however, I need to address and establish the status of the pedestrian bridge because it may be that notwithstanding the attention it has received, it may be a red herring because consent is not actually sought for the construction of any pedestrian bridge in these proceedings.
- 30 What is a red herring? Herring are fish that are naturally a silvery hue, but they turn reddish-brown when they are smoked. Long before refrigerators were invented, this was done to preserve the fish for months at a time. They can also be pretty smelly (Mental Floss, 'Where Did the Phrase 'Red Herring' Come From?' <https://www.mentalfloss.com/article/562812/where-did-phrase-red-herring-originate>). The expression "red herring" is defined as a fact, idea, or subject that takes people's attention away from the central point being considered. The Oxford English Dictionary defined:
- "red herring" as a metaphor to draw pursuers off a track...the trailing or dragging of a dead Cat or Fox (and in case of necessity a Red-Herring) three or four miles...and then laying the Dogs on the scent...To attempt to divert attention from the real question..."
- 31 In my opinion the focus on the pedestrian bridge may be a red herring because consent is not sought for its construction as part of these proceedings and it is one of three options or alternatives considered by the traffic engineers on how

the intersection might be dealt with as a result of the impact of the Proposed Development.

- 32 Much time was spent on the topic of the pedestrian bridge during the proceedings including the earlier procedural ruling of 26 July 2023 *Thunderbirds Are Go Pty Ltd v Council of the City of Ryde* [2023] NSWLEC 1401, where the Registrar dismissed the Applicant's motion to amend the Development Application by the inclusion of the pedestrian bridge as a concept of a pedestrian bridge for which consent is not sought, for the purpose of the assessment of the Proposed Development and allowing the consent authority to consider the impact of the Proposed Development in full. The Registrar concluded at [7] as follows:

“For a judge or commissioner of this Court to assess the impact of the pedestrian bridge, there must be certainty. My view is that the proposed amendment to the development that is before the Court lacks certainty. Further to this point, under the *Environmental Planning and Assessment Act 1979*, it defines development application to mean an application for consent under Part 4 of that Act. As consent is not sought for the pedestrian bridge, I am exercising my discretion on this occasion and decline to grant leave to the Applicant to amend the development application and I dismiss the motion.”

- 33 As mentioned earlier, Moore J, on 8 August 2023, after hearing a Motion to review the Registrar's decision made the orders in accordance with Short Minutes of Order setting aside the decision of the Registrar of 26 July 2023. The Court agreed to the Applicant amending the Development Application to rely on document listed at items (a)-(gg) in the Schedule to the Notice of Motion filed 7 June 2023. Leave was then granted for the Applicant to rely on the drawings and documents listed at items (hh)-(qq) in the Schedule to the Applicant's Notice of Motion filed 7 June 2023.
- 34 The Applicant tendered a Statement of Environmental Effects, Lane Cove Bridge (Conceptual Assessment) dated 5 June 2023 (Ex DD), there is also a Visual Impact Assessment of the Pedestrian Bridge dated 31 May 2023 (Ex LL) and numerous other documents which purport to provide concept designs and drawings in what seems to be an attempt to create some certainty as to any impact if there were to be a pedestrian bridge (Ex DD through to Ex MM). I

understand that the reason, or context, for the Applicant preparing and providing this material regarding a concept pedestrian bridge to be a consequence of an earlier agreement in principle communicated by TfNSW for a pedestrian bridge as set out in the R2 ASOFAC at par 26 as follows:

"26. On 16 June 2023, TfNSW provided "in principle" agreement to the proposed pedestrian bridge conceptual design (Revision G), noting that the design is subject to further design review post consent under s 87 of the Roads Act. The "in principle" agreement was subject, inter alia, to:

(a) the Applicant obtaining development consent for the Proposal, including development consent for the pedestrian bridge, with the imposition of TfNSW conditions;

(b) The Applicant obtaining TfNSW's approval and concurrence with respect to the pedestrian bridge under sections 61, 87 and 138 of the Roads Act;

(c) The Applicant entering into a Major Works Authorisation Deed (WAD) with TfNSW, and

(d) For the pedestrian bridge to be constructed at no cost to TfNSW and the Applicant shall fund the maintenance of the bridge for the first 10 years post construction via an upfront payment.

TfNSW relies on the terms of this letter for their full force and effect"

- 35 The Applicant concedes that works will be required on Lane Cove Road, the M2 Motorway and Fontenoy Road at and on approach to the intersection to facilitate vehicular and pedestrian access to the Site for the Proposed Development. Various options were considered by the experts, the Applicant adopts Option 1 preferred by the Applicant's traffic engineer expert, Mr Bitzios, which does *not* include a pedestrian bridge. Option 1 is described in detail below at [128]. The Applicant divides its evidence tendered to the Court in the proceedings as between what is part of the development application and what is evidence on the application:

"that distinction is as between and relates to for what consent is sought and that which is evidence for something that the Applicant will need to obtain an approval for in the future, and that's the options thing. The purpose of the proposed condition 60A is an attempt to formulate a performance based condition that would deal with the intersection." (Transcript 26 February 2024, p 8 at 17- 35)



36 The Applicant explains further that consent is not sought to construct a pedestrian bridge, not is consent sought to have two right turns out of Fontenoy Road, “or anything like that. I’m just telling the world that if I get an approval, that I need to do something at the intersection and here are some alternatives”. (Transcript 26 February 2024, p 12 at 24-50)

37 The submission is supported by the FASOFAC in Reply (Ex LLL) at 27A (c) on p 10

“the Applicant is presenting the pedestrian bridge material as evidence because the application, as proposed, will necessarily require works in Lane Cove Road to respond to changes in traffic conditions and this may include a pedestrian bridge,”

38 I accept that off-site impacts of the Proposed Development are required to be assessed and acknowledge that the Applicant relies on the earlier in principle agreement to a pedestrian bridge from TfNSW to support a proposition that there has already been some assessment by TfNSW of a pedestrian bridge. This is a little problematic as the Second Respondent presses contention 3 regarding the uncertainty of the impact the Proposed Development will have on the classified road, which I set out at [113] and come back to at [134].

39 As a result, I find that the pedestrian bridge is merely one of the three options or alternatives considered by the traffic engineer experts on how to manage the change to traffic conditions resulting from the Proposed Development. As such, the pedestrian bridge is part of the consideration as to whether the Court reaches the requisite state of satisfaction pursuant to s 2.119(2) of the Transport and Infrastructure SEPP and forms part of the reasoning as to why I conclude that I am unable to reach the requisite state of satisfaction in order to overcome that jurisdictional precondition.

*What are the components to the Proposed Development?*

40 I return to the Proposed Development and to identifying what its various components are. To give an illustrative context and assist in understanding

FILED ON  
13 FEB 2014

LEGEND:

- Facade dressings & self closing doors
- Fire rated walls
- Door changes

NOT FOR CONSTRUCTION

Notes:

- \* Minor changes to form and configuration may be required when drawings are subsequently prepared for construction purposes after the grant of development consent is issued.
- \* The pedestrian bridge is shown for the purpose of assessment only and not approved. The pedestrian bridge does not form part of the development the subject of the development application.

DKO

Project Name: [illegible]  
Project Address: [illegible]  
Project Number: [illegible]  
Project Date: [illegible]  
Project Status: [illegible]

Other: [illegible]

Revision Number: [illegible]

Revision: [illegible]

41 The first component of the Proposed Development is the alterations and additions to the existing main garden centre building (located on the western corner of the Site) include modifications to the garden centre, café, amenities, food and beverage venue, neighbourhood shops and provision of a winter garden. Extension of the existing function spaces in the south west corner of the site is also proposed. Amendments following the Applicant's Notice of Motion to rely on amended plans include:

- 20



- (2) Deletion of three (3) designated neighbourhood shops, and the garden centre tenancy's configuration is amended.
  - (3) The amended configuration includes one (1) neighbourhood shop 56.94m<sup>2</sup> in area.
  - (4) Provision of four (4) designated garden centre tenancies/ neighbourhood shops to the north of the new entry arcade. Tenancies are 61.81m<sup>2</sup>, 61.94m<sup>2</sup>, 73.01m<sup>2</sup> and 71.66m<sup>2</sup>.
  - (5) Relocation of amenities.
  - (6) Pedestrian zone with stair access associated with pedestrian bridge.
- 42 The second component is parking which is itself comprised of a number of elements. The Proposed Development includes a total site-wide parking provision of 539 off-street car parking spaces. An internal loading bay designed to accommodate vehicles up to the size of a 12.5m long Heavy Rigid Vehicle (HRV) is proposed within the north-eastern portion of the site.
- (1) The proposal retains the existing forty-seven (47) at grade parking spaces fronting Lane Cove Road and the existing lower ground floor parking which accommodates one hundred and seventy-one (171) parking spaces. The proposal includes excavation works to accommodate an additional one hundred and three (103) underground parking spaces, motorcycle parking, and a main communication room within the north eastern corner of the site. The lower ground floor carpark is extended in an eastern direction to accommodate an additional fifty (50) spaces.
  - (2) Construction of a multi-level car parking containing two hundred and eighteen (218) spaces to the northern side of the Site with access from Lane Cove Road is proposed. The ground floor level is to accommodate a new garden centre, storage room, loading bay, waste room, and

internal stair access for the sale of wall climbing tickets. Solar panels are proposed on the roof.

- (3) Amendments following the Applicant's Notice of Motion include:
  - (a) The northwestern side boundary setback of the carparking building is modified.
  - (b) Reduction of one (1) parking space on each level.
  - (c) Internal reconfiguration relating to northwestern fire stair core.
  - (d) Entrance set back.
- (4) Building additions to the east of the car park to accommodate a waste room, an end of trip facility including showers and lockers, a security and building manager office, mail room, staff kitchen and lounge, store rooms, and plant rooms. Amendments following the Applicant's Notice of Motion include:
- (5) Additional fifty (50) spaces.
- (6) Main communication room with an area of 65.44m<sup>2</sup> is provided at the northeastern corner of lower ground floor.
- (7) Waste room is provided to the north of the water foundation and skylight.
- (8) Relocation of five (5) motorcycle spaces to the west of the new waste room.
- (9) Relocation of accessible parking spaces to the east of the existing retail parking spaces.
- (10) Sixty-eight (68) spaces are nominated for retail purposes. Internal barriers are added to delineate the retail and commercial parking.

- (11) Reduction in two (2) existing car parking spaces. Deletion of the external fire stairs and lift.
- 43 The third component is Alterations to the existing building to the south which are to facilitate the provisions of the main switch room, prep kitchen, and existing services. Building additions/alterations are now also proposed to the south-east of the existing component of the underground carpark.
- 44 The fourth component involves the function centre, including demolition of the existing building to the south east of the existing below ground parking space which is also proposed to accommodate an extension to the existing function centre. This increases the area of the function centre from 365m<sup>2</sup> to 995m<sup>2</sup>. The additions to the function centre provide for a new Function Room 4 and courtyard to the south-west of the lower ground floor carpark, extension of the existing function spaces in the south west of the Site, including three (3) function rooms, amenities, kitchen, and pre-function waiting room.
- 45 The fifth component is the contentious construction of an 18-storey office building (HOB of 80m) with a communal lobby located between the existing garden centre/neighbourhood shops is proposed. The building contains six (6) lift cores, two (2) fire stairs and amenities on each level. The roof top includes plant equipment. Amendments following the Applicant's Notice of Motion include the inclusion of winter gardens to levels 6, 10, 11, 13 and 14 and Level 18 setback to reflect Level 5 and 12. The reasons this component is contentious is because of its visual impact.
- 46 The sixth component is the construction of a restaurant and associated amenities to the east of the office building. Roof top dining is proposed, and an outdoor dining area is provided to the east and south at the ground level.
- 47 The seventh component is the contentious vehicular access to the passenger vehicle parking and heavy vehicle servicing 6 facilities is proposed to occur via an existing driveway, which forms the eastern leg of the signalised intersection of Lane Cove Road, the M2 Motorway and Fontenoy Road. Adjustments to site

entrance with internal northern road. Relocation of 2 x kiosks and a substation to the northwestern frontage. The reasons this component is contentious is because of the frontage onto classified roads and the requirement to satisfy the terms of s 2.119(2) of the Transport and Infrastructure SEPP regarding the safety, efficiency, and ongoing operation of those roads.

- 48 The eighth and final component of the Proposed Development is landscaping works, including the removal of 97 trees (as identified in the submitted Arborist report) and provision of winter gardens and roof top gardens. Additional winter gardens added to Levels 6, 10, 11, 13 and 14 within the commercial tower.

