



Land and Environment Court
New South Wales

Case Name: Warriewood Developers Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2024] NSWLEC 1321

Hearing Date(s): 21-22 March 2024

Date of Orders: 14 June 2024

Decision Date: 14 June 2024

Jurisdiction: Class 1

Before: Washington AC

Decision: The Court orders:
(1) The appeal is upheld.
(2) Development application DA2021/2600 for the subdivision of land into twelve (12) lots, supporting civil engineering works, biodiversity management of riparian/wetland areas and the construction of two (2) residential flat buildings on land legally described as Lot 2 in DP 972209, Lot 2 in DP 349085 and Lot 1 in DP 349085, known as 43, 45 and 49 Warriewood Road, Warriewood is determined by the grant of consent, subject to the conditions at Annexure A.
(3) The applicant is to pay the respondent's costs thrown away pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, as agreed or assessed.
(4) All exhibits are returned except for A, B, C and 3, 4 and 6.

Catchwords: DEVELOPMENT APPLICATION – subdivision – creek line works – construction of residential flat buildings – appeal upheld

Legislation Cited: Biodiversity Conservation Act 2016, s 7.2
Environmental Planning and Assessment Act 1979, ss

1.3, 4.15, 4.47, 8.7, 8.14, 10.3
Land and Environment Court Act 1979, s 39
Water Management Act 2000, s 91
Rural Fires Act 1997, s 100B

Biodiversity Conservation Regulation 2017, ss 7.1-7.3
Pittwater Local Environmental Plan 2014, cl 4.3, 4.6,
5.21, 6.1, 7.1, 7.2, 7.6, 7.10
State Environmental Planning Policy (Planning
Systems) 2001, s 2.19, Sch 6 s 3,
State Environmental Planning Policy (Resilience and
Hazards) 2021, ss 2.7, 2.8
State Environmental Planning Policy 65 – Design
Quality of Residential Apartment Development, Pt 2

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal
Council (2018) 236 LGERA 256; [2018] NSWLEC 118
Wehbe v Pittwater Council (2007) 156 LGERA 446;
[2007] NSWLEC 827

Texts Cited: Apartment Design Guide 2015
Biodiversity Assessment Method 2020
Pittwater 21 Development Control Plan
Planning for Bush Fire Protection 2019
Warriewood Valley Roads Masterplan 2018

Category: Principal judgment

Parties: Warriewood Developers Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
M Staunton (Applicant)
S Patterson (Solicitor) (Respondent)

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File Number(s): 2023/96634

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** The applicant, Warriewood Developers Pty Ltd, has requested development consent for the Torrens Title subdivision of the land at 43-49 Warriewood Road, Warriewood into thirteen (13) lots, and the construction of two residential flat buildings, associated civil works and landscaping works. Northern Beaches Council, the respondent, has refused the relevant Development Application DA2021/2600 and it is from this actual refusal that these Class 1 proceedings have been brought to the Court, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 2 This matter was listed for a hearing on 21 and 22 March 2024 and commenced on site. At the commencement of proceedings, we heard from five objectors who raised issues of traffic, overshadowing, privacy, and the suitability of the development type. These issues broadly reflect the concerns raised in the 22 written submissions made in response to the initial development application, and the 21 additional submissions made in response to the amended application. There was some overlap between the objectors' issues and Councils contentions as identified in the Statement of Facts and Contentions (SOFAC) (Ex 1) at contentions: 1, Height; 2, Unacceptable design of residential flat buildings, and; 6, Unsuitable access arrangements.
- 3 At the commencement of proceedings in Court, leave was granted for the applicant to rely on a suite of amended documents that resulted from the expert witness joint reporting process. The proposed development, as amended, is for the subdivision of the land into twelve (12) lots, and the construction of two residential flat buildings with basement parking on one of those lots. This lot also incorporates the outer creekline corridor and adjacent land, which will facilitate the stormwater works, Endangered Ecological Community (EEC) restoration area, and a shared path. The remaining lots are proposed as Torrens title residential allotments that will not be developed as part of this application. The application also includes the construction of an extension to Lorikeet Grove, associated civil works, earthworks, tree removal and landscaping works.

- 4 As a result of those amendments and the expert evidence, the Council submits that the development is now acceptable subject to the agreed draft conditions of consent and consideration of the issues raised by objectors.
- 5 For the following reasons, I find that the development is acceptable on merit, and there are no relevant planning grounds or matter of jurisdiction to warrant refusal of this development application.

