Land and Environment Court

New South Wales

Case Name:	Wilbec Chatswood Pty Ltd v Willoughby City Council
Medium Neutral Citation:	[2024] NSWLEC 1234
Hearing Date(s):	13-15 February 2024, final submissions 6 March 2024
Date of Orders:	03 May 2024
Decision Date:	3 May 2024
Jurisdiction:	Class 1
Before:	Walsh C
Decision:	The Court directs that: 1) The parties are to prepare final settled conditions of consent, consistent with the findings in this judgment, and to file these by no later than 15 May 2024; 2) With completion of the direction at (1) above, final orders will be made granting development consent; 3) Liberty to restore is available in the usual way.
Catchwords:	DEVELOPMENT APPLICATION – mixed use development – savings provisions retain previous controls in area identified for significant increases in density – how to understand desired future character – implications of letter of offer to enter a planning agreement relating to affordable housing – building height contravention – floor space ratio contravention
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.15, 4.17, 7.4, 7.7, 8.7 Land and Environment Court Act 1979, s 39 Willoughby Local Environmental Plan 2012, cll 1.8A, 4.3, 4.4, 4.6, 6.7, 6.8, 6.23
Cases Cited:	Baron Corporation Pty Limited v Council of the City of Sydney (2019) 243 LGERA 338; [2019] NSWLEC 61

	Cranbrook School v Woollahra Municipal Council (2005) 144 LGERA 21; [2005] NSWLEC 716 Cranbrook School v Woollahra Council (2006) 146 LGERA 313; [2006] NSWCA 155; 66 NSWLR 379 Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118 IPM Holdings Pty Ltd v Council of the City of Sydney [2020] NSWLEC 1593 Maygood Australia Pty Ltd v Willoughby City Council [2013] NSWLEC 142 Progress & Securities Building Pty Limited v Burwood Council & Anor (No 2) (2008) 158 LGERA 102; [2008] NSWLEC 135 Stokes v Waverley Council (No 2) (2019) 242 LGERA 392; [2019] NSWLEC 174 Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) 129 LGERA 195; [2003] NSWCA 289
Texts Cited:	Apartment Design Guidelines 2015 Willoughby Development Control Plan 2006
Category:	Principal judgment
Parties:	Wilbec Chatswood Pty Ltd (Applicant) Willoughby City Council (Respondent)
Representation:	Counsel: A Galasso SC (Applicant) M Wright SC (Respondent) Solicitors: Mills Oakley (Applicant) Maddocks (Respondent)
File Number(s):	2022/343917
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by Willoughby City Council (Council) of development application DA-2022/240 (DA). The site for the DA is 42 Archer Street, Chatswood (site).

Proposal

2 The DA, as amended, proposes demolition of an existing four-storey residential flat building and the construction of a 26-storey mixed use building. The bulk of the areas on the ground floor, the first two floors above and half of the third floor have been identified as for "community facility" uses. The rest of the building would be used for residential development, comprising 42 residential units and some outdoor communal space. There would be 4 levels of basement parking. Specified landscaping is also proposed, along with other typical subsidiary works associated with this development form. The proposal would provide a “through site link” to allow public access between Archer Street and Claude Street along the site’s northern boundary.

Site and locality

3 The site is a rectangular-shaped parcel with an area of 1115m2. It has two street frontages, Archer Street to the east and Claude Street to the west, both frontages are 18.29m. The site has a depth of 60.69m. At present vehicle access is from Claude Street.

4 The site sits a little south of the existing higher density residential and retail hub of Chatswood but, as will be explained more fully below, within an area earmarked for significant increases in density.

Statutory context

5 What I might call the dynamics of the statutory setting, and the proposal’s response to it, have some significance in this matter.

Planning instruments at time of DA lodgement

6 The central relevant environmental planning instrument is Willoughby Local Environmental Plan 2012 (WLEP). At lodgement of the DA, on or about 8 August 2022 (Council’s Statement of Environmental Effects Ex 1 par 35), a certain suite of controls applied to the site under then WLEP. As summarised in Council’s Outline of Submissions (COS) dated 21 February 2024 (par 20), the following controls applied to the site:

> “a) zoning of *R4 High Density Residential*, in which zone a residential flat building was permissible with consent;
>
> b) height of building limit of 34m (cl 4.3);

c) floor space ratio [limit] of 1.7:1 (cl 4.4); and

d) minimum lot size of 1,100m2 for development for the purpose of a residential flat building in the R4 zone (cl 6.10)."