### **Joint Expert Reports**

- 49 The parties rely on the following nine (9) expert disciplines:

- (1) Heritage and a Joint Expert Report (JER Heritage) was filed on 5 February 2024 prepared by Paul Rappoport, Conservation Architect and Heritage Town Planner, and Renee Regal, Heritage Consultant, on behalf of the Applicant and Joshua Symons, Senior Archaeologist, on behalf of the First Respondent (Ex R1.7).
- (2) Bushfire and a Joint Expert Report (JER Bushfire) was filed on 5 February 2024 prepared by Lew Short for the Applicant and Stuart McMonnies for the Respondent (Ex R.1.5). The experts agree that consent is not required from the NSW Rural Fire Service as the application is not captured under s 100B of the *Rural Fires Act 1997*. The experts also agree that with the application of the Bushfire Conditions (Annexure 7 to the JER Bushfire) the proposal will have an acceptable level of bushfire safety.
- (3) Building Code of Australia – Building Surveyor and a Joint Expert Report (JER Building Surveyor – Building Code) was filed on 5 February 2024 and a correction to para 29 was filed on 20 February 2024 prepared by Dean Goldsmith for the Applicant and Daniel Keato for the First Respondent (Ex R1.8)

- (4) Ecology, and a Joint Expert Report (JER Ecology) filed 6 February 2024 (Ex R.1.9) and a Supplementary JER (JER Ecological & Lighting Issues) was filed 27 February 2024 (Ex R1.17) prepared by Ian Benson, Ecologist, Dr Chris McLean, Principal Environmental Planner, David Buchanan, Specialist Lighting Designer, and Mincong Chen Senior Electrical Engineer. The experts agreed on a condition of consent regarding future light spill onto the LCNP.
- (5) Landscape and arboriculture and a Joint Expert Report (JER Landscape Architecture and Arboriculture) was filed on 7 February 2024 prepared by Glenn Bird, arboriculture expert for the Applicant and John Shinkfield, Landscape expert for the Applicant and Toby Piper, arboriculture expert for the First Respondent and Greg Tesoriero, Landscape expert for the First Respondent (Ex R1.6).
- (6) Traffic engineering and Parking and a Joint Expert Report (JER Traffic and Parking) (Ex R1.11) was filed 13 February 2024 prepared by Damian Bitzios, traffic engineering expert for the Applicant, Yafeng (Alex) Zhu, traffic expert for the First Respondent, Daniel Pearce, parking expert for the First Respondent and Matthew McCarthy traffic engineering expert for the Second Respondent. A Supplementary JER Traffic and Parking (Ex R1.19) filed 29 February 2024 was prepared following a joint conference during the proceedings in relation to the letter dated 20 February 2024 and the attachments prepared by Mr Bitzios, the proposed condition of consent included in the FASOFAC in Reply and the R2 ASOFAC.
- (a) Eden Gardens Macquarie Park – Traffic and Transport Impacts Assessment” prepared by Bitzios Consulting dated 8 December 2023 (The Bitzios Report) at Annexure B to the JER.
- (b) “Given that the Bitzios Report is new material not reviewed or responded to by CoR or TfNSW prior to this JER, the review of

the report in Attachment B has resulted in new or more specific issues not included in the SOFACs” (par 10).

- (c) Right turn into site from Land Cove Road.
- (7) Civil Engineering (Stormwater) Joint Expert Report (JER Civil and Stormwater Engineering) filed 14 February 2024 prepared by Stephen Hazlewood Stormwater Expert for the Applicant, Justin Byrne Civil Expert and Daniel Pearse Stormwater Expert for the First Respondent (Ex R1.4). Supplementary JER Civil and Stormwater Engineering filed 29 February (Ex R1.20) was prepared by Steven Hazelwood and Daniel Pearse in relation to the revised stormwater report dated 28 November 2023 where Mr Pearse concludes that the revised Stormwater Management Report and Plan are acceptable in regard to discharge control and both experts agree are preferred to the original and that the measures, subject to the extension of the dispersal trench to be 48m in length inside the southern boundary of the Site, should be implemented should consent be granted.
- (8) Town planning Joint Expert Report Town Planning and Urban Design (Visual Impact) (2 volumes) filed 20 February 2024 prepared by Stephen Kerr, Town Planning, Peter Smith, Urban Design and John O’Grady, Visual Impact for the Applicant and Ben Tesoriero, Town Planning, Russell Olsson, Urban Planning and Jane Maze-Riley, Visual Impact for the First Respondent (Ex R1.12).
- (9) Acoustic and a Joint Expert Report (JER Acoustic) was filed on 21 February 2024 prepared by Eleni Chrysafis for the Applicant and Thomas Taylor for the First Respondent (Ex R1.10). Following receipt of the ASOFAC and prior to the commencement of joint conferencing, Ms Chrysafis conducted additional noise measurements on site and produced a supplementary acoustic report. This report was used by the experts in the course of joint conferencing, with the report being amended over the course of joint conferencing. This final report with

Project Number SYD0684, Revision 08 and dated 15 February 2024 is attached as Appendix C to this report and the experts provide at par 31 as follows:

“31. Section 6.3.2 of the ADP Revision 8 Report details the noise intensive operational activities that will occur on the site. The ADP Revision 8 Report is sufficiently clear to have an understanding of what activities will occur on site at any given time (time of use, patron numbers, music noise levels) to enable prediction of noise impacts to nearby development.

32. Section 6.3.4 of the ADP Revision 8 Report provides a detailed list of the acoustic mitigation measures (both management and building works) that are necessary in order to ensure that noise from the site is controlled such that compliance with relevant noise emission criteria are met. This includes:

a. Times of use and patron populations (in particular for outdoor areas associated with the café, restaurant and Function Rooms).

b. Music noise limits for these spaces (inside and outside).

c. Building shell constructions for the café, restaurant and Function room necessary in order to ensure that any amplified music within these spaces will be adequately controlled so as to meet noise emission requirements.

33. Provided that the recommendations in Section 6.3.4 of the ADP Revision 8 Report are adopted, the site would be capable of operating while meeting the amended noise emission goals identified in Section 3 of the ADP Revision 8 Report

47. The experts agree that the particulars that are raised in Contention 14 have been resolved through the preparation of the Supplementary report.

48. The experts agree that if the recommendations in Section 6.3.4 of the ADP Revision 8 Report are implemented and adhered to at all times the site is capable of operating while meeting relevant EPA and Office of Liquor and Gaming Noise Emission requirements.

49. With respect to noise condition 3.1(e ), the experts are unable to comment on a noise level that would cause degradation to a specific habitat. However through the noise control measures in Section 6.3.4 of the ADP Revision 8 and paragraph 75 of this joint report, the operational noise would be reduced to levels consistent with EPA guidance for noise impacts on National Parks and below the ambient noise level expected in the Park as a result of road traffic noise from the M2 Motorway and Lane Cove Road.”

50 I now set out my reasons why I reach the conclusion that although in my opinion the Proposed Development has merit, the inability to be satisfied of the

jurisdictional prerequisite results in an inability to grant consent. I set out my reasons by addressing the merit contention of visual impact and then the traffic impact jurisdictional prerequisite as I had identified above at [7].

**Is the visual impact of the Proposed Development acceptable? (Urban Design and Visual impact: Contention 2 – First Respondent)**

- 51 The visual impact contention involves a number of issues focusing on the height of the 18 storey commercial building. The First Respondent's contention 2 ASOFAC titled Scale and urban design, reads as follows:

"The proposed development has an unacceptable scale which results in visual impacts to surrounding properties.

..."

- 52 The Applicant submits that "The proposed development is responsive to, and makes use of, the flexibility uniquely given to the subject site to achieve a development of an appropriate scale (both in terms of floor space and height)." (Applicant Written submissions, p 7). In closing submissions, the Applicant emphasises the absence of a HOB control in circumstances where heights of building are, as described by the Applicant "quite intensely and microscopically almost prescriptively controlled." (Transcript 1 March 2024 p 5 at 25). The Applicant goes on to explain that "there is a specific desire to retain what can in many respects be unarguably the best component of the precinct on site, that is the embellished cultural gardens, retention of the historic uses on the site, namely the garden centre ... and we would submit that whilst the tower is taller than certain people in this appeal might like ... it is not impacting, it is not introducing an element which is foreign to the precinct, or the subregion. It is accommodated in the latitude of space between the subject site and other uses, and we would submit that overall provides for as some might describe a symphonic result in terms of site planning." (Transcript 1 March 2024 p 6 at 31)
- 53 The First Respondent submits that although it is accepted that the RLEP does not impose a maximum height for development on the Site, "That does not mean that the height of the proposed development is not an issue. The



objectives set out in cl 4.3 of the RLEP remain necessary to be satisfied.” (R1 Written Submissions) Those objectives are reproduced below with the relevant objectives (b) and (d) emphasised as follows:

#### 4.3 Height of buildings

(1) The objectives of this clause are as follows—

(a) to ensure that street frontages of development are in proportion with and in keeping with the character of nearby development,

*(b) to minimise overshadowing and to ensure that development is generally compatible with or improves the appearance of the area,*

(c) to encourage a consolidation pattern and sustainable integrated land use and transport development around key public transport infrastructure,

*(d) to minimise the impact of development on the amenity of surrounding properties,*

(e) to emphasise road frontages along road corridors.

54 Preston CJ held in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 at 457:

“43 The rationale is that development standards are not ends in themselves but means of achieving ends. The ends are environmental or planning objectives. Compliance with a development standard is fixed as the usual means by which the relevant environmental or planning objective is able to be achieved. However, if the proposed development proffers an alternative means of achieving the objective, strict compliance with the standard would be unnecessary (it is achieved anyway) and unreasonable (no purpose would be served).”

55 The First Respondent is concerned that because of the context of the Site, the proposed 18 storey “tower development”, or office building, with its proposed height of 79.3m (North and South Tower Elevation Drawing DA403 Rev 2 dated 11/12/2023, Ex A shows the reduced levels (RL) which result in the following calculation:  $RL140.140 - RL60.840 = 79.30m$ ) is highly likely to remain a “solo isolated tall tower in that immediate locality”, (R1 written subs p 9) which is 60% higher than what might be possible on the southern side of the M2 Motorway.

- 56 The RLEP HOB map shows that the Site is unique (amongst developable sites) in that it has not been made the subject of height limit and the Applicant submits that:

“This mapping cannot be attributed to any oversight by the legislator. The Court should infer a deliberate legislative intent behind the mapping. The legislator should be presumed to have reasons for the differential treatment of the subject site (relative to neighbouring sites). The legislator’s reasons for the different treatment of the site should be inferred as follows:

- (a) The site does not form part of an immediate cluster of sites, being separated by nearby developable land by the M2 and Lane Cove Road. The absence of a height limit is indicative that the legislator expected a more flexible approach to building massing which may be needed (and could be used) for this site.
- (b) Given the site’s proximity to the Lane Cove National Park it may be desirable to move the building mass away from the park (for bushfire and amenity reasons) and mass upwards (rather than horizontally).
- (c) The site is the existing location of award-winning gardens. Massing upward, rather than horizontally, allows for their retention.”

- 57 Mr O’Grady explains at par 93 of the JER Town Planning and Urban Design that the tower form enables an appropriate response to both the site conditions and impacts on adjacent development in that:

“a. To provides for increased views from the nearby 9 storey residential flat building compared to a 7-9 storey lower rise form that would otherwise traverse across the site potentially blocking views to the Chatswood and the City skyline.

b. Enables continued use of the ground plan for landscape, display gardens and other uses that provides a more compatible interface with the national park.

c. Consolidates the building form further from the boundary to the National Park.

94. Unlike development in the Macquarie Park Precinct the majority of the ground plane of the proposed development is provided as a landscaped garden setting for the use of persons visiting the site – including retention of the award winning display gardens, and spaces for recreation, markets and dining.

95. A tower form with its small footprint enables activation of the ground plan and uses that continue the functions that the community currently enjoy on the site.”

- 58 I accept Mr O'Grady's explanation for the rationale behind the design of Proposed Development including the 18 storey or 80 m commercial building on the Site.

*Context of the Site relative to the Macquarie Park Innovation and Investigation Areas*

- 59 Both the Applicant and the First Respondent take into consideration the context of the Site relative to the Macquarie Park Innovation Area and the Macquarie Park Investigation Area, however, the First Respondent (Written subs pp 8-9) submits that:

"The Applicant places much weight on the fact that the Site is near to the Macquarie Park Innovation Area. It is accepted that the proposed rezoning of the Macquarie Park innovation area does contemplate some buildings much taller than the proposed development, but those tall buildings are significantly distant from the proposed development.

Part of the Macquarie Park Investigation Area has been the subject of a draft Stage 1 rezoning planning proposal which has been placed on exhibition (Ex R1.16). Relevantly, it proposes to rezone the stage 1 land, and amend the RLEP's Macquarie Park Corridor Precinct Incentive Height of Buildings Map and the Macquarie Park Corridor Precinct Incentive Floor Space Ratio Map.

The proposed land zoning map of the Stage 1 land is set out on page 30 of Exh R1.16): a large part proposed to be zoned as E2 commercial centre, some parts as MU1 mixed use, and some as E3 productivity support.

The proposed Macquarie Park Corridor Precinct Incentive Height of Buildings Map is at page 32 of Exh 16. Relevantly, a comparison of the proposed rezoning and the maximum heights (utilising the incentive) shows the following:

MU1 (Mixed Use)	X 45m, AC1 110m, AD1 130m and AF1 150m
E2 (Commercial Centre)	X 45m AA 65m AE1 150m
E3 (Productivity Support)	X 45m

Much of the land immediately south of the M2 motorway from the Site is currently identified as being in the B7 (E3) zone. Whilst unclear, it is anticipated

that much of that land remain within the E3 zone with a consequential maximum (incentive) height of 45m.”

- 60 Understanding the planning context of the area and surrounds of the Site set out above is what underpins the visual impact assessment undertaken by Mr O’Grady and Ms Maze-Riley in JER Town Planning and Urban Design, Attachments 2 and 6 (Ex R1.12).
- 61 There are two aspects to the visual impact assessment being the assessment of the visual impact of the Proposed Development, from the road and the visual impact as perceived from the LCNP.

*Visual impact from the road*

- 62 The First Respondent submits that the commercial building component of the Proposed Development will be the only 80m high building along Lane Cove Road north of the M2 motorway and the context of the Proposed Development is such that the consent should be refused.
- 63 The First Respondent tendered on the third day of the hearing (28 February 2024), 4 sheets titled “M2 Motorway Green Corridor Map” being mapping of the extent of visible development along both sides of the M2 motorway prepared by Ms Maze-Riley (Ex R1.18). In that regard, the Court was invited on the first day of the hearing to drive a length the M2 Motorway generally in accordance with a map printed by the Applicant from Google maps with a notation “Directions for drive along M2 Corridor”. After hearing objectors on Site, walking across the signalised intersection, inspecting the Site and inspecting the Tunks Hill Picnic Area with representatives from LCNP, I undertook the drive view requested by the Applicant and I drove from the Site to Cheltenham, turning shortly after Beecroft Road and then returning past the Site and continuing back to the Court. I had the benefit of making my own observations of visible development along the M2 Motorway. I do not describe that length of M2 Motorway as being a green corridor.