The site and locality

- 6 By way of background, the site is located at 43-49 Warriewood Road, Warriewood, legally described as Lot 2 in DP 972209, Lot 2 in DP 349085 and Lot 1 in DP 349085. It has an area of 22,187m², with frontage to Warriewood Road to the north-east and Narrabeen Creek to the south-west.
- 7 While the north-eastern portion of the site has been largely cleared of native vegetation and now consists of exotic vegetation and grass surrounding dilapidated dwelling houses, the portion of the site that is adjacent to Narrabeen Creek contains remnant bushland, including an EEC of *Swamp Sclerophyll Forest on Coastal Floodplains*. This portion is also mapped as bushfire-prone land (Category 2 Vegetation and Vegetation Buffer) on the Bushfire Prone Land Map pursuant to s 10.3 of the EPA Act. A relatively shallow sewer line traverses the north-east of the site, roughly parallel to Warriewood Road, and was observed at the site view as partially exposed.
- 8 The site is flood prone due to flooding from the creek, with the hazard level decreasing from High Hazard to Medium and then Low Hazard as the site slopes up, away from the creek, towards Warriewood Road (Ex 1).
- 9 Development surrounding the site is largely residential of varying density, scale, age, and style. The area is undergoing extensive change due to its designation within cl 6.1 as the 'Warriewood Valley Release Area' as per the Urban Release Area Map of the Pittwater Local Environmental Plan 2014 (PLEP).

The relevant planning context

- 10 The proposed development is a:

- (1) Designated development pursuant to s 2.7 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP R&H), as the land is identified as containing coastal wetlands on the Coastal Wetlands and Littoral Rainforests Area Map of this SEPP,
 - (2) Nominated integrated development, requiring approval from the Natural Resources Access Regulator pursuant to s 91 of the *Water Management Act 2000*,
 - (3) Integrated development, requiring approval from the NSW Rural Fire Services pursuant to s 100B of the *Rural Fires Act 1997*, and
 - (4) Regionally significant development pursuant to s 2.19 and Sch 6 s 3(b) of the *State Environmental Planning Policy (Planning Systems) 2001*.
- 11 Accordingly, an Environmental Impact Statement (EIS) has been prepared by Creative Planning Solutions Pty Limited dated August 2021.
- 12 The site is zoned R3 Medium Density Residential under the PLEP, within which development for the purposes of multi-dwelling houses is permissible with consent. Within the Warriewood Valley Release Area, No 43 lies within Buffer Area 1h, No 45 within Buffer Area 1g, and No 49 within Buffer Area 1f as per the Urban Release Area Map of the PLEP cl 6.1.
- 13 The objectives of the R3 zone are:
- To provide for the housing needs of the community within a medium density residential environment.
 - To provide a variety of housing types within a medium density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To provide for a limited range of other land uses of a low intensity and scale, compatible with surrounding land uses.
- 14 With a combination of residential flats and single dwellings, as well as open space, vegetation management, stormwater works and local road construction, I am satisfied that the proposed development meets these objectives.
- 15 PLEP cl 4.3 sets a maximum height of buildings development standard of 10.5m for the site, to which the development does not comply. A variation to this development standard is sought via a written request submitted pursuant to PLEP cl 4.6 and is discussed further below. The objectives of cl 4.3 are:
- (a) to ensure that any building, by virtue of its height and scale, is consistent with the desired character of the locality,

- (b) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
- (c) to minimise any overshadowing of neighbouring properties,
- (d) to allow for the reasonable sharing of views,
- (e) to encourage buildings that are designed to respond sensitively to the natural topography,
- (f) to minimise the adverse visual impact of development on the natural environment, heritage conservation areas and heritage items.

16 PLEP cl 5.21 provides for flood planning and includes a list of matters that must be considered in deciding whether to grant development consent. This clause also provides at 5.21(2) that development consent must not be granted to development on this land unless the consent authority is satisfied the development:

- (a) is compatible with the flood function and behaviour on the land, and
- (b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and
- (c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and
- (d) incorporates appropriate measures to manage risk to life in the event of a flood, and
- (e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.

17 PLEP cl 6.1 provides for the Warriewood Valley Release Area. Subcl (4) requires the consent authority to be satisfied that the proposed development will not have any significant adverse impact on any of the following:

- (a) opportunities for rehabilitation of aquatic and riparian vegetation, habitats and ecosystems within creek line corridors,
- (b) the water quality and flows within creek line corridors,
- (c) the stability of the bed, shore, and banks of any watercourse within creek line corridors.

18 PLEP cl 7.2 provides for development involving earthworks, and lists the following matters that must be considered by the consent authority:

- (a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,

- (b) the effect of the development on the likely future use or redevelopment of the land,
- (c) the quality of the fill or the soil to be excavated, or both,
- (d) the effect of the development on the existing and likely amenity of adjoining properties,
- (e) the source of any fill material and the destination of any excavated material,
- (f) the likelihood of disturbing relics,
- (g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,
- (h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development,
- (i) the proximity to and potential for adverse impacts on any heritage item, archaeological site or heritage conservation area.

19 PLEP cl 7.6 concerns biodiversity and provides a list of matters that must be considered by the consent authority. Further, this clause provides that development consent must not be granted unless the consent authority is satisfied that:

- (a) the development is designed, sited and will be managed to avoid any significant adverse environmental impact, or
- (b) if that impact cannot be reasonably avoided by adopting feasible alternatives—the development is designed, sited and will be managed to minimise that impact, or
- (c) if that impact cannot be minimised—the development will be managed to mitigate that impact.