7 Again, as at August 2022, Willoughby Development Control Plan 2006 (WDCP 2006) was in operation and provided certain additional applicable controls.

Current planning instruments

8 From 30 June 2023, and after a considerable project of strategic planning (Ex 1 pars 16-34F), a substantial revision to WLEP came into effect. The revised instrument is described as Willoughby Local Environment Plan 2012 (Amendment No. 34). I will henceforth refer to this revised instrument as Amended WLEP, and for convenience of description only I will refer to the instrument applicable at DA lodgment date as Unamended WLEP. As advised in COS (par 22) and I think not in dispute, Amended WLEP imposes the following controls on the subject site:

"a) zoning of *MU1 Mixed Use*, in which residential accommodation is prohibited. However, as the Site is located in Area 8 on the Special Provisions Map, development for the purposes of residential flat buildings is permissible with consent if the ground floor is used for non-residential purposes only, and at least 17 per cent of the gross floor area of the building will be used for non-residential purposes (cl 2.5 and Sched 1, cl 27);

b) height of building limit of 90m (cl 4.3);

c) floor space ratio of 6:1 (cl 4.4);

d) a minimum lot size of 1,200m2 for development for the purposes of mixed use development (cl 6.16);

e) an active street frontage control (cl 6.7) (which applies because the site is now identified as "Active Street Frontages" on the Active Street Frontages Map under the Amended WLEP), pursuant to which development consent must not be granted to the erection of a building unless the consent authority is satisfied that the building will have an "active street frontage" (as defined in cl 6.7);

f) an affordable housing control (cl 6.8) (which applies because the Site is now located in Area 3 on the Affordable Housing Map under the Amended WLEP), pursuant to which the consent authority may impose an affordable housing condition, which may require a developer to make an affordable housing contribution (by way of a dedication of floor space or the payment of a monetary contribution) equivalent to 10 per cent of the gross floor area of the residential component of the development (cl 6.8); and

> g) a design excellence control (cl 6.23) (which applies because the site is now located in Area 5 on the Special Provisions Map under the Amended WLEP), pursuant to which the consent authority must not grant consent to any development involving inter alia the erection of a new building unless the consent authority considers that the development exhibits design excellence (cl 6.23(3)), and the design of the development is the winner of a competitive design process held in relation to the development (cl 6.23(6)).”

9 From 4 October 2023, Willoughby Development Control Plan 2023 (WDCP 2023) commenced operation. WDCP 2023 does not contain any savings provision and, according to COS (par 25), had the effect of repealing WDCP 2006.

Savings provisions - Amended WLEP

10 Importantly, Amended WLEP includes a savings clause, cl 1.8A, which relevantly provides as follows:

> "(1) If a development application has been made before the commencement of this Plan in relation to land to which this Plan applies and the application has not been finally determined before that commencement, the application must be determined as if this Plan had not commenced.
>
> (2) An amendment made to this plan by Willoughby Local Environmental Plan 2012 (Amendment No 34) does not apply to a development application made, but not finally determined, before the commencement of that plan."

11 It is clear that the DA was lodged with Council before the commencement of Amended WLEP. Therefore, this DA must be determined as if Amended WLEP “had not commenced”. In turn, Unamended WLEP continues to apply to the evaluation of the DA.

12 It will be seen that there is nonetheless considerable attention to Amended WLEP in this matter. I understood each of the parties to acknowledge the legitimacy of this mindful of the judicial findings in *Maygood Australia Pty Ltd v Willoughby City Council* [2013] NSWLEC 142 [28]-[37], underpinned by *Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* [2003] NSWCA 289; (2003) 129 LGERA 195 at [33]-[51]. In short, and notwithstanding any other points of justification, Amended WLEP can be considered as if a proposed instrument (under s 4.15(1)(a)(ii) of the EPA Act) and warrants consideration in the evaluation of the DA as such.