- 64 The JER Town Planning and Urban Design (Ex R1.12) includes a number of images at Fig 16 Macquarie Park Today and Fig 17 Macquarie Park Tomorrow as an illustration of the existing context and the potential future built context of the Site.
- 65 It is potentially a distraction and references by the First Respondent to the fact that cl 6.9 of the RLEP does not apply to the Site (see par 16 R1 Written Submissions) just adds to the confusion where the task is to consider the relevant HOB objectives of cl 4.3 of the RLEP in a merit assessment of the Proposed Development. Accordingly, the existing future desired character of the area is relevant for that purpose and assessing the compatibility of the Proposed Development with the area.
- 66 The experts broadly agree that the proposed 18 storey commercial building will be highly visible from locations within 1 km of the Site and less visible from locations beyond that. Importantly, Ms Maze-Riley acknowledges that “although the tower may be visible in isolated, elevated views beyond this distance, the experts agree that the visibility in and of itself is not likely to generate significant visual impacts.” (JER Town Planning and Urban Design, par 235)
- 67 Notwithstanding this, Ms Maze-Riley is of the opinion that:
- “the proposed tower at 18 storeys in height, and with a long north-west facing elevation (57.1m to Lane Cove Road) is visually inappropriate, incongruous to the existing context, incompatible and juxtaposed with the immediate urban and visual context, and existing and desired future character for this part of Macquarie.” (JER Town Planning and Urban Design, par 229)
- 68 Ms Maze-Riley refers to the vegetation along the M2 Motorway and Lane Cove Road. At par 254 she goes on to say that “notwithstanding that view impacts from road carriageways typically attract less weight, given that potential views to the tower are from moving viewing situations, they are still publicly available views and should be considered. The sensitivity of road types varies depending on its function, location and usage for example the visual impacts in views from a single lane local road in west Killara would attract less weight than a major

arterial route or motorway located within a National Park such as for example the M2 and sections of Lane Cove Road.” Ms Maze-Riley concludes at 256 that the proposal creates adverse visual impact on public domain views including from Lane Cove Road. However, Ms Maze-Riley concedes that “aside from adjacent public roads, the most affected areas in relation to adverse visual impacts are Tunks Park and to a lesser extent Tuckwell Park.

69 I have preferred the opinion of Mr O’Grady where at par 109 of the JER Town Planning and Urban Design (Ex R1.12) he provides as follows:

“109. The proposed tower will be visible from a number of locations along the M4 Motorway. Specifically, the tower will be visible intermittently and will form a new horizon element in views from vehicles travelling north over distances up to approximately 1 km and from vehicles travelling south west, again intermittently where view lines are not screened by vegetation or roadside infrastructure. However, when considering visual impacts from the Motoway [sic], it is important to consider two mitigating factors:

i. The changing visual experience that is characteristic of motorway environments where views are from vehicles travelling at speed. This dynamic characteristic of views from highways and freeways is a mitigating factor in their sensitivity by virtue of the fact that any close view would only be available for a short time period and that views will change rapidly with movements.

ii. The local visual environment – High rise towers have become integral to the developing visual environmentl [sic] of the M2 Motorway in the vicinity of the Eden Gardens site. Major high rise precincts within 1 km of the site include, amongst others, the Macquarie Park precinct, the Trinitee Business Park at Delhi Road and the Landcom Lachlan’s Square development between Delhi and Epping Roads. The journey in either direction along the Motoway [sic] will include numerous views of high rise development, both as isolated built elements and as part of development precincts.”

70 A discrete aspect of visual impact relates to what is referred to as a landscape buffer on the road and the Court was assisted by the evidence of the landscape/arborist experts in Ex R1.6 and oral evidence.

71 The First Respondent’s Contention 7 in the R1 ASOFAC provides that the tree removal to “facilitate the installation of the future ramp structure required will reduce the existing landscape buffer, subsequent screening and visual amenity



provided to uses of the public domain and to the existing residents of 1-15 Fontenoy Road” pg 4.

72 The expert evidence of Mr Piper in the JER Landscape at p 5 is that:

“the scale of tree removal proposed is excessive, will result in a poor outcome for the surrounding landscape setting and should therefore not be supported.”

73 Whereas, in cross examination Mr Piper agrees that his reference to the removal of all tree across the 60 m section of Lane Cove Road verge not being in the best interest of maintaining or improving the existing “publicly owned urban forest” was made prior to him being made aware that that part of Lane Cove Road is a tollway (Tcpt: 28 February 2024, p 14 at 37). In cross examination Mr Piper agrees that to the extent that he deals with immediate visual impacts, if there was a lift instead of ramps for any future pedestrian bridge, that would lessen the immediate visual impacts (Tcpt: 28 February 2024, p 15 at 50).

74 After considering the expert opinions and having had the benefit of inspecting the Site, including the drive view, I conclude that the visual impact of the Proposed Development from the public domain on the classified roads to be acceptable. Having reached that conclusion, I find that the Proposed Development achieves the second objective of cl 4.3(1) of the RLEP, namely that the Proposed Development is generally compatible with the appearance of the area. I deal with the overshadowing concerns below in the context of the interface of the Proposed Development with LCNP.

#### *Visual impact on Lane Cove National Park*

75 This issue relates to the interface with the Lane Cove National Park (LCNP) which refers predominantly with visual impact (Contention 3, R1 ASOFAC) but also includes other ecological concerns including overshadowing and weeds, or edge effects (Contention 11, R1 ASOFAC).

76 The First Respondent’s contention 3 titled Impacts upon Lane Cove National Park reads as follows:

"The development creates an unacceptable interface with the Lane Cove National Park, impacting on fauna habitat values, vegetation integrity, aquatic ecological values with the jarring building height resulting in significant visual impacts upon sensitive surrounding areas. These impacts are inconsistent with the zone objectives of C1 National Parks and Nature Reserves within the Ryde LEP 2014."

- 77 As described by Mr O'Grady in JER Town Planning and Urban Design (Ex R1.12) at par 104:

"104 The subject site shares its north eastern and south eastern boundaries with the LCNP. Specifically, the site adjoins the Tunks Hill Picnic Area, an informal picnic and barbecue area in an elevated location on the central western boundary of the Park. The Tunks Hill Picnic Area is one of approximately 12 picnic areas described on the LCNP website (<https://www.nationalparks.nsw.gov.au/visit-s-park/parks/lane-cove-national-park/visitor-info#Facilities>). It is the most elevated of the picnic areas described on the website and is also the only picnic area located adjacent to the LCNP boundary.

105 Both VIA reports agree that the development will be significantly visible from parts of the Tunks Hill Picnic Area. Aside from this location, however, the development would be only intermittently visible from within the boundaries of the LCNP. It may be partially visible, but would be largely screened by vegetation, in isolated views from Riverside Drive, but, notably, it would not be visible from other picnic areas or recognised walking tracks further into the Park, where it would be screened by topography and vegetation.

106 So, in my opinion, the only location within the LCNP where views of the building would have potential to negatively impact on park users would be from the Tunks Hill Picnic Area. This picnic area essentially comprises 3 open grassed spaces, 2 at its northern edge and one to the south. The northern clearings are each surrounded on all sides by vegetation while the southern clearing slopes toward the south and is bordered by vegetation to its north, east and west. This southern clearing is oriented to the south and include long views across the river valley and on to the Chatwood CBD skyline. The northern clearings tend to be more enclosed but they are at the interface with development on the Eden Gardens and beyond."

- 78 I have reproduced an extract from the website referred to by Mr O'Grady below at Fig 3 (Ex JJJ, Tab 8) and Fig 4 and compared it with Fig 10 from the JER Town Planning and Urban Design, Ex R1.12, at Fig 5. I note that Ms Maze-Riley also uses the image at Fig 10 of the JER Town Planning and Urban Design again at Fig 32 and gives her opinion that the Proposed Development will "adversely impact the visual quality and user experience of the Tunks Park" (para 260), and at par 262 "these impacts are inappropriate in relation to view



from a national park, where view and user scenic preferences are typically for views characters by a natural environment and high scenic quality.”

79 Ms Maze-Riley’s assumption of user scenic preferences is contradicted to an extent by the website of the LCNP which boasts “great views of Chatswood” from the specific area of concern, the Tunks Hill Picnic Area as evidenced at Fig 3 and Fig 4 below.

80 Mr O’Grady concludes that the visual impact of the development on the Tunks Hill Picnic Area in particular, and more generally on the LCNP, is acceptable for the following reasons (JER Town Planning and Urban Design, p20 par 108, Ex R1.12):

“i. It has been agreed that the Tunks Hill Picnic Area is essentially the only location within the LCNP from which the development would be substantially visible. From the remainder of the Park the development would either not be visible or, in isolated locations, partially visible behind existing vegetation.

ii. The Picnic Area is arguably the least ‘natural’ of the listed picnic areas within the Park. It is elevated above the rest of the Park, at levels similar to the adjoining Eden Gardens site, and has views to existing high rise development to the south. The northern clearings also have filtered views to Eden Gardens and to the residential towers on the northern side of Land Cove Road. Accordingly, I consider this picnic area to be less sensitive to visual change than other parts of the Park.

iii. In the context of the particular visual character of the Tunks Hill Picnic Area and the agreed fact that the proposed development will be only minorly visible from other locations within the Park, my opinion is that the visual impacts of the proposal on the LCNP are acceptable.”

81 Starting with visual impact, I have considered the Heritage expert evidence from Paul Rappport for the Applicant and Joshua Symons for the First Respondent (Ex R1.7). They generally agree that the Proposed Development will not generate a negative heritage impact upon the Tunks Hill Barn, Tunks Hill Picnic Area, and the Lane Cove National Park. The First Respondent’s European heritage expert, Mr Symons, does not assert that there will be any adverse heritage impact from the development. The evidence of the Applicant’s European heritage expert, Mr Rappport, is that the development will not generate a negative heritage impact upon the Tunks Hill Barn, Tunks Hill Picnic Area, and the Lane Cove National Park (JER Heritage, p 6). I accept this evidence.

- 82 I next considered the Landscape and Arboricultural expert evidence in JER Landscape Architecture and Arboriculture, (Ex R1.6) and oral evidence.
- 83 Greg Tesoriero, Landscape expert for the First Respondent at p 7 of the JER Landscape Architecture and Arboriculture refers to the NSW National Park & Wildlife Service (NWPS) publication titled 'Developments adjacent to National Parks and Wildlife Service lands. Guidelines for consent and planning authorities', August 2020 Environment, Energy and Science Department of Planning, Industry and Environment (Tab 4, Ex R1.12) and says that this document provides a guideline and that the Proposed Development "does not achieve any of the aforementioned outcomes, which given the scale of the development and sensitivity of the adjoining land, is a poor landscape outcome".
- 84 I note that at 1.1 Background the Guideline provides as follows:
- "These guidelines have been prepared for use by councils and other planning authorities when they assess development applications that may impact on land and water bodies managed by the National Parks and Wildlife Service (NPWS)."
- 85 Mr Tesoriero goes on to say that the LCNP Plan of Management 2016 (Tab 5, Ex R1.12) reinforces those guidelines and opines that "the poor edge treatment and negative visual impact of the development to LCNP, as highlighted by the photomontage in Figure 1 below, does not align with management objectives of the Plan of Management and is a poor outcome for LCNP". The photomontage Mr Tesoriero refers to is sourced from the Visual Impact Assessment by Mr O'Grady at Tab 3 of the JER Town Planning and Urban Design (R1.12) and a photomontage to the same effect is also included in the Visual Impact Assessment by Ms Maze-Riley at Tab 6 of the JER Town Planning and Urban Design.
- 86 I note the concern articulated by Mr Tesoriero however I also note his agreement with Mr Shinkfield at pg 6 of the JER Landscape Architecture and Arboriculture that increased landscaping would have further implications to bushfire and asset protection zones.

- 87 There is no existing landscape buffer between the national park and the Site as there is presently a road on the Site up to the boundary and on the other side there is vegetation from the national park. Mr Tesoriero seeks to protect the scenic qualities of the park, the ecological integrity, the amenity, edge effects and the character of the landscape (Tcpt: 28 February 2024, p 17 at 35)
- 88 I note that the edge effects have been dealt with by the ecologists and stormwater engineers.
- 89 National Parks and Wildlife Service has a website which includes an image of the tall buildings in Chatswood referred to by the experts. The image includes a caption "Great views of Chatswood, free barbecues and space for up to 300 people are just some of the best assets of Tunks Hill picnic area in Land Cove National Park". The extract in Tab 8 of Ex JJJ is reproduced below at Fig 3 and an extract from the website is reproduced below at Fig 4 both include the same caption.