20 PLEP cl 7.10 requires the consent authority to be satisfied that all essential services are available or, will be available when required.

21 The Pittwater 21 Development Control Plan (PDCP) applies to the site, and in accordance with EPA Act s 4.15 the relevant provisions are considered below.

22 The detailed siting and design of the residential apartment blocks is governed by the Apartment Design Guide (ADG) and the State Environmental Planning Policy 65 – Design Quality of Residential Apartment Development (SEPP 65). The provisions of both of these are considered below.

The expert evidence

23 In accordance with the Court's directions, expert evidence was prepared in the form of Joint Reports as follows:

- (1) A Joint Expert Engineering Report (Ex 4), covering matters of water, ecology and flooding, by
 - (a) Dr David Robertson (ecology expert), Dr David Cummings (aquatic ecology and water quality expert), Nathan Broadbent (civil engineering and stormwater expert) and Ben Caddis (flood management expert) for the applicant.
 - (b) Louise Collier for the respondent
- (2) A Joint Expert Town Planning Report (Ex 3), by
 - (a) Greg Boston for the applicant
 - (b) Adam Susko for the respondent
- (3) A single expert report regarding traffic and parking contentions, dated 21 December 2023 was provided by Oleg Sannikov (Ex B vol 2 tab 14), and a supplementary letter by the same author dated 20 March 2024 (Ex D). In oral evidence, Mr Sannikov provided expert evidence for the applicant and James Brocklebank gave expert evidence for the respondent.

The resolution of contentions between the parties

- 24 Let me first deal with those matters initially in contention between the parties and which the experts agree have been resolved by certain amendments to the application.
- 25 From the evidence before me, including the amended application, draft conditions of consent and expert evidence, I am satisfied that each of the contentions as listed in the SOFAC (Ex 1) are resolved, or may be resolved subject to the imposition of conditions of consent.
- 26 I will deal with each contention in turn, as set out in the SOFAC.

Contention 1 – Height

- 27 The overall height of the two proposed residential flat buildings remains in exceedance of the 10.5m height limit as set by PLEP cl 4.3.
- 28 At the northern building, the north-eastern end of the building is compliant in height, however as the land slopes down to the south-west the roof form breaches this height limit at various points by between 187mm (1.7%) and 2.266m (21.5%). The southern building also breaches the height limit to an increasing extent as the land slopes to the south-west, with the breach ranging from between 260mm (2.4%) and 1.838m (17.5%).

- 29 As a result of this exceedance, pursuant to cl 4.6(3) of the PLEP, the applicants have provided a written request to justify the contravention of the Height of Buildings development standard. This written request must demonstrate that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify the contravention. The applicant's written request was amended after the initial development application process and the document now before the Court is by Boston Blyth Fleming Town Planners, dated 4 March 2024 (Ex C tab 2).
- 30 To demonstrate that compliance with the development standard is unreasonable or unnecessary, the applicant applies the first test established in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827, that the objectives of the standard are met notwithstanding the contravention.
- 31 The town planning experts agree that the objectives of the standard, as set out above, are achieved in the following ways:
- (1) The proposed buildings are consistent with the desired character of the locality as it is consistent with the desired future character of the Warriewood Valley Release Area identified at cl A4.16 of the PDCP. The proposed residential development is supported by adequate infrastructure including roads and essential services. The height of the development is responsive to the topography and maintains a height below the tree canopy level. Significant native planting is included in the perimeter. The building design incorporates articulation and modulation to create compatible bulk and scale, with the upper levels set back from the edge to reduce the extent and impact of the height-breaching elements. The desired future character also requires the development to be designed to be safe from hazards and to that end, earthworks are utilised to elevate habitable floor levels to meet the required flood planning levels. This contributes to the breach of the height standard.
 - (2) The buildings will be compatible with the height and scale of surrounding and nearby development, as both buildings will read as a 3-storey building above surrounding ground level, noting that the fill required for flood planning matches the levels already established by the constructed portions of Lorikeet Grove. The levels and height achieved by the buildings are consistent with the adjacent residential flat buildings at 31 and 34 Warriewood Road, and as a result the proposed built form is sympathetic to the urban context and visually harmonious with surrounding and nearby development.
 - (3) The amended application includes shadow diagrams that demonstrate that, notwithstanding the breach of the height standard, compliant solar

access is maintained to all surrounding properties, and able to be achieved on future development lots on this site. Overshadowing has been minimised through the reduction in upper-level floor space at both end of each building.