Lining up the proposal's features with respect to both Unamended and Amended WLEP

13 Council has summarised what it sees in regard to compliance or otherwise of the proposal with both Unamended WLEP at lodgement and Amended WLEP. First in regard to Unamended WLEP, Council submits as follows (COS pars 28-32):

> "28. The proposed development is permissible with consent in the R4 zone.
>
> 29. The proposed development breaches the 34m height of building control in clause 4.3, being 90 metres in height (by an exceedance of 56 metres). The applicant relies on a clause 4.6 request for this contravention: see Exhibit A, Tab 6.
>
> 30. The proposed development breaches the 1.7:1 FSR control in clause 4.4. The applicant relies on a clause 4.6 request for this contravention: see Exhibits J and K.
>
> 31. The proposed development complies with the 1,100m2 minimum lot size control in clause 6.10.
>
> 32. Under the WLEP (as unamended), the consent authority does not have any power to impose an affordable housing condition as a condition of consent to the proposed development because the subject site is not within Area 3 or Area 9 on the Special Provisions Map."

14 Turning to Amended WLEP, Council submits as follows (COS pars 34-40):

> 34. The proposed development would be permissible with consent in the MU1 zone, as an additional permitted use pursuant to clause 2.5 and Schedule 1, item 27.
>
> 35. The proposed development would comply with the 90m height of building control in clause 4.3.
>
> 36. The proposed development would comply with the 6:1 FSR control in clause 4.4, with an FSR of 5.28:1. The calculation of FSR relies on the "bonus" FSR conferred by clause 4.4(2A) of Amended WLEP, which provides that part of the floor area of a building which is used for community facilities is taken not to be part of the gross floor area of the building for determining the maximum floor space ratio of the building: see Exhibit K, pp 4-8.
>
> 37. The proposed development would not comply with the 1,200m2 minimum lot size control in clause 6.16. To that end, the applicant relies on a "notional" clause 4.6 request in which it argues that any contravention of this development standard would be justified: see Exhibit A, Tab 8.
>
> 38. The proposed development does not include any ground floor commercial premises, and therefore would not comply with the active

street frontage control in clause 6.7, which requires that all ground floor premises facing the street are used for commercial purposes. Rather, the proposed development provides for community facilities on part of the ground floor of the development.

39. The proposed development does not include any dedicated floor space for affordable housing, and nor can any condition be imposed requiring the developer to pay any monetary contribution for affordable housing (see paragraph 32 above), and therefore would not provide an affordable housing contribution which would comply with clause 6.8.

40. The proposed development has not been subject to a competitive design process or chosen as the winner of that process. It therefore would not comply with the design excellence requirements under clause 6.23.

15 I will turn to related development control plan provisions as relevant below.

Issues in dispute

16 Some seventeen of the contentions nominated in Ex 1 remain in dispute. There is value in synthesising the contentions for this evaluation, which I do below, bringing the contentions down to three substantive topics and a more general topic addressing certain other matters of detail. I introduce the topics as:

(1) Desired future character and design excellence

(2) Unamended WLEP contraventions in relation to FSR and building height

(3) Affordable housing

(4) Other matters.

17 The first two topics are concerned with built form, mindful of the contextual setting, and are very related. The topics are intended to address Contentions 3, 4, 7, 12, and 15, but also Contentions 6(c) and 9 (relating to landscape deep soil zones), 14 (“inconsistency with minimum site area controls”), 16 (relating to “active street frontage” requirements) and 20 (“site suitability”).

18 The third topic, affordable housing (Contention 18), is less design-related at least as far as this particular proposal is concerned. It is an important topic nonetheless in regard to strategic planning ambitions of Council and related to wider metropolitan concerns with this topic.

19 Contentions 1, 2, 11B, 24(a) and 24(b), where not otherwise covered previously, are dealt with in my fourth topic.

20 For me, Contention 21 ("public interest") essentially relates to the consideration of all of the preceding topics.

21 Here I can also note that those providing expert evidence in relation to the contested issues are as follows:

Name	Expertise	Appointed by
O Stanish	Urban design	Applicant
M Zanardo	Urban design	Council
A Longley	Landscape	Applicant
C Mackenzie	Landscape and arboriculture	Council
J Mead	Town planning	Applicant
P Wells	Town planning	Council
D Trinder	Waste management	Applicant
K Morgan	Waste management	Council
P Oitmaa	Hydrogeology and groundwater	Applicant
C Stephenson	Hydrogeology and groundwater	Council

A note on WLEP-related policy interpretation

22 Certainly, a key factor in the evaluation exercise involves how best to work with the two environmental planning instruments considered in the evidence of, in particular, the planning and design experts and in the submissions of the parties. As I do this, I am acutely aware of the submission of Council that when

considering the weight to be given to Amended WLEP, consideration should be given to the "whole instrument" (COS par 26(e)):

> …that is, all of the relevant controls in the Amended WLEP, not just to those controls that the applicant has relied on to justify its height and FSR exceedances under the WLEP (unamended).