## NSW National Parks and Wildlife Service

[Home](#) > [Things to do](#) > [Tunks Hill picnic area](#)



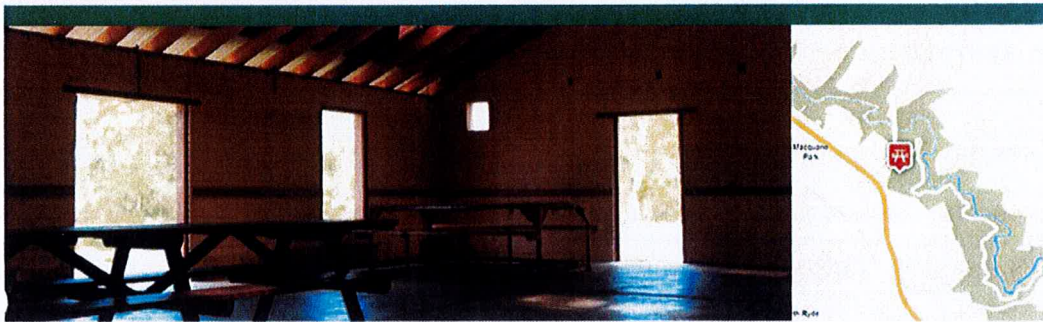
**NSW  
National  
Parks  
and Wildlife  
Service**

# Tunks Hill picnic area

Search



Lane Cove National Park



Great views of Chatswood, free barbecues and space for up to 300 people are just some of the best assets of Tunks Hill picnic area in Lane Cove National Park.

### Type

Picnic areas

### Where

[Lane Cove National Park in Sydney and surrounds](#)

*Fig 3: Extract of national park website, Tab 8 of Ex JJJ*



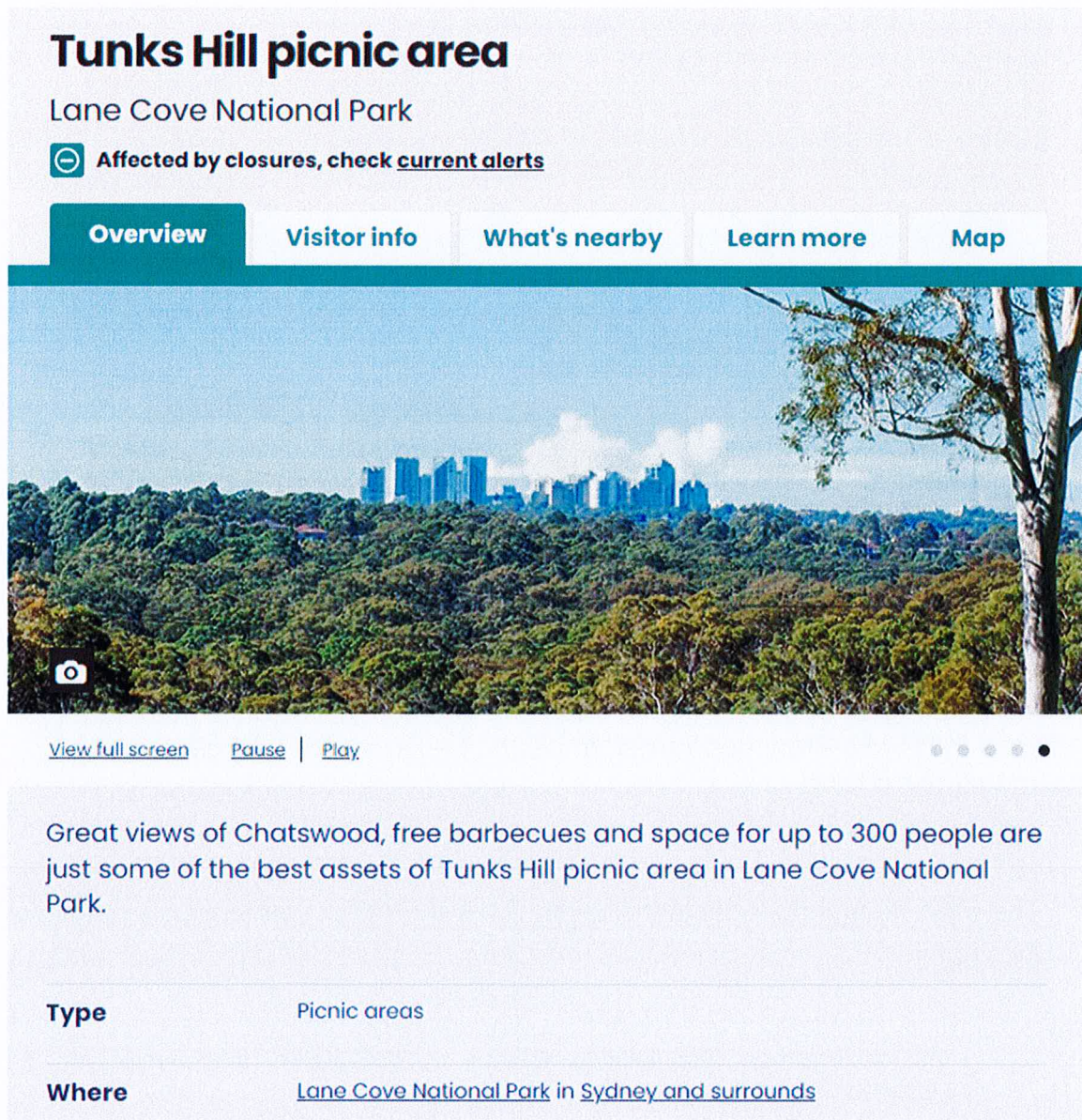


Fig 4: Extract from national park website  
<https://www.nationalparks.nsw.gov.au/things-to-do/picnic-areas/tunks-hill-picnic-area>

90 I also include the image at Fig 10 of the JER Town Planning and Urban Design (Ex R1.12) titled “Photomontage from Tunks Hill Picnic Area, north western clearing – 24mm focal length (source: Virtual Ideas)” below at Fig 5.





*Fig 5: image at Fig 10 of the JER Town Planning and Urban Design “Photomontage from Tunks Hill Picnic Area, north western clearing – 24mm focal length (source: Virtual Ideas) (Ex R1-12)*

91 The objectives in cl 4.3(1) of the RLEP include “to minimise overshadowing”. The First Respondent contends in the R1 ASOFAC at Contention 3 particular (m) that:

“the development also fails to achieve an acceptable relationship with the LCNP for the following reasons:

a. Excessive overshadowing of the Tunks Hill Picnic Grounds and heritage building.

...”

92 The Applicant is silent on overshadowing in closing submissions and the FASOFAC in Reply does not address it either however, there is evidence by way of expert opinion in the joint reports as well as in cross examination as well as the shadow diagrams in Ex A, including the winter solstice drawings DA 1808 22 June at 1 pm and DA 1809 22 June at 2 pm, DA 1810 22 June at 3 pm and DA 1811 22 June at 4 pm.

93 I have considered the evidence of Stephen Kerr in JER Town Planning and Urban Design at p 65 and 66 (Ex R1.12) and the evidence of Ben Tesoriero in

JER Town Planning and Urban Design at p 68 (Ex R1.12) where he refers to the shadow diagrams.

- 94 Further, the evidence of Dr McLean in the Supplementary JER Ecological and Lighting Issues (Ex R1.17) and oral evidence is that overshadowing can have an effect on the flora and fauna that would live in those area which are now going to be more overshadowed. Dr McLean and Mr Benson agree at pg 9 of Ex R1.17 as follows:

“No vegetation associated with Duffys Forest will be directly impacted by the proposal. Shading and other indirect impacts would potentially affect around 0.7 ha of vegetation adjacent to LCNP, which is already impacted by edge effects and other impacts associated with peri-urban setting.”

- 95 Dr McLean clarifies in cross examination as follows:

- (1) the 0.7 ha is area of the Duffys Forest Endangered Exological Community (EEC) from the shadow diagrams (Tcpt 28 February p 42 at 3)
- (2) the principle component of overshadowing is in the winter months (Tcpt 28 February p 42 at 35)
- (3) DA 1808 22 June at 1 pm shows that Duffys Forest EEC area in the middle of winter is largely unshaded, but to the extent that shade is starting, because of the shape of the shade it's looking like it's the trees that are along that boundary (Tcpt 28 February p 46 at 27)
- (4) DA 1809 22 June at 2 pm shows that although the building is casting shadow into the Duffys Forest EEC area, the length of the shadow from the trees is extended as well in plan (Tcpt 28 February p 47 at 4)
- (5) In essence, it's the time between 2pm and 3pm during the winter solstice and then presumably beyond that has that effect of the Proposed Development overshadowing the Duffys Forrest EEC area. At 2pm, the Lion's share of the EEC is still in sun - that is, technically in sun. At 3pm

we've got the building's shadow that we can see is that long dark bit, but if we went to 4pm, which is the next sheet, DA 1811, then the EEC is in shadow but not just from the building, also from the vegetation shadowing onto it. (Tcpt 28 February p 47 at 10 - 19)

"it's that hour in the winter solstice that we're concerned with?

WITNESS MCLEAN: Yes." (Tcpt 28 February p 47 at 10 - 19)

- (6) There is no overshadowing effect to the north of the Site where the Duffys Forrest EEC is most characteristic and the part of the EEC that is most impacted from the additional shadow is downslope and not as diagnostic (Tcpt 28 February pp 50 and 51)
- 96 Mr Benson's evidence on the topic of overshadowing starts a pg 13 and following of Ex R1.17 and he opines that, "The impacts from shading will not modify the EEC to the extent that it no longer represents Duffys Forest."
- 97 In the context of the concessions by Dr McLean in cross examination extracted above, I find in accordance with Mr Benson's opinion and conclude that the design and height of the Proposed Development, in particular the 18 storey commercial building is such that overshadowing is minimised because the effect of the additional overshadowing, agreed to be an indirect impact to 0.7ha area of Duffy Forrest EEC is in essence limited to 1 hour during the winter solstice.
- 98 I also find that the visual impact of the Proposed Development on the LCNP is acceptable for the reasons given by Mr O'Grady quoted above at [77] and [80] and to some extent can be considered not incompatible with the boast on the LCNP own website promoting Tunks Hill Picnic Area.
- 99 Having considered the opinions of the expert witnesses and the evidence before the Court, I find that the Proposed Development minimises the impact on the amenity of the LCNP consistent with the objectives of cl 4.3 of the RLEP.



**Traffic contentions and whether the jurisdictional prerequisite can be satisfied regarding the affect of the Proposed Development on the classified roads.**

100 Raised primarily by the Second Respondent in Contentions 1 through to 3 and others in the R2 ASOFAC, and all relate to the impact of the Proposed Development on the safety, efficiency and ongoing operation of the M2 Motorway and Lane Cove Road and whether the jurisdictional prerequisite in s 2.119(2) of the Transport and Infrastructure SEPP can be satisfied.

101 With TfNSW being a party to these proceedings, and the authority responsible for classified roads, the First Respondent defers to the submissions from the Second Respondent in relation to traffic. However, the First Respondent makes the following general submissions regarding the adverse impacts of the Proposed Development on the classified roads:

“Various options have been considered by the parties’ traffic engineers. Regardless of the Applicant emphasising that works relating to traffic/pedestrian management is not part of this development application, off-Site impacts need to be taken into consideration in the evaluation of the DA.

SIDRA modelling has been prepared by the Applicant’s traffic engineer, Mr Bitzios. Whichever way one turns, his SIDRA modelling of each of the options presents delays for traffic through the intersection and consequent queuing of motor vehicles. Whilst Mr. Bitzios sought to justify his SIDRA modelling as an “isolated model” that is the evidence before the Court, and it shows an adverse impact on the traffic.” (First Respondent Written Submissions at par 34 and 35)

102 The First Respondent then considers the impact of the Proposed Development on the local road, Fontenoy Road and relies on the evidence of its expert, Mr Zhu where he concludes that in relation to the proposed intersection upgrades (Options 1 and 3) the traffic impacts on Fontenoy Road have not been satisfactorily addressed and “will result in excessive delay for right turning traffic existing from Fontenoy Road onto Land Cove Road durin the critical weekday AM peak hour period ... The proposed development and intersection upgrade options will therefore have adverse traffic efficiency impacts on a significant number of drivers exiting Fontenoy Road.” (Supplementary JER Traffic, R1.19 at [13]). Mr Zhu refers to the proposed 6m setback of the ‘STOP’ line for the right turn and expresses his concern about a left turning bus into Fontenoy Road from Lane Cove Road where the swept path analysis show limited

clearance and any further shifting of the 'STOP' line beyond the 6 m would further impact the efficiency of right turning movements out of Fontenoy Road (Supplementary JER Traffic, Ex R1.19 at [13(2)]).

- 103 Mr Bitzio, acknowledges that his preferred Option 1 increases delays and queues to right turns out of Fontenoy Road although he disagrees that the increases are significant because "all arriving traffic to the right turn pocket continues to clear in its allocated green phase." (Supplementary JER Traffic, Ex R1.19 at [15]).
- 104 The Second Respondent submits that the Court must refuse the development application because the jurisdictional precondition of being satisfied that the Proposed Development will not have any adverse effect on the classified roads for the purpose of s 2.119(2)(b)(i) and (iii) of the Transport and Infrastructure SEPP is not met. The Second Respondent gives four reasons.
- 105 Firstly, the Second Respondent submits that there is no traffic modelling for the design of the vehicular access to the Site as shown in the extract of the Ground Floor Plan DA 105 (Ex A) reproduced below at Fig 6. The Applicant seeks approval for the internal driveway and access arrangements as shown in that plan. However, the traffic impact assessment which underpins DA 105 has been expressly rejected by the Applicant's traffic expert. All experts in Ex R1.11 at paras [7] to [8] agree to reject the Colston Budd modelling. All previous mitigations and in principle agreement given by TfNSW were expressly on the Colston Budd modelling which is now agreed to be 'inaccurate' because it does not 'provide an accurate traffic assessment of the proposed development due to factors including traffic generation and accuracy of SIDRA modelling" (JER Ex R1.11 at paras [7] to [8]) I will come back to traffic modelling at [149].