- (4) Available public and private view lines have been inspected and the experts are satisfied that the breach of the development standard and the design of the buildings will not give rise to any unacceptable view loss.
 - (5) The buildings are designed to respond sensitively to the natural topography in that they respond to the slope of the land, but at the same time are elevated as a consequence of the flooding affectation of the site. This modification of the natural topography is minimised as much as possible.
 - (6) The proposed development will not adversely impact the natural environment due to appropriate civil and stormwater works and building design. Furthermore, the site is not listed as a heritage item or within a heritage conservation area.
- 32 The experts further agree that the proposed development is consistent with the objectives of the R3 Medium Density Residential zone, as listed above, irrespective of the breach of the development standard because it provides for the housing needs of the community and contributes to the provision of a variety of housing types within a medium density residential environment.
- 33 PLEP cl 4.6(3)(b) requires the written request to demonstrate sufficient environmental planning grounds to justify contravening the development standard. Importantly, “the focus of cl 4.6(3)(b) is on the aspect or element of the development that contravenes the development standard, not on the development as a whole, and why that contravention is justified on environmental planning grounds” (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [24]). The primary environmental planning grounds put forward are based on flooding and topography. The written request states that the rear (south-western) portion of the site requires filling to ensure that the habitable floor levels and proposed roadway are safe from flooding hazard. Were it not for this flooding affectation, the proposed 3-storey buildings could be readily designed to comply with the building height standard, although the irregular topography of the site does contribute to the extent of the breach. The applicant further submits in the written request that allowing for the building height breach in response to

flooding and topographical characteristics of the site promotes the orderly and economic development of the site, consistent with Objective 1.3(c) of the EPA Act.

34 Based on this written request, and pursuant to PLEP cl 4.6, I am satisfied that:

- (1) The written request demonstrates that compliance with the Height of Buildings development standard is unreasonable and unnecessary because the proposal complies with the relevant objectives of both the Zone R3 Medium Density Residential and the Height of Buildings development standard, notwithstanding the non-compliance. Further, the non-compliance does not result in any adverse impacts on the amenity of adjoining properties.
- (2) The written request establishes sufficient environmental planning grounds to justify contravening the development standard by demonstrating that the breach is the result of an appropriate response to flood planning requirements and topography, and does not result in a development that is incompatible with the surrounding character, or desired future character, of the area.
- (3) The written request further demonstrates that the proposal is in the public interest as it is consistent with the relevant objectives of both the zone and the development standard.
- (4) Finally, the parties submit that, by Planning Circular PS 20-002 dated 5 May 2022, the Secretary of the Department of Planning & Environment advised that consent authorities can assume the concurrence of the Planning Secretary to a cl 4.6 request except for (inter alia) variations exceeding 10%. The circular further provides that concurrence can be assumed when a Local Planning Panel (LPP) is the consent authority where a variation exceeds 10% because of the greater scrutiny of the LPP process compared with decisions made under delegation. This application was originally determined by the LPP. Section 39(2) of the *Land and Environment Court Act 1979* (LEC Act) allows the Court to stand in the shoes of the consent authority and, pursuant to the planning circular, assume the concurrence of the Secretary. Notwithstanding this, I am satisfied that the matters raised in PLEP cl 4.6(5) are addressed as the contravention does not raise any matter of significance for regional or state planning, and that the public interest is still served notwithstanding the breach of the development standard in this particular case.

Contention 2 – Unacceptable design of residential flat buildings

35 The town planning experts agree in Ex 3 that the amended architectural plans adequately respond to the Design Quality Principles of SEPP 65 pt 2, and the relevant requirements of the ADG, through building modifications including increased setbacks, reduced floor plates to the second floor, building

articulation and façade modulation, material selection, tree planting, and an appropriate mix of unit types.

- 36 In support of the applicant's submission that the proposed residential flat buildings meet the Design Quality Principles listed in SEPP 65, a Design Verification Statement has been filed with the Applicant's Bundle, Ex C tab 7. Further, an ADG Compliance Report has also been provided in Ex C tab 5 to clarify how the proposed buildings meet the relevant requirements of the ADG.
- 37 Issues of overlooking and the interface between the proposed building and adjacent dwellings are also dealt with through the parties' agreed conditions of consent at condition 34, which requires privacy screens to all first floor bedroom windows on the north-western and south-eastern elevations, and condition 13(l) that requires privacy planting in relevant boundary locations.
- 38 The issues raised in this contention are discussed further below as part of the issues raised by objectors.

Contention 3 – Inadequate Water Management:

- 39 This contention raised numerous detailed issues regarding stormwater management and the impact on the wetlands at the north west of the site, adjacent to the creek, as well as issues with the overland flow path, drainage infrastructure, the flood evacuation plan, water infiltration, and overall water management.
- 40 A detailed joint report was provided (Ex 4) that resulted in an amended suite of documents that now incorporate the required amount of detail, and the following additional measures:
 - (1) A bioretention system to manage incoming stormwater flows and the discharge into the wetland/creek,
 - (2) Adequate Flood Assessment and details on the stormwater and drainage design,
 - (3) Reconfiguration of the overland flow path,
 - (4) Adequate drainage upgrades to Warriewood Road,
 - (5) Adequate flood management, subject to conditions and the discussion below,
 - (6) An adequate Water Quality Monitoring Plan,

(7) Adequate modelling and analysis to support the above measures, and conditions of consent to ensure implementation of Council's requirements, where relevant.