23 Apart from consideration of Unamended WLEP, my efforts to draw in the whole of the relevant provisions of Amended WLEP should be apparent.

Desired future character and design excellence

24 Council's closing submissions (COS par 44) acknowledge the agreed evidence from planning and design experts that Amended WLEP and WDCP 2023 provide better indications of the desired future character for the site and surrounds than the earlier planning instruments. While the proposal may be aligned with certain provisions of Amended WLEP (eg FSR and building height), Council argued that the proposal is at odds with other significant provisions of Amended WLEP and WDCP 2023.

25 For me, the significant subtopics which require attention here are as follows: side setback, Claude Street frontage (including landscaping and deep soil area) active street frontage and design excellence. I introduce them initially, including points of dispute, then consider the topic more holistically including in regard to the question of whether the proposal involves an essential inconsistency with the strategic intentions of the planning controls.

Side setback

26 The proposed side boundary setbacks are 4.5m to the northern boundary and 3m to the southern boundary. WDCP 2023 Part L 4.3.4(b)(dp3) would require a 4.5m building setback from all boundaries. The dispute related to the southern side setback, which according to Mr Wells demonstrates a distribution of building bulk that is contrary to the requirements of WDCP 2023 and Council's desired future character for the area, along with Apartment Design Guideline (ADG) requirements. Mr Wells believed that (Ex 10 par 229):

> ".. a flow-on effects of the proposal's failure to satisfy the minimum 27m frontage pertaining to WDCP 2012 at Part E 1.1 (1) and WDCP 2023 Part D Part 4.4.2(a) translates to side setback departures".

27 Dr Zenardo and the applicant's planning and urban design experts were satisfied with the southern boundary setback. Dr Zenardo's evidence included a review of the objectives of the applicable controls under WDCP 2023 and the ADG, concluding that "this non-compliance is acceptable in this particular circumstance".

Claude Street frontage including landscaping and deep soil area

28 While the experts were happy with the Archer Street frontage on streetscape and landscape character grounds, there were concerns on the part of Council in regard to Claude Street, to which the site has a 18.29m street frontage. There was some agreement that Part D 4.4.2(a) of WDCP 2023, requiring a minimum 27m frontage width does not directly apply to the proposal (as Part D applies to commercial development and the proposal does not include commercial development). But WDCP 2023 Part B 4.3.2 would apply and also requires a 27m frontage. The purpose of the control is:

> … to ensure vehicles can enter and leave a site in a forward direction, and adequate landscaped areas are provided along the streetscape.

29 Mr Wells, Ms McKenzie and Dr Zenardo all saw this as a significant failing of the proposal. It was not site ingress and egress that was the concern, it was in relation to landscape provision along the streetscape. Dr Zenardo linked, what he saw as a landscape response deficiency along Claude Street to other policy provisions (Ex 10 par 266):

> … the street frontage of 18.29m does not meet this control and this directly contributes to not meeting the objective to provide an adequate landscaped area, particularly along the streetscape of Claude Street. Other relevant objectives that are not met include WDCP 2023 Part B 2.1.2 objective (a) that "site area and lot dimensions should ensure adequate provision is made for…. sufficient area for landscaping, including deep soil zones that can support tree planting", WDCP 2023 Part B 2.1.5 objective (b) that "landscaped areas should include deep soil zones located primarily along the street frontage…" and WDCP 2023 Part B 2.1.5 objective (c) that "landscaped areas should… plant trees with wide canopies within the deep soil zones…"
>
> These aspects are not considered to meet the desired future character as anticipated by WDCP 2023 for this type of development. MZ deals further with street frontage at Key Area 7 with regard to site area.