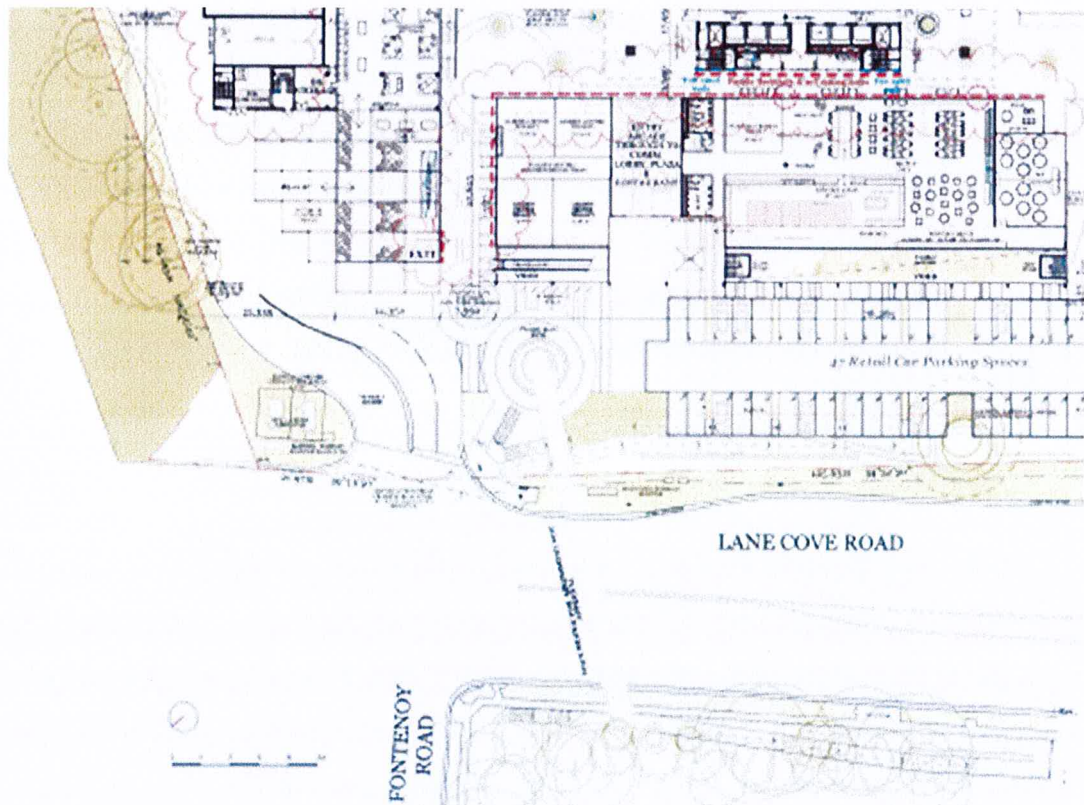


Fig 6: Extract of Ground Floor Plan DA 105 Rev B dated 12/11/2023 (Ex A)

- 106 Ground Floor Plan DA 105 Rev B dated 11/12/2023 is listed as an approved plan in the Proposed/Draft Conditions of Consent (Ex QQQ)
- 107 The second reason given by the Second Respondent as to why the Court will not be satisfied that the Proposed Development will not have any adverse effect on the classified roads for the purpose of s 2.119(2)(b)(i) and (iii) of the Transport and Infrastructure SEPP is that the modelling contains a number of assumptions which present risks and uncertainties to the design of the mitigation works that are unlikely to be approved by TfNSW.
- (1) For example, there are uncertainties with respect to the design of vehicular access to the Site which is shown to have one left exit lane measuring 10m-12m and no chevron marking. However, the modelling has assumed that the left exit land will be 50m in Option 1 and Option 3 and 28 m in Option 2.

- (2) Another example is that there is uncertainty with respect to the scope and nature of the mitigation measures proposed by the Applicant. The modelling has not considered the impact of the proposed 6m (or longer) setback of the right hand turning lane from Fontenoy road in Option 1 and Option 3, however it is expected to have an impact. Further, the modelling has assumed a reduction in the pedestrian crossing time to 2 seconds from the existing 2 to 4 seconds (in Mr Bitzios' view) or 6 to 14 seconds (on Mr McCarthy's view), which is unlikely to be approved by TfNSW.

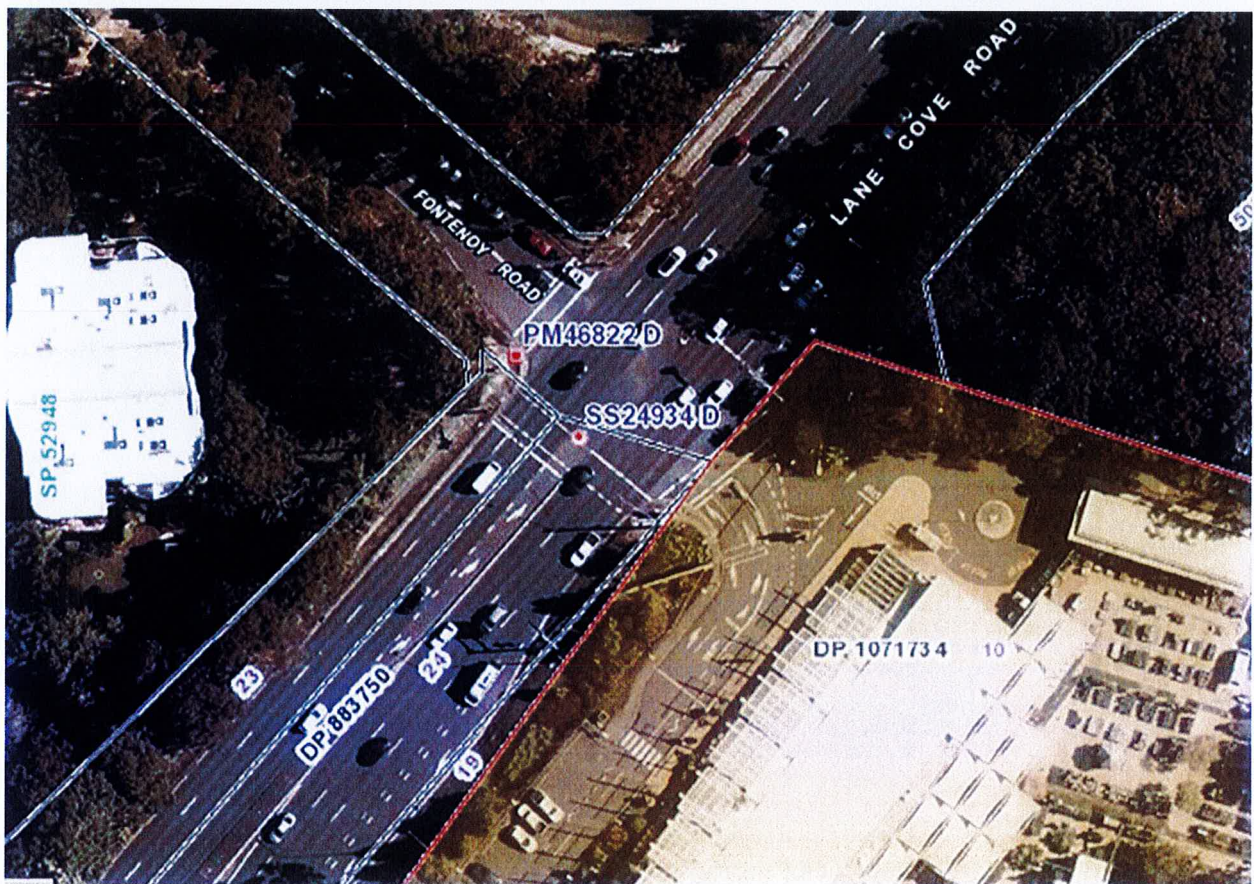
108 Thirdly, the Second Respondent submits that the unmitigated impacts of the Proposed Development will have an adverse effect on the safety, efficiency and ongoing operation of the M2 Motorway and Lane Cove Road. This was openly conceded by Mr Bitzios, see also JER Ex R1.11 at paragraph [43(a)] where he says that there is no point modelling unmitigated impacts because the road network is already at capacity so the addition of any cars will have an impact on the network. On this basis Mr Bitzios accepted that the Proposed Development would have an adverse impact on the efficiency of classified roads if left unmitigated.

109 Fourthly, the Second Respondent submits that the results of the modelling demonstrate that the Proposed Development, even with the implementation of mitigation measures comprising Option 1, Option 2 and Option 3, will have clear adverse effects on the safety, efficiency and ongoing operation of the M2 Motorway and Lane Cove Road as a result of both the design of the vehicular access to the land, and the nature, volume or frequency of vehicles using the classified road to gain access to the land.

110 It is this fourth reason, with which I agree, which leads me to find that I am unable to be satisfied that the safety, efficiency and ongoing operation of the classified road will not be adversely affected by the development as a result of the design of the vehicular access or the nature, volume or frequency of vehicles using Lane Cove Road or the M2 Motorway and as such I must not grant consent to the development. I now give my reasons.



In evidence at Ex R2.2 are title searches for lots 19, 23 and 24 in DP 883750 and Tollway declaration and Plan numbered 6002 031 SP 0004 together with Ex R2.4 being an aerial photograph with the Tollway Boundary marked in purple outline. The Second Respondent helpfully provided in written submissions an extract from SIX Maps showing the overlay of part of the boundary lines of the individual lots 19, 23 and 24 in DP 883750 on an aerial photograph of the intersection with Fontenoy Road and the vehicular access to the Site and the current signalised pedestrian crossing which the parties and their experts traversed with the Court during the on-site view. The SIX maps image is consistent with Ex R2.4 "Tollway Boundary". I reproduce the SIX Maps extract below at Fig 7 and the Tollway Boundary at Fig 8.



*Fig 7: Plan 3 from R2 Written Submissions showing lots 19, 23 and 24 in DP 883750 owned by TfNSW and being part of the M2 Tollway*



Tollway Boundary - purple boundary

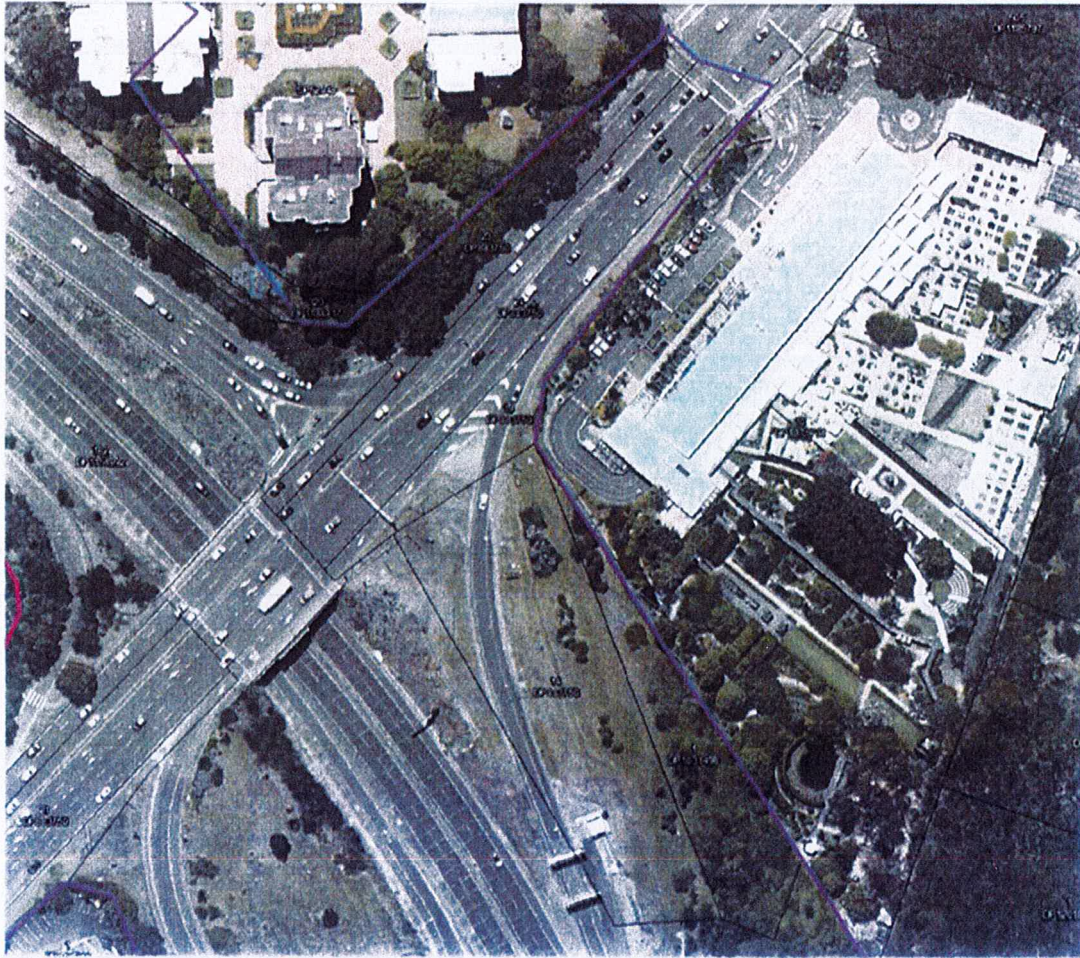


Fig 8: Tollway Boundary (marked in purple) (Ex R2.4)

111 The First Respondent's contention 6 is as follows:

"The development has a frontage to a regionally significant road corridor and results in adverse traffic impacts to the road network and surrounding local roads as a result of the traffic generated."

112 The Second Respondent contends at 1 (R2 ASOFAC):

"Contention 1: Adverse Impact on traffic safety, efficiency and ongoing operation of classified road

1. The Amended Development Application must be refused because the Court could not be satisfied on the basis of the Applicant's traffic impact assessment that the safety, efficiency and ongoing operation of Lane Cove Road being a classified road 10 (MR162), and M2 Motorway, being a tollway, will not be

adversely affected for the purposes of s 2.119(2) of the TI SEPP and s 4.15(1) of the EPA Act.”