- 41 Further oral evidence was given during the hearing to clarify the flood evacuation strategy, pursuant to the requirements of PLEP cl 5.21. Ms Caddis submitted (and this was not contested) that in the event of a flood, occupants would be required to shelter in place. Ms Collier submitted that the strategy was acceptable, however the duration of flood events is critical. In this instance, the experts agree (as supported by the Revised Flood Impact Assessment by BMT dated 19 March 2024 (Ex 4 Tab J)) that this environment is largely subject to flash floods of a duration of less than 6 hours. Within that 6 hour duration, there would only be a short time where Lorikeet Grove is not trafficable and that subsequently the intended 'shelter in place' strategy will not adversely affect the safe occupation and efficient evacuation of people.
- 42 From the evidence of the experts, both oral and in Ex 4, I am satisfied that the proposed development incorporates appropriate measures to manage risk to life in the event of a flood, and meets the requirements as set out in PLEP cl 5.21.

Contention 4 – Inadequate consideration of the potential impacts upon wetlands

- 43 This is both discussed and resolved by the relevant engineers in Ex 4 in relation to contention 3(a)(i) through the inclusion of the bioretention system that discharge to a rock-lined weir. The experts agree that this arrangement seeks to minimise the impacts of stormwater on the EEC from the site.
- 44 In addition, pursuant to PLEP cl 6.1(4) and SEPP R&H ss 2.7 & 2.8, the applicant submits that the coastal wetlands in this location will not just be protected, but enhanced. The design of the development has considered the proximity of the wetland to the development, and incorporated requirements for revegetation, protection and enhancement. Under the *Biodiversity Conservation Act 2016* (BC Act), all developments that requires development consent under Pt 4 of the EPA Act that is likely to significantly affect threatened species, as set out in s 7.2 of the BC Act and ss 7.1-7.3 of the Biodiversity Conservation Regulation 2017 (BC Regulation), must be assessed using the Biodiversity Assessment Method 2020 (BAM) with the results presented in a

Biodiversity Development Assessment Report (BDAR). As this proposed development requires clearing of native vegetation within an area mapped on the Biodiversity Values Map, the impacts associated with this development require assessment using the BAM. Subsequently, a BDAR (Ex 4 tab E) and Biodiversity Management Plan (BMP) (Ex 4 tab F) have been submitted, both of which are prepared by Cumberland Ecology dated 29 February 2024. These documents guide the revegetation of a native buffer between the proposed development and the creek in order to protect and enhance the biophysical, hydrological and ecological integrity of the EEC.

- 45 From this expert evidence and the supplementary Water Management Report by ACOR Consultants, version B dated 6 March 2024 (Ex 4 tab G) the amended engineering plans by ACOR (Ex 4 tab H) the Water Quality Monitoring Plan prepared by H2 Consulting Group, dated 8 March 2024, and the BMP, I am satisfied that sufficient measures have been taken to protect, and enhance, the biophysical, hydrological and ecological integrity of the coastal wetland. From this evidence, I am further satisfied that the proposed development will not significantly impact on the biophysical, hydrological or ecological integrity of the adjacent coastal wetland, or the quantity and quality of surface and ground water flows to and from the adjacent coastal wetland, or littoral rainforest, as required by SEPP R&H ss 2.7 & 2.8.

Contention 5 – Contaminated land

- 46 From the submissions of the parties, the Preliminary Site Investigation dated 7 July 2023, Detailed Site Investigation dated 18 July 2023, and Remediation Action Plan dated 28 July 2023 by Sydney Environmental Group, the site has low level contamination that can be remediated as per the Remediation Action Plan and the relevant conditions of consent. Subsequently, I am satisfied, in accordance with the requirements of SEPP R&H s 4.6 that the land will be suitable for the intended residential use after remediation.

Contention 6 – Unsuitable access arrangements

- 47 As discussed further below under ‘Issues raised by objectors’, Mr Staunton for the applicant, submits that access from both Warriewood Road and Lorikeet Grove was considered by the applicant. However, due to the location of an

existing shallow sewer line, access from Warriewood Road was not feasible. In addition, the experts agree that, as demonstrated in Ex D, a sensitivity analysis has been undertaken that demonstrates the additional traffic volumes generated by the development are well within the capacity of the existing road network and that access from Lorikeet Grove is suitable, and as intended by the Warriewood Valley Roads Masterplan.

Contention 7 – Essential Services

48 The parties submit and, based on the evidence provided in the following documents, I am satisfied that the development proposal now demonstrates that this contention is resolved as each lot will be appropriately serviced.:

- Joint Expert Engineering Report,
- Amended architectural plan A02.2 R-12,
- Ausgrid Electrical Infrastructure Report by Edgewater Connections dated 21 March 2024 (Ex F),
- Technical memorandum water and wastewater servicing for No 43-49 Warriewood Road Warriewood (Ex B tab 11), and
- The agreed draft conditions of consent.

49 Subsequently, the requirements of PLEP cl 7.10 and cl C6.5 of the PDCP, which requires all new development including new allotments to be fully serviced, are met.