113 The Second Respondent contends at contention 3 (R2 ASOFAC):

“Contention 3: Uncertainty due to inadequate information as to assessment and mitigation of impacts on classified roads

3. The Amended Development Application should be refused because there is uncertainty as it provides inadequate information as to the Proposal's impacts on the safety, ongoing efficiency and operation of classified roads, being Lane Cove Road and M2 Motorway, and as to the effective mitigation of those impacts, in particular the pedestrian bridge which TfNSW understands is proposed to be constructed pursuant to a future development application by the Applicant.”

114 I come back to uncertainty and contention 3 at [133].

115 The legal framework regarding roads was given some attention because of the role of the Second Respondent and the jurisdiction of the Court. Firstly, the M2 Tollway is owned by TfNSW in its own right, that is, not as a roads authority of a public road under ss 7 and 145 of the *Roads Act 1993*.

116 A Tollway is a classified road, but not a public road, s 52(2), *Roads Act 1993*. It is classified as a freeway and declared as Freeway No. 6002 under the *Roads Act 1993*, is declared as a tollway under s 52 of the *Roads Act 1993* and identified as a privately operated tollway in the Schedule of Classified Roads and Unclassified Regional Roads, prepared and published by TfNSW pursuant to s 163 of the *Roads Act* and last updated on February 2023 (R2 ASOFAC pg 3) (operated by Transurban until 2048 – R2 written submissions, par 16)

117 The Proposed Development is not integrated development s 8.14(3), EPA Act.

118 Consent is not sought for road works pursuant to s 138 of the *Roads Act 1993*, where only TfNSW may provide such consent (or concurrence), if it were to be sought, over the classified road (Lane Cove Road) and the M2 Tollway. Accordingly, s 39 of the LEC Act has no role to play in relation to these proceedings, because the Court can only stand in the shoes of the Council.



- 119 Two decisions relied on by the Second Respondent to support the explanation of the legal framework and the jurisdiction of the Court generally and specifically in these proceedings. The first decision is *Captive Vision Pty Ltd v Ku-ring-gai Council (No 3)* [2019] NSWLEC 1472 where Dixon SC at [76] says as follows:

“On appeal, I have the functions of the Council (the original decision maker) and those available to me under s 39 of the LEC Act. While I accept that the Court has wide powers on appeal including in respect of the particular subject matter of the appeal, in this instance, these powers do not extend to the grant of the s138 consent. The application for that consent is simply not the application in respect of which the Court may dispense with concurrence. The Court’s jurisdiction is either enlivened or not: there can be no relevant concept of “sufficient engagement”. The precondition in the DA is not satisfied and therefore the construction certificate cannot issue. The term “sufficiently engaged” referred to by Captive is an unusual phrase. It appears to be something short of power but sufficient to empower me to dispense with concurrence and issue the s138 consent. While different facts bring about different outcomes under SEPP 64 (depending on the size of the sign and its proximity to a classified road,) these matters are not relevant to my determination of this appeal or to a different reading of the text of s 39(6). In short, I do not accept, as Captive submits that s 39(6) is “sufficiently engaged” to enable this Court to issue both the s138 consent and the construction certificate (which depends upon it) without the concurrence of the RMS.”

- 120 The second decision is *Australian Leisure and Hospitality Group Pty Ltd v Manly Council (No 4)* [2009] NSWLEC 226.

- 121 I accept that this is the legal framework applicable to these classified roads and to any works proposed on them.

*Is there an adverse impact on the safety efficiency and ongoing operation of Lane Cove Road and M2 Motorway? s 2.119(2) Transport and Infrastructure SEPP (R2 Contention 1 and R1 Contention 6)*

- 122 The Applicant refers to the objective of s 2.119 of the Transport and Infrastructure SEPP which is:

“to ensure that new development does not compromise **the effective and ongoing operation and function** of classified roads.” (bold added)

- 123 Transport and Infrastructure SEPP s 2.119 provides as follows [emphasis added]:

“2.119 Development with frontage to classified road

(1) The objectives of this section are—

(a) to ensure that new development does not compromise the effective and ongoing operation and function of classified roads, and

(b) to prevent or reduce the potential impact of traffic noise and vehicle emission on development adjacent to classified roads.

(2) The consent authority must not grant consent to development on land that has a frontage to a classified road unless it is satisfied that—

(a) where practicable and safe, vehicular access to the land is provided by a road other than the classified road, and

(b) ***the safety, efficiency and ongoing operation of the classified road will not be adversely affected by the development as a result of—***

(i) ***the design of the vehicular access to the land, or***

(ii) the emission of smoke or dust from the development, or

(iii) ***the nature, volume or frequency of vehicles using the classified road to gain access to the land, and***

(c) the development is of a type that is not sensitive to traffic noise or vehicle emissions, or is appropriately located and designed, or includes measures, to ameliorate potential traffic noise or vehicle emissions within the site of the development arising from the adjacent classified road.”

124 The Applicant accurately summarised as follows:

“It is plain that it is not practicable to provide vehicle access by a road other than the classified road. No party to the proceedings has contended otherwise. Therefore, no issue arises under section 2.119(2)(a). There is no suggestion that there would be any emission of smoke or dust from the development. Therefore, no issues raises under section 2.119(2)(b)(ii). The development is not sensitive to vehicle emissions (and in any event is appropriately located and designed in this respect). The development includes measures, to ameliorate potential traffic noise within the site of the development arising from the adjacent classified road, as per section 5, page 18, of the *Eden Gardens Redevelopment, 307 Lane Cove Road, Macquarie Park: Amended Noise Impact Assessment* at Annexure C of the joint acoustic expert report (Exhibit R1.10). Therefore, no issues arise under section 2.119(2)(c). No party to the proceedings has suggested otherwise.” Applicant written submissions p12 footnote 36.

125 Therefore, the jurisdictional prerequisite is limited to satisfying the terms of s 2.119(2)(b)(i) and (iii), namely the Court must be satisfied that the safety,

efficiency and ongoing operation of the classified road will not be adversely affected by the development as a result of the design of the vehicular access to the land or the nature, volume or frequency of vehicles using the classified road to gain access to the land.

- 126 In order to deal with the Second Respondent's contentions, it is necessary to determine what is the proposal, or put another way, for what does the Applicant seek consent in relation to vehicular access to the Site? To do that, it is necessary to understand that the traffic experts evaluated three options for works within, or associated with, Lane Cove Road, now properly understood to be the M2 Motorway. These were identified as options 1, 2 and 3 (JER Traffic and Parking, at [22], page 5 and at [62(d)], page 25 (Exhibit R1.11)). Options 1 and 3 do not involve the construction of a pedestrian bridge, while option 2 does involve such a construction.
- 127 The proposal for the pedestrian bridge (option 2) and the associated removal of the existing pedestrian crossing at the Lane Cove Road traffic lights is not preferred by the Applicant's traffic engineer, Mr Bitzios (JER Traffic and Parking at [28(c)], page 13). Mr Bitzios prefers option 1 (which retains the existing signalised pedestrian crossing) or, if option 1 is not ultimately acceptable to TfNSW, option 3 (which similarly retains the existing signalised crossing) (JER Traffic and Parking at [24(c)], page 6 and [62(d)], page 25). Mr Bitzios says that a two-lane right turn entry into the site is his preferred option (JER Traffic and Parking at [27(w)], page 13). The Applicant adopts Mr Bitzios' preferences, namely Option 1
- 128 Option 1, the preferred mitigation measure is described in Exhibit R1.11 and the Respondent notes in R2 subs pg 17 that it is modified to correct the misalignment in the original Option 1 such that a chevron line marking was added to the Eden Gardens site access driveway) as follows:
- (1) Two right hand turn lanes northbound along the M2 Motorway/Lane Cove Road (one 35 m and one 55 m, totalling 90m);

- (2) An additional short entry lane approximately 24m long on the Eden Gardens site access driveway; and
  - (3) A new right hand turn lane approximately 20m in length from Fontenoy Road into the M2 Motorway/Lane Cove Road
- 129 The Second Respondent notes that for the purposes of preparing Option 1, Option 2 and Option 3, as well as the associated modelling, Mr Bitzios did not rely on the Ground Floor Plan DA 105 Rev B in Ex A (Ex R1.11, p 5 at para 20(a)).
- 130 The Second Respondent submits that the proposed pedestrian bridge was the only mitigation measure that was considered, assessed and the subject of 'in principle' support by TfNSW (subject to express requirements being met). That is, the two options considered by the traffic experts in these proceedings have not been considered or assessed by TfNSW or other relevant stakeholders, including Transurban the operator of the M2 Motorway. (R2 Written Submissions, p10, para 42). In that regard, I note that Matthew McCarthy is the Second Respondent's traffic engineer expert and that he co-wrote the JER Traffic and Planning dated 12 February 2024 (Ex R1.11) and the Supplementary JER Traffic dated 28 February 2024 (Ex R1.19)
- 131 Ultimately, what Mr Bitzios' modelling of Option 1 shows is to be gleaned from Ex R1.19 pg 25 as summarised in R2 subs pg 19 as follows:
- (1) PM Peak at Lane Cove Road (N) i.e. southbound, approach with a through movement:
    - (a) An increased in delay from 16 seconds to 39 seconds representing an increase of approximately 150%; and
    - (b) An increase in queue from 314m to 485m representing an increase of more than 50%;

- (2) PM Peak at Lane Cove Road (S) i.e. northbound, approach with a through movement, a reduction in arrival flow from 3,017 vehicles to 2,669 vehicles representing a reduction of approximately 11.53% (which increases the duration of peak hour); and
- (3) PM Peak overall average vehicle delay increase from 13 seconds to 28 seconds representing an increase of 115%

132 During cross examination Mr Bitzios concedes that “there are “many uncertainties” with respect to the design of the mitigation works including with respect to the design of vehicular access to the Site, the multiple mitigation measure (ie Option 1, Option 2, Option 3 and other possible options), the setback to the right hand turn movement from Fontenoy Road and the change in pedestrian crossing time. The Respondent submits that this concession is consistent with that made in the JER Traffic (Ex R1.19) to the effect that there remains “a considerable number of uncertainties in the inputs necessary to define a precise, preferred intersection design”. (JER Traffic, Ex R1.19, p 7 at par 30)

133 It is this uncertainty which the Second Respondent contends (at contention 3) should lead to refusal of the Proposed Development by asking the question whether there is adequate information or is there an element of uncertainty in relation to the impact of the Proposed Development on the classified road (Contention 3 R2 ASOFAC)

134 The concern as contended by the Second Respondent is one of uncertainty due to inadequate information as to assessment and mitigation of impacts on classified roads “in particular the pedestrian bridge which TfNSW understands is proposed to be constructed pursuant to a future development application by the Applicant”.

135 In response the Applicant says that there is, or will be, sufficient information regarding the impacts of the Proposed Development on classified roads to allow determination by the grant of development consent. The Proposed



Development does not include any works that would alter the currently acceptable pedestrian access arrangements and the Applicant submits that approval of the development does not necessarily mean that there will ultimately need to be a material change to the current pedestrian access arrangements. The Applicant submits at pg 10 par 53 in written submissions that the Court should be satisfied that the development does not propose, or require, any material adverse change to the pedestrian access to the Site. I accept that pedestrian access may not be adversely affected by the Proposed Development however, that is not the question the Court is tasked with. It is vehicular access to the Site and the flow of traffic which is determinative.

- 136 As to uncertainty of the off site works on the classified road, the Applicant submits that:

"It may be accepted that some reconfiguration of Lane Cove Road (actually M2 Motorway) will be required. However, the nature and precise location of such works remain unknown. Three options have been considered in the evidence in the current proceedings. Ultimately, the final selection of an option will be a matter for TfNSW" (Applicant written submissions pg 10 at par 52)

- 137 The Applicant submits, in closing, that the current plans before the Court are at Ex A which include the pedestrian bridge:

"however, if it's the case that on mature reflection with the benefit of an appreciation of the work done by Mr Bitzios a view is formed that the bridge is not necessary at all then there is an exhibit that reflects the evidence. The exhibit number is exhibit G is the architectural sheets. I think there's four sheets that would replace the similar sheets in exhibit A that take the bridge away from the subject site and otherwise embellish that land instead of having a bridge would have a landscaped area." (Transcript 1 March 2024, pg 9 at 43)

- 138 The Applicant goes on in closing to clarify that the 3 options are not mutually exclusive and explains as follows:

"What I mean by that is it may well be the case that ultimately there is a requirement by Transport for New South Wales for a bridge, and for option 1 or option 3, or part of option 1, or part of option 3. They are expressed as options. In their form they look like they're mutually exclusive, but there's no reason why in the result there can't be a bridge, and there can't also be elements of option 3. The best example of that is of course that in the correspondence that I will take you to in a moment from Transport in relation to the bridge option there was expressed to be a condition of the in principle

approval that the right turn bay in Lane Cove Road turning into the site heading north be extended from its current 30 metres to 80 metres. I will take you to that in a moment. Mr Bitzios's formulation of option 3 has a 70 metre lane. It may well be that there's a variation in there, either 70 or 80, so that's another two cars.

Mr Bitzios's option 3 of course had works in Fontenoy Road that were not previously the subject of necessary discussion between Transport and the applicant. But there may well be the case that the debate that was had before this Court in relation to the pedestrians, for example, crossing Lane Cove Road pressing the button, whether it's 2 seconds, 9 seconds, or whatever, is sought to be addressed in order to provide for additional intersection capacity by Transport for New South Wales by the provision of the bridge. It is a sledgehammer that cracks a nut in the sense of it's a significant piece of infrastructure to accommodate pedestrian crossing, but ultimately if that is something that Transport requires, and may I say officially, that is not in this appeal but officially for the purposes of the development application, so far it has required the bridge as we understand it, and my client is aware of that. My client will have to build it if there's to be reliance upon any grant of consent in relation to the subject site.

It may well be as I said that there's a combination of more than one option, that is the options that Mr Bitzios has presented and or the option that we have described as the pedestrian bridge, and that would mean, pausing of course on that part of the written submissions that's concerned with further development consent for a small part of the site, that there may yet need to be an alteration to the sort of evidence that you see in exhibit G to accommodate potentially the bridge and potentially a wider throat into the site and from the site as is reflected in exhibit G." (Transcript 1 March 2024, pg 10)

- 139 I find that it is sufficiently certain that some reconfiguration works to the M2 Motorway will be necessary for the Proposed Development. There are other elements of uncertainty that are not sufficiently resolved and I return to this question below when I consider the Applicant's proposed condition 60A and whether there has been sufficient and appropriate consideration of the off site impacts when I look at the traffic modelling from [149]. These considerations all assist in reaching the same conclusion as to the lack of satisfaction of the jurisdictional prerequisite.
- 140 One element of uncertainty is which option should be adopted, if any, or any combination of them, for the reconfiguration of the M2 Motorway as identified above. The other element of uncertainty is the prior traffic modelling and whether the in principle approval from TfNSW remains reliable, although this too might be a red herring for the purpose of these proceedings.

141 The Second Respondent relies on a number of decisions regarding certainty which I now consider.

142 The first is *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2010] NSWLEC 242 per Biscoe J which was appealed to the Court of Appeal, *Hoxton Park Residents Action Group Inc v Liverpool City Council* [2011] NSWCA 349 per Giles JA, Basten JA and Macfarlan JA at [44] and [46] in response to the third issue, Council's obligation to consider impact of bridge:

"44. The resolution of this issue turns on the scope of the phrase "the likely impacts of that development" in s 79C(1)(b). The impact must be one flowing from the development the subject of the development application: the question is how remote a "likely" impact must be, in order to disqualify it from the scope of the consideration. This requires an evaluative judgment which will often not involve any bright-line boundary. An antecedent question may, therefore, be, who is to determine the point at which a particular impact is too remote to demand consideration? That question was not addressed in the submissions of this Court, it being assumed that it was a matter for the courts to answer. In the language of administrative law, whether a particular impact was required to be taken into account or not was a jurisdictional fact. On one approach, the issue can be avoided by accepting the common approach of the parties."

...

46. Once it is accepted that the primary judge was entitled to consider for himself whether the bridge was "likely" to be constructed as a consequence of approving the development application, and once the challenge to that decision is rejected, the respondents must show some implied restriction on the remoteness of the chain of likely consequences. Some such limitation must follow from the concept of "impact": as remoteness from the development increases, impact is likely to decrease, until it no longer has practical significance in terms of approving or refusing to approve the application. Further, the likelihood of a particular impact may diminish with remoteness. "Likely" in this context has the meaning of a "real chance or possibility" rather than more probable than not: *Randwick Municipal Council v Crawley* (1986) 60 LGRA 277 at 279-281; *Drummoyne Municipal Council v Maritime Services Board* (1991) 72 LGRA 186 at 193."

...

53. The submission that these cases are distinguishable, in the sense that they involve different issues, may be accepted. However, they illustrate a common underlying principle, namely that the same environmental impacts of a development may need to be considered separately in the exercise of separate powers. Once it is found that a particular activity is a likely impact of the development for which approval is sought, the impacts flowing from that activity can only be excluded from consideration in respect of the development application if one reads into the language of s 79C(1)(b) an exclusion of environmental impacts which have been or are likely to be considered in relation to a separate development application required for that activity.

...

56. First, it is not necessary to imply the proposed limitation into the text of s 79C in order to give effect to the purpose of the EP&A Act; indeed, such an implication may be contrary to the stated objects of the Act. Secondly, it is by no means clear that such an implication would, in the words of Spigelman CJ in *Young*, be a "text based" exercise. Thirdly, and consequently, it is not possible to say with certainty that the legislature would have adopted this approach if its attention had been drawn to the present situation. Accordingly, the respondents' contention must be rejected. The conclusion reached by the primary judge was correct.

- 143 Secondly, the Second Respondent relies on the Court's findings in *Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41 per Preston CJ where his Honour observed that the likely impacts of the development (s 4.15(1)(b), EPA Act) includes both onsite and offsite impacts and the critical factor is that there is a connection between the likely impact and the proposed development (at [7]) – the DA did not seek consent for the works in the North Creek Road reserve to provide access to and service the proposed development and road upgrade works were required to provide safe and efficient traffic movement to and from the proposed seniors housing development (at [9]). The commissioner at first instance did not consider the impacts and granted a deferred commencement conditions of consent requiring a separate application and approval for those works. Preston at [30], [31] and [38]:

"30. I find that the Commissioner did err on questions of law in her consideration of the likely impacts of the proposed development. The Commissioner was required to make an evaluative judgment as to whether the likely impacts of the road, civil and infrastructure works required to be undertaken in the North Creek Road reserve were likely impacts of the proposed development, and if so, to take those impacts into consideration in determining the development application for the proposed development. The Commissioner did not take those impacts into consideration, not because she formed the opinion that the impacts were too remote, but for other reasons that involved error.

31. The Commissioner did not consider the impacts of the road, civil and infrastructure works in the North Creek Road reserve were too remote from the proposed development. To the contrary, the Commissioner found that the road access from the North Creek Road to the proposed development was "a fundamental element of the development", that was necessary "to provide safe and efficient traffic movement to and from the development". The Commissioner considered the nexus of the works to the proposed development was so inextricable that she imposed a deferred commencement condition of consent requiring the approval of the works prior to the consent operating and hence the proposed development being able to be carried out. The Commissioner must therefore be taken to have determined that the works in

North Creek Road were inextricably involved with the proposed development and that the likely impacts of the work had a real and sufficient connection with the proposed development.

...

38. In the present case, the Commissioner did not have an understanding of the likely impacts of the road, civil and infrastructure works in the North Creek Road reserve or undertake an evaluation of the relevant matter of the likely impacts of the proposed development with that understanding. The Commissioner instead deferred for later consideration "a complete environmental assessment of all works proposed in the North Creek Road" by granting consent subject to a deferred commencement condition under s 4.16(3) of the EPA Act. The Commissioner thereby failed to take into consideration a mandatory relevant matter."

- 144 The Second Respondent submits that the impacts on the classified road directly flows from the Proposed Development and that it is not remote. Mr Bitzios concedes that the impacts of the Proposed Development on the classified road must be mitigated, saying that there was no point even modelling the unmitigated impacts because the roads are already at capacity.
- 145 The Second Respondent expressly contends further that there is insufficient information to assess the likely impacts of the Proposed Development on the classified roads resulting in uncertainty and that in any event, the Proposed Development will have an adverse impact on the M2 Motorway and Lane Cove Road.
- 146 I accept the Second Respondent's submission, and find, that the Court must have regard to the environmental impacts of the mitigation measures. The remaining questions is whether there is sufficient information before the Court, in respect of the mitigation measures, in order for the Court to undertake a proper assessment of the likely impacts of those measures. In turn then the Court is to either be satisfied, or not, as to whether the classified roads are adversely affected by the Proposed Development in the terms of s 2.119(2) of the Transport and Infrastructure SEPP.
- 147 I find that there is uncertainty regarding future approval for the options 1 and 3 mitigation measures for the reasons articulated by the Second Respondent (R2 subs p 30) as follows:



- (1) To the extent that mitigation measures are proposed on the M2 Motorway, the Applicant would require the consent of both TfNSW (as the land owner) and Transurban (as the owner of the M2 Motorway) for any work proposed on that land. The Applicant has no ability to provide land owner consent for the purpose of obtaining planning approval. As the M2 Motorway is not a public road, a consent under s 138 of the Roads Act would not be required.
- (2) To the extent that works are proposed on Lane Cove Road and Fontenoy Road, the Applicant would require the consent of the Council for any works proposed on that land. The Applicant would require a planning approval and s 138 of the *Roads Act 1993* approval which would require the concurrence of TfNSW.
- (3) The traffic signals work would require the approval of TfNSW under s 87 of the *Roads Act 1993*. Such approval is very unlikely in circumstances where the Proposed Development will have adverse affects on the classified road network even with the proposed modelled mitigation measures.
- (4) The likely impacts of the mitigation measures cannot be the subject of a deferred commencement condition as such a condition would not be valid having regard to the findings of the Court in *Palm Lakes*. In that regard, I note that the Applicant's draft condition 60A is an operative condition which I consider further below.
- (5) The Applicant's invitation for the Court to accept the proposition that the Court is not required to consider the likely impacts of the mitigation measures because there are options, the options are presently uncertain and the option(s) will ultimately be the subject of an environmental assessment process should be rejected. If the Applicant's position were accepted by the Court, it would enable developers to simply proffer possible mitigation measures at the development application stage without being required to properly satisfy the Court that the terms of

s 2.119(2) of the Transport and Infrastructure SEPP have been satisfied. I accept that in these proceedings the works that will be ultimately required to the intersection are more complex factually and within a more complex legal framework for the Applicant to be able to rely on establishing a feasible outcome. However, in any event, I am not satisfied that any of the outcomes, or options, satisfy the jurisdictional prerequisite because of the adverse affect on the classified road.

148 It is not sufficient, as Mr Bitzios expresses, to have various degrees of satisfaction. The various decisions of the Court confirm that the Court must be satisfied and if not, consent must be refused. I have referred to the following:

(1) *Modern Motels Pty Limited v Fairfield City Council* [2013] NSWLEC 138 Preston CJ at [27]-[33].

(2) *Chahda v Liverpool City Council* [2018] NSWLEC 1371, Dixon SC at [35]:

“The clause does not contemplate varying degrees of satisfaction, it invites satisfaction or not and an assessment by a traffic expert that “the impact will not be significant” does not allow me to have the requisite satisfaction as required by cl101(2)(b)(i) and (iii).”

(3) *PC Infrastructure Pty Ltd v Wentworth Shire Council* [2024] NSWLEC 1139 is a decision I handed down on 26 March 2024 (heard over 4 days in September and October 2023. That matter, similarly, presented some uncertainties regarding the impact on a classified road and I looked at the previous decisions of *Modern Motels* and *Chahda* in determining the satisfaction, or otherwise, of the jurisdictional prerequisite of the terms of s 2.119 of the Transport and Infrastructure SEPP.

149 I find that the evidence before the Court does not sufficiently assist the Court and I now at the evidence before the court and the traffic modelling presented by the Applicant.

150 The Second Respondent submits that the Applicant, and the Court, cannot rely on the prior in principle approval from TfNSW because it was given on different metrics.

151 The in-principle approval was based on the Colston Budd Assessment and all experts agree that the Colston Budd assessment is not reliable (JER Ex R1.11 at paras [7] to [8]). However, the new metrics provided by Mr Bitzios are more conservative and that it may be arguable that these are sufficient to rely on the in-principle approval. However, it is not just the metrics but also the nature and extent of the works required to the intersection. The Second Respondent submits that in cross examination Mr Bitzios accepted that (R2 subs pag 21):

“TfNSW gave its in-principle support to proposed pedestrian bridge with an extension to the existing right hand turn lane from Lane Cove Road into the Site from 30m to 80m. Option 2 is different from the proposal which received TfNSW’s in-principle support because Option 2 does not provide for any extension of the right hand turn lane. Further, such support relied on the assessments of Colston Budd Rogers (Ex KK, Technical Note dated 1 June 2022, paras 13 and 15, and Annexure B, and Updated Assessment dated 29 May 2023, Table 2) which showed that the Proposed Development would increase traffic generation in the AM Peak and the PM Peak by around 197-243 car trips whereas Mr Bitzios’ assessment (Ex R.11 at par 70) has an increase to 408-454 car trips representing a doubling of traffic generation.”

152 The Applicant proposes an operative condition of consent in the Applicant’s FASOFAC in Reply at [45(g)] (Exhibit LLL) and included at Condition 60A in Ex QQQ. The Applicant is proposing that the Court, by condition, prevent (Applicant written submissions pg 14 par 69):

- (1) the development from proceeding to the construction certificate stage, unless it has first obtained approval for the proposed reconfiguration works and the works meet pre-determined performance criteria; and
- (2) an occupation certificate being issued until those works are constructed to TfNSW’s satisfaction.

153 The First Respondent submits that the existence of the draft condition 60A confirms inability for the Court to be satisfied prior to the grant of consent. I find

that the evidence before the Court does not assist sufficiently to overcome the hurdle of s 2.119(2) of the Transport and Infrastructure SEPP.

154 The Applicant's Proposed Condition 60A provides as follows:

**"60A. Effective and ongoing operation and function of a classified roads.**

The objective of this condition is to ensure that the development does not compromise the effective and ongoing operation and function of any classified roads and that the safety, efficiency and ongoing operation of any classified roads will not be adversely affected by the development as a result of:

- the design of the vehicular access to the site, or
- the nature, volume or frequency of vehicles using the classified roads to gain access to the site.