Contention 8 – Inappropriate subdivision design

50 The development application, as amended, now incorporates a Plan of Subdivision (drawing 6278-STG2, sheets 1 and 2 by Peter Nancarrow dated March 2024 Ex 4 tab K) that has been prepared in accordance with the requirements of PDCP cl 6.9. The parties agree that the amended architectural plans demonstrate that each lot has a buildable area that can accommodate a compliant development, and that this contention is subsequently resolved.

Contention 9 – Creekline Corridor

51 The development application, as amended, now identifies the 50m creekline corridor on drawing Amended architectural plan A02.1 R-12. This includes demarcation of the 25m inner, and 25m outer, corridors in accordance with PDCP cl C6.1. The dedication of the inner creekline corridor is now proposed,

and therefore meets the requirements of the Contributions Plan and PDCP cl C6.1. The land adjacent to this creekline corridor now forms part of Lot 12, the superlot upon which the residential flat buildings are to be constructed, and when coupled with the Biodiversity Management Plan dated 29 February 2024 by Cumberland Ecology (Ex 4 tab F), this resolves the Council's concerns regarding ongoing maintenance of this vegetation. This is further supported by the Landscape Concept: South, rev H dated 6 March 2024 by Creative Planning Solutions, which documents the intended landscape intervention and regeneration in this area. The planning experts agree that this resolves contention 9 and meets the relevant requirements of the PDCP.

Contention 10 – Public Interest

- 52 The planning experts agree in Ex 3 that, notwithstanding the numerous submissions in objection to the proposal, the proposed development as amended is generally consistent with what could reasonably be expected on this site, pursuant to the prevailing development controls, and that subsequently it is considered to be in the broader public interest.

Contention 11 – Inconsistencies in Development Application

- 53 The planning experts submit and, based on this and the amended architectural drawings, engineering plans, landscape plans and BASIX Certificate, I am satisfied that the inconsistencies highlighted in this contention have been resolved.

Contention 12 – General Terms of Approval

- 54 At the time of submission, the necessary general terms of approval (GTAs) from each relevant approval body, required in accordance with cl 4.47(2) of the EPA Act, had not been obtained by the applicant.
- 55 Prior to the conclusion of the hearing, GTAs were provided by the Department of Planning and Environment - Water, on 21 March 2024 pursuant to s 91 of the *Water Management Act 2000* (Ex 6).
- 56 Regarding the requirement for a Bush Fire Safety Authority (BFSA) pursuant to s 100B of the *Rural Fires Act 1997* (Rural Fires Act), the applicant submits that on 6 August 2023 the NSW Rural Fire Service granted a BFSA with conditions

for the proposed development, not amended (Ex 2 tab 6B). Subsequently, an amended Bushfire Assessment Report has been prepared, by Advanced Bushfire Performance Solutions, dated Dec 2023 (Ex B tab 12). A further letter by Advanced Bushfire Performance Solutions, dated 10 March 2024 states that the recommendations in this amended report are consistent with the conditions in the BFSA, and that those conditions are standard conditions that reflect compliance with acceptable solutions in the RFS guideline Planning for Bush Fire Protection 2019.

57 Noting that the application has been amended subsequent to the issue of the BFSA, the applicant submits that, pursuant to EPA Act s 8.14(4)(a), the Court may determine the appeal whether or not the consent authority has obtained general terms of approval from each relevant approval body. Mr Staunton further submits that, based on the evidence above, I can be satisfied that the application as amended, meets the requirements of the previously issued BFSA, and that, as the applicant will need to apply for approval under s 100B of the Rural Fires Act, this is acceptable.

58 Subsequently the parties submit, and I am satisfied, that all requirements under EPA Act s 4.47(2) have been met for this development application.

Issues raised by objectors

59 I now turn to the issues raised by objectors on site. These issues included traffic, overshadowing, privacy, and the suitability of development type. The relevant traffic and flooding experts addressed the Court and explained why the application, as amended, resolved Council's concerns and those of the objectors. I will address each issue raised by objectors in turn.

Traffic

60 The objectors' concerns in relation to traffic were twofold. Firstly, issues were raised regarding the provision of site access off Lorikeet Grove rather than Warriewood Road, and the safety and traffic implications of this. The second followed on from this – that the increased density resulting from this development will unacceptably increase traffic movement, and exacerbate existing parking and safety concerns to both Lorikeet Grove and the nearby Bubalo Street, which connects Lorikeet Grove to Warriewood Road.

- 61 Relevantly, pursuant to PDCP cl C6.4 and as per the Warriewood Valley Roads Masterplan, Warriewood Road in this location is a collector road and Lorikeet Grove is a local road.
- 62 One resident objector included a peer review of the Traffic Report by Mr Sannikov (Ex B vol 2 tab 14) in his letter of objection (Ex 2, tab 16(U)). This peer review, by Ross Nettle of Transport and Traffic Planning Associates, questioned the traffic generation rates applied by Mr Sannikov to determine the capacity of Lorikeet Grove and the associated local road network for the traffic volumes that would be generated by the proposed development.
- 63 In oral evidence, the traffic experts disagreed on the total traffic generated from the development, with Mr Brocklebank submitting that he agreed with Mr Nettle that the development would generate higher levels of traffic than that stated by Mr Sannikov, however he disagreed with the magnitude stated by Mr Nettle. In summary, the experts agreed that, if a very conservative estimate were made, in the worst case scenario the proposed development would result in an average of 37 vehicle movements per hour. Mr Brocklebank confirmed in evidence that the capacity of Bubalo Street, which was the more constrained local road, was 150 vehicles per hour and that the resulting traffic generation was well within capacity.
- 64 Regarding the position of the primary access to the site, Mr Brocklebank confirmed that in circumstances such as this, it is generally accepted as best practice, from a traffic management perspective, to provide access from a local road- which in this case is Lorikeet Grove. Further, with reference to cl 6.10 of the PDCP, Mr Brocklebank confirms that the PDCP does not contemplate additional access roads off Warriewood Road, but instead requires connections to existing local roads as per this application.
- 65 Several objectors referred to an earlier intention, by Council, for the site to be accessed from Warriewood Road. The development assessment report of the initial application (Ex 2 tab 10) discusses this, requesting the applicant to demonstrate that access from Warriewood Road is not feasible, and to clarify the impact of additional traffic volume on the local access road network.

- 66 To demonstrate that access from Warriewood Road is unfeasible, Mr Brocklebank turned in evidence to the site constraints, noting that the existing sewer, which traverses the site between Warriewood Road and the proposed residential flat buildings, would very likely interfere with any access ramps to the residential flat buildings. This is mainly due to its shallow position in relation to the natural ground and necessary road levels, and a requirement for the sewer pipe to be encased in concrete if traversed. Any such encasement would increase the thickness of the pipe and the subsequent level of the sewer line, hindering any ability to provide suitable access from Warriewood Road. This submission is further supported by a survey of the sewer dated 4 March 2024 (Ex C tab 1).
- 67 To clarify the impact of the additional traffic volume on the local road, I refer again to the expert evidence as already discussed that confirms the additional traffic volume generated by this development is well within the capacity of the local road network. The Development Assessment Report suggests that should the local road network be used, additional controls would be required to limit the traffic volumes using Bubalo Street however the applicant submits, and I accept, that this is outside the scope of the development.

Overshadowing

- 68 Several residents raised concerns that the new residential flat buildings would overshadow their homes and gardens. This was also raised as a contention by Council on contention 2.b.ii. and in response, the applicant provided additional solar access and shadow diagrams that demonstrate the relationship between the proposed development and adjoining properties, and further demonstrate compliance with the requirements for solar access to neighbouring properties as set out in the PDCP cl D16.9. This control requires that, “where the principal living area and private open space within an existing adjoining dwelling currently receives sunshine during midwinter, any proposed adjacent development is not to reduce that solar access below three hours.” The experts agree that the additional information provided by the applicant demonstrates that this requirement is met.

- 69 Additionally, in his closing submission, Mr Staunton gave a detailed analysis of the setbacks and total building separation between the proposed buildings and the existing ones on neighbouring sites, based on drawing A12.5 R-12 and 12.6 R-12 from the amended architectural set (Ex 4 tab L). With reference to the evidence of Mr Susko in Ex 3, he notes that not only do the proposed setbacks comply with all relevant controls, but additionally, the building setbacks to the boundaries are greater than the setback requirements prescribed by the ADG, which ameliorates or negates any impact of overshadowing that might be caused by the height exceedance.
- 70 Subsequently, based on the amended plans including a comprehensive solar analysis, and the expert evidence, I am satisfied that the overshadowing impacts of the development are within the allowable development controls and are therefore acceptable.

Privacy

- 71 Concerns were raised by objectors regarding the impact of the proposed buildings on the privacy of existing neighbouring dwellings. This was also raised by the Council at contention 2.a.iv. Based on the amended plans, particularly the detailed sections provided at drawing A12.3 R-12, the respondent accepted that the privacy concerns to the northern building are resolved. However, in evidence, Mr Susko maintained concerns regarding the privacy impacts of the extensive glazing to the rear of the first floor of both proposed buildings (Sections A12.6 R-12), and the ambiguity of what appeared to be privacy screens to these windows. To mitigate any perceived or actual privacy impacts from these windows, the planners have agreed a condition of consent detailing privacy screens to these windows, which forms condition 34 of Annexure A.
- 72 In addition to this, Mr Susko raised specific concerns regarding the interface between the southern building and neighbouring properties in that the ground level of this block is, except for one dwelling, higher than the respective garden for each ground level dwelling, which could create a privacy impact if not ameliorated (as per sections on architectural drawing A12.4 R-12). To that end, the planners have again agreed a condition of consent requiring a tall

screening hedge to be planted along the property boundary at this point, which forms condition 13(l) of Annexure A.

- 73 Based on the amended plans, the expert evidence and the recommended conditions of consent, I am satisfied that any perceived or actual privacy impacts will be adequately managed, and that the concerns raised by objectors have been adequately addressed.