Prior to the issue of a construction certificate the applicant must obtain all necessary consents, approvals and authorisations for works that achieve the objective of this condition, assessed in accordance with the following criteria:

ID	Outcome Type(s)	Criteria	Reasoning
1	Safety	Demonstrate that neither the left turn-in pocket from Lane Cove Road or the right turn-in pocket(s) from Lane Cove Road generate 95 <sup>th</sup> percentile queue lengths that exceed the storage capacity of their respective pockets in either peak period.	To ensure queues of development-destined traffic in turn pockets do not spill into the adjacent through traffic lanes on Lane Cove Road
2	Safety	Improving sightlines relative to the Base Case between vehicles turning left out of the site, vehicles turning right from Fontenoy Road and pedestrians crossing at any signalised crossing across the southern side of the intersection	To not increase the risk of collisions between left turn and right turning vehicles or between turning vehicles and pedestrians
3	Efficiency	The travel times on Lane Cove Road between Lady Game Drive and Waterloo Road when averaged over the AM and PM peak hours and in both	Accounts for the interactive effects of flows and intersection phase times through the intersections in this area.

		<p>directions of travel are no greater than 10% longer than the Base Case travel times</p> <p>Note: This is to be determined on the basis that development traffic would substitute for an equivalent volume of base traffic because the approach routes to the study area are at capacity in peak hours now. Not doing so would artificially over-estimate the volume of traffic that could reasonably enter the study area. The base traffic displaced through these calculations would be assumed to re-mode, re-time its departure or re-route accordingly.</p>	
4	Efficiency	Demonstrate that the Fontenoy Road approach to its intersection with Lane Cove Road and the M2 approach to its intersection with Lane Cove Road operate below a degree of saturation (DoS) of 1.0 in both peak hours.	Ensures that the at least the same volume of traffic clears these approaches in peak hours as in the Base Case with no residual queues in each phase.
5	Operations	Demonstrate that the sequence of traffic signal phases does not need to be changed	To ensure no new impacts on the coordination of traffic signals along Lane Cove Road
6	Operations	Demonstrate that an 18m bus can turn left from Lane Cove Road into Fontenoy Road and turn right from Fontenoy Road into Lane Cove Road with the same lane occupation as it does now.	To ensure no additional impacts of bus turns on traffic movements or on bus operations.

Plans and specifications for the above works must be prepared to the satisfaction of TfNSW.

Prior to the issue of an occupation certificate the applicant must carry out and complete the above works (at no cost to the Council or TfNSW). All measures approved to satisfy this condition must be installed and completed to the satisfaction of TfNSW prior to the issue of any occupation certificate.



Note: see also conditions 40B and 40C”

- 155 Conditions 40A, 40B and 40C referred to in the proposed condition 60A are conditions sought by TfNSW and agreed to by the Applicant. For completeness I reproduce them as follows:

“40A. Nothing in this consent authorises the carrying out of off site works to mitigate the traffic impacts of the development. Traffic Mitigation Works are required to be approved under a separate consent pursuant to Part 4 of the *Environmental Planning and Assessment Act 1979* prior to the carrying out of any development approved under this consent.

40B. Prior to the issue of any Construction Certificate (including a partial Construction Certificate), the applicant must at its own expense, do the following:

(a) Assess and design the necessary Traffic Mitigation Works to the satisfaction of TfNSW. Details of these requirements should be obtained by email to [developerworks.sydney@transport.nsw.gov.au](mailto:developerworks.sydney@transport.nsw.gov.au).

Detailed design plans of any proposed works within a road reserve, including Lane Cove Road, are to be submitted to TfNSW for approval prior to the issue of a construction certificate and commencement of any road works. Please send all documentation to [development.sydney@transport.nsw.gov.au](mailto:development.sydney@transport.nsw.gov.au).

A plan checking fee and lodgement of a performance bond is required from the applicant prior to the release of the approved road design plans by TfNSW.

(b) Enter into a Works Authorisation Deed (WAD) for the Traffic Mitigation Works (including any pedestrian bridge) to the satisfaction of TfNSW. TfNSW fees for administration, plan checking, civil works inspections and project management shall be paid by the developer prior to the commencement of works.

(c) Provide to TfNSW satisfaction a concept Traffic Control Signal Plan at the intersection Lane Cove Road/Fontenoy Road/Eden Gardens Access Road (TCS3446) dealing with the traffic generation of the development. The Traffic Control Signal (TCS) plans shall be drawn by a suitably qualified person and endorsed by a suitably qualified practitioner.

The submitted design shall be in accordance with Austroads Guide to Road Design in association with relevant TfNSW supplements. The certified copies of the TCS design and civil design plans shall be submitted to TfNSW for consideration and approval prior to the release of a Construction Certificate and commencement of road works. Please send all documentation to [development.sydney@transport.nsw.gov.au](mailto:development.sydney@transport.nsw.gov.au).

TfNSW fees for administration, plan checking, civil works inspections and project management shall be paid by the developer prior to the commencement of works.

(d) Obtain any owner's consent for any impacted properties, including any Traffic Mitigation Works proposed on the M2 Motorway.

(e) Obtain development consent for the necessary Traffic Mitigation Works, including a pedestrian bridge in accordance with Drawing No: DA105, Revision 2, dated 11/12/2023, prepared by DKO Architecture.

Note: see also condition 60A. (The Applicant accepts the above condition but also continues to press for its proposed condition 60A. These two condition should be read together. Hence the Applicant proposes this note.)

40C. Prior to the issue of any Occupation Certificate, the applicant must at its own expense, have constructed, completed and if required dedicated the Traffic Mitigation Works to the satisfaction of TfNSW.

(Reason: absent the above the development will have an adverse impact on the safety, efficiency and ongoing operation of the road network)

Note: see also condition 60A. (The Applicant accepts the above condition but also continues to press for its proposed condition 60A. These two condition should be read together. Hence the Applicant proposes this note.)"

- 156 The Applicant submits that Condition 60A "is known as a *Grampian* condition. The imposition of a *Grampian* condition, by itself, does not establish a real and sufficient link between the impacts of the carrying out of the development that is the subject of the *Grampian* condition (here, the works within Lane Cove Road) and the development for which consent was granted (here, the development on 307 Lane Cove Road) (see *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110 at [152]) where Preston CJ says as follows:

"The imposition of a *Grampian* condition, by itself, does not establish a real and sufficient link between the impacts of the carrying out of the development that is the subject of the *Grampian* condition (here, the gas transmission pipeline) and the development for which consent was granted (here, the Project)."

- 157 The Applicant submits at pg 14 as follows:

"The Court of Appeal specifically considered what is now known as section 4.17(4) in *Kindimindi Investments v Lane Cove Council* [2006] NSWCA 23. It

said that the provision's intent is to allow an initial level of uncertainty and lack of finality. The provision allows a condition to require a variation of a proposal where the intended result is sufficiently identified, but the means of achieving it are left to the proponent (at [57] and [59]). A court will not regard conditions as being impermissibly uncertain or imprecise if — although in general terms — the conditions identify the outer limits of what is being authorised (*GPT RE v Belmorgan Property Development* [2008] NSWCA 256 at [57]).

A development consent can allow a degree of practical flexibility or imprecision, the reason is that the relevant degree of flexibility or imprecision does not contravene any statutory limit on the power being exercised (*Kindimindi* at [55]).

However, the imposition of such a condition does not excuse the consent authority from its obligation to take into consideration the likely off-site impacts of a development caused by other development not the subject of a development application but that has a 'real and sufficient link' with the proposed development (*Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41 at [6]; *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2011) 81 NSWLR 638; [2011] NSWCA 349 at [44], per Basten; *Bell v Minister for Urban Affairs and Planning* (1997) 95 LGERA 86). Having said this, such consideration is only necessary where there is sufficient certainty as to 'what and where' the other development would be to allow the consent authority to 'be able to consider the likely impacts of that other development'. *Mullaley Gas and Pipeline Accord Inc v Santos NSW (Eastern) Pty Ltd* [2021] NSWLEC 110 at [147] where Preston CJ says as follows:

“In these circumstances, there was insufficient certainty as to what and where would be the other development to be able to consider the likely impacts of that other development. The likely impacts of the pipeline are location-dependent. Without knowing which pipeline is to be used to transport product gas from the Project, what is to be the route of the pipeline, and what are the natural and built environments along the route of the pipeline, it is not possible to assess the likely impacts of the pipeline on the natural and built environments.”

158 The Second Respondent submits that it is a self-serving condition that is not enforceable because “there is no certainty that any road works will be carried out by the Applicant at all. The proposed condition provides that the Applicant “must obtain all necessary consents, approvals and authorisations ... to achieve the objective of this condition.” If the Applicant does not ultimately propose to do any road works, then the Applicant will not need to obtain “all necessary” consents, approvals and authorisations because none would be required.” (R2 Written Submissions, p 32, para 113(e)).

159 The jurisprudence referred to above at [148] supports the position that deferred commencement conditions may be appropriate for merit assessment but they are not appropriate for satisfying jurisdictional prerequisites. Similarly, a

*Grampion* condition may be appropriate where there is sufficient certainty, however I am not satisfied that it is an appropriate solution in these circumstances where the nature of the works required at the intersection remains uncertain.

160 The Applicant refers the Court to the current Chief Judge's decision in *HP Subsidiary Pty Ltd v City of Parramatta Council* [2020] NSWLEC 135 (*HP Subsidiary*), Preston CJ at [104], [109]-[113]. The Applicant submits that this decision is about the provenance and power to impose a condition such as draft condition 60A, and respectfully adopts the analysis undertaken by the Chief Judge with adaption to a consent which is relative to the circumstances of this Site and this appeal.

161 I understand that *HP Subsidiary* deals with additional traffic management works such as traffic control devices (a No U-turn sign and a median island) and at [112] and [113] Preston CJ says the following:

“112. I agree with *HP Subsidiary* that it is not necessary to impose a deferred commencement condition and it will be sufficient to impose an operational condition of consent that the traffic control devices must be installed before an occupation certificate can be issued for the proposed development. This will ensure that there will be no resident-generated traffic from the development before the traffic control devices are operational to control such traffic.

113. Any risk associated with carrying out construction of the development before the traffic control devices have been approved and installed, such as not being able to obtain or a delay in obtaining the necessary authorisation and approval of the traffic control devices, will be borne by *HP Subsidiary*. It must decide if it is inclined to or can afford to take that risk. If it does not wish to take the risk, it can defer commencement of construction of the development until it has obtained the necessary authorisation and approval of the traffic control devices.”

162 There are circumstances where adopting the *HP Subsidiary* approach can be satisfactory. When all merit matters are assessed and jurisdictional prerequisites are satisfied, it may be appropriate to grant consent with an operative condition while noting that any risk associated will be borne by the Applicant. This is not one of those circumstances because the extent and type of works required are much more complex than the installation of traffic control

devices, the extent of the works remains uncertain and the various options of what those works might be all result in an adverse impact on the classified road.

- 163 The Applicant's proposed condition 60A replicates the objectives set out in s 2.119(1)(a) and the requirement in subs (2)(b). The First Respondent submits that:

"These are matters for the Court to determine prior to the grant of consent.

The existence of the draft condition 60A confirms the current inability for the Court to be satisfied prior to the grant of consent."

- 164 I have considered all the evidence regarding off site impacts of the Proposed Development, and in relation to the affects by the proposed design of the vehicular access to the Site, and the nature, volume or frequency of vehicles using the classified roads to gain access to the land, I am satisfied that the safety, efficiency and ongoing operation of the classified roads will be adversely affected. In conclusion, the proposed condition 60A is not appropriate for want of certainty and for want of satisfaction of the jurisdictional prerequisite.

*Public interest and Site suitability, s 4.15(1)(d) and (e) of the EPA Act (R2 Contention 2)*

- 165 I accept the Applicant's submission that the design of the Proposed Development with the tower office building is in the public interest for the reasons articulated by Mr O'Grady at [76] and [79] however, the Second Respondent's contention is focused on the site suitability (s 4.15(1)(c) of the EPA Act) in the context of the Site's frontage onto the classified roads.
- 166 I find that the Site could be made suitable for the Proposed Development but only upon satisfaction of the terms of s 2.119(2) of the Transport and Infrastructure SEPP.

## **Findings and Conclusions**

- 167 I find that the evidence before the Court does not support the First Respondent's merit contentions that the design of the Proposed Development



results in significant unacceptable and environmental impacts. I conclude that the merit contention as to whether the visual impact of the Proposed Development is acceptable does not warrant refusal of the development application because:

- (1) The visual impact on the LCNP, in particular, Tunks Hill Picnic Area, is acceptable for the reasons given by Mr O'Grady and to some extent supported by Ms Maze-Riley; and
- (2) The visual impact from the public domain, namely the M2 Motorway and Lane Cove Road, is acceptable for the reasons given by Mr O'Grady and to some extent supported by Ms Maze-Riley.

168 I conclude that I am not satisfied that the jurisdictional precondition in the terms of s 2.119(2)(b)(i) and (iii) of the Transport and Infrastructure SEPP is achieved because the evidence is that the volume of traffic will have an adverse impact on the safety, efficiency and ongoing operation of the M2 Motorway and Lane Cove Road. Further, I am not satisfied that the design of the vehicular access to the land is sufficiently certain in order to achieve the requisite state of satisfaction that the adverse effect resulting from the nature, volume or frequency of vehicles using the classified road to gain access to the Site will be mitigated in order to result in no adverse effect.

169 For these reason I conclude that development consent cannot be granted for want of power to do so.

**Orders:**

170 The Court orders:

- (1) Pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the applicant is to pay the costs of the respondent that have been thrown away as a result of the amendment of the application as agreed or assessed.

- (2) The appeal is dismissed.
- (3) Development consent is refused to development application LDA2021/0095 lodged on 30 March 2021 for alterations and additions to the existing garden centre and construction of an 18 storey office building including a multi-level car park and additional dining space at 307 Lane Cove Road, Macquarie Park, legally described as Lot 10 in DP 1071734.
- (4) All exhibits are retained.

I certify that this and the preceding [70] pages are a true copy of my reasons for judgment.



**E Espinosa**

**Commissioner of the Court**

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