Suitability of the development type

- 74 Some of the resident objectors raised issues regarding the suitability of the development type, with one objector stating, with reference to the residential apartment blocks, that the development “should not be in Warriewood in this form” (Ex 2 Tab 14D).
- 75 I note that residential flat buildings are permitted with consent on the site and further, that PDCP cl C6.10 specifically states that “denser housing typologies, including Residential Flat Buildings and Multi Dwelling Housing, should be located on the north-eastern side of Lorikeet Grove, in close proximity to the creekline corridor”. Further, as stated in the expert planning evidence (Ex 3), both planning experts are satisfied that the form and siting of these buildings allow for a wide and dense landscaped buffer in all directions, unlike alternate forms of development observed on Bubalo Street, and subsequently provide a mass and form that is compatible with the surrounding character.
- 76 The planning experts have both given evidence clarifying how the length, articulation, modulation, materials and landscape design of these proposed buildings are consistent with the planning controls and supportable in this location (Ex 3).
- 77 From the evidence given by the planning experts (Ex 3 and oral evidence), the Design Verification Statement (Ex C tab 7), the ADG Compliance Report (Ex C tab 5) and the relevant conditions of consent, I am satisfied that the proposed development is as envisaged by the planning controls, meets the relevant development controls of the PLEP except for cl 4.3 Height of buildings which, as discussed above, is adequately justified pursuant to PLEP cl 4.6. The proposed development also meets the controls set out in PDCP cll C6.10, D16.9, and D16.13, as well as the relevant requirements of the ADG and SEPP

65. I am subsequently satisfied that the development type, as proposed, is suitable in this location.

Other matters of jurisdiction

78 From this joint report and extensive annexures, although I am satisfied that the contentions raised by Council are adequately resolved, there are additional matters of jurisdiction of which I must be satisfied that have not already been dealt with in this judgment. Accordingly, as detailed below there are no jurisdictional impediments to the grant of consent to this development application.

- (1) The application was made with the written consent of the owners of the land to which this development application relates (Ex 2 tab 3).
- (2) Pursuant to PLEP cl 2.1 and 2.3, the proposed development is permissible with consent in the R3 Medium Density Residential zone and is consistent with the objectives of this zone.
- (3) Pursuant to PLEP cl 4.3, the proposed development breaches the height of buildings development standard but for the reasons given, I am satisfied that the written request submitted pursuant to PLEP cl 4.6 adequately justifies the breach of this development standard.
- (4) For the reasons given, pursuant to PLEP cl 5.21, I have considered the flood-related matters listed in subcl (3) and am satisfied that the development meets the requirements of subcl (2).
- (5) Pursuant to PLEP cl 6.1, and again for the reasons given in this judgment, I am satisfied that, in respect of the Warriewood Valley Release Area, the proposed development will not have any significant adverse impact on any of the matters identified in cl 6.1(4).
- (6) Pursuant to cl 7.1 of the PLEP, the subject site is mapped as containing Class 3, 4, and 5 acid sulfate soils. A Preliminary Acid Sulfate Soil Assessment has been prepared by NG Child & Associates, dated 16 November 2021 that identifies an acceptable acid sulfate soil risk at the site, and provides precautionary recommendations that apply to the development through the application of condition 81 of the agreed conditions of consent.
- (7) Pursuant to PLEP cl 7.2, I have considered the earthworks-related matters listed in subcl (3) and based on the expert evidence and the Bulk Earthworks Plan by ACOR, rev D (Ex4 tab D), I am satisfied that these matters have been adequately addressed.
- (8) Pursuant to PLEP cl 7.6, issues of biodiversity were raised as contentions and, for the reasons given in this judgment I have considered the matters listed in subcl (3), and am satisfied that the development is sited, and will be managed to avoid any significant adverse environmental impact.

- (9) As discussed in response to Council's contentions, pursuant to PLEP cl 7.10 all essential services will be available to the site.

Conclusion

- 79 From this evidence, the evidence of the joint reports, and the submissions of the parties, I am satisfied that the issues raised in contention by the Council, and also by objectors, are adequately addressed in this proposed development subject to the agreed conditions of consent at Annexure A. I further note that there are no matters of jurisdiction that prevent me from determining the development application by way of consent.
- 80 Further, I concur with the parties' submission that the proposed development is in the public interest.
- 81 Accordingly, I determine that the proposed development is acceptable, and the appeal should be upheld.
- 82 The Court orders:
- (1) The appeal is upheld.
 - (2) Development application DA2021/2600 for the subdivision of land into twelve (12) lots, supporting civil engineering works, biodiversity management of riparian/wetland areas and the construction of two (2) residential flat buildings on land legally described as Lot 2 in DP 972209, Lot 2 in DP 349085 and Lot 1 in DP 349085, known as 43, 45 and 49 Warriewood Road, Warriewood is determined by the grant of consent, subject to the conditions at Annexure A.
 - (3) The applicant is to pay the respondent's costs thrown away pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, as agreed or assessed.
 - (4) All exhibits are returned except for A, B, C and 3, 4 and 6.

E Washington

Acting Commissioner of the Court

Annexure A

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.