30 Dr Zenardo also linked what he saw as a deficient response in Claude Street to the site's non-compliance with WDCP 2023 provisions relating to site area.

More particularly WDCP 2023 Part L 4.3.1(c) requires Amended WLEP's site area control of 1200m2 to be met. The site area at 1115m2 does not do so.

31 A factor here was what was seen to be a significant deficiency in deep soil area at the western boundary when ADG requirements were taken into account. The result is that landscape areas along Claude Street are, according to Ms McKenzie, insufficient to support medium, large or even small canopy trees. According to Ms McKenzie (Ex 5 par 18):

> The footprint of basement, driveway and paved areas substantially reduce the opportunity to provide any meaningful landscaping to the Claude Street frontage.

32 Mr Longley highlighted the capacity for root zone expansion beyond areas qualifying as deep soil zones on the site. Mr Stanish highlighted to a higher degree of precision the actual ADG requirements which open the door to alternative solutions, in regard to deep soil provision, in CBD settings.

Active street frontage

33 Clause 6.7 of Amended WLEP provides that consent must not be granted unless the consent authority is satisfied that the building will have an active street frontage. The objective of the clause is "to promote uses that attract pedestrian traffic along certain ground floor street frontages in [relevantly] Zone MU1 Mixed Use". Subclause 6.7(5)(b) provides, relevantly, that: "a building has an active street frontage if …all ground floor premises facing the street are used for commercial premises."

34 The principal concern of Council's experts is again Claude Street. As put by Mr Wells (Ex 10 par 350): "[the] narrowness of the site 'squeezes' a cluster of services to Claude Street, eliminating any active street front".

Design excellence

35 Amended WLEP includes at its cl 6.23 various provisions relating to the topic of design excellence which would apply to the proposal were it to have been lodged after the amendment. Provisions of note include subcl 6.23(3) which require a positive finding of satisfaction on the part of the consent authority that the development exhibits design excellence, and subcll 6.23(6)-(10) relating to requirements for a "competitive design process held in relation to the

development" (although a consent authority has discretion in relation to this latter matter). The proposal is not subject to a design excellence clause under Unamended WLEP (Ex 10 pars 334-335). Mindful of my commentary at [13], the abovementioned provisions of cl 6.23 of Amended WLEP are a consideration in the evaluation of the DA, rather than a statutory pre-requisite.

36 Dr Zenardo argues that the proposal does not exhibit design excellence, working through the relevant particulars of cl 6.23 (4)-(5) of Amended WLEP (Ex 10 pars 328-333). I think it is fair to say that most of Dr Zenardo's points criticising the proposal relate to the resolution of the Claude Street frontage. As outlined above, this relates to the suggested domination of the proposed driveway at this frontage and perceived inadequacies in regard to deep soil and landscaping, and a lack of an active street frontage (at least as defined).

37 Mr Stanish also works through particulars of cl 6.23 (4)-(5) of Amended WLEP and finds the opposite to Dr Zenardo. An explanation of various building elements is provided and Mr Stanish argues that "the design will undoubtedly set a new standard for architectural quality in this part of Chatswood" (Ex 10 Table 1 p 76).

38 Mr Wells argues that (Ex 10 par 338):

> The consent authority cannot be satisfied that the Proposed Development exhibits design excellence having regard to the matters in clause 6.23(4) and (5), because the Amended DA has not been the subject of an architectural design competition under clause 6.23(6)(b) of the Amended WLEP.

Consideration

39 In the broad, I am more persuaded by the applicant's case in this topic. The key question mark is in regard to the Claude Street presentation. When I consider the Claude Street setting as a whole, I am satisfied with the proposal's response to site context. That is, in regard to response to both constraints (such as site width) and opportunities (such as through provision of the through site link). The through site link is an important positive design response which will help activate Claude Street, both in regard to the site but also for other forthcoming developments on other sites fronting Claude Street. The proposal brings significant gains on that front.

40 When I turn to the site width constraint, and the suggested landscaping and deep soil deficiencies, something notable to me during the site inspection was the significant landscape presence in Claude Street already. That is, streetside planting which have a positive streetscape presentation effect (and were not otherwise threatened by the proposal). The proposal's landscape deficiency in regard to the Claude Street setback, which has been addressed to the extent practical in the landscape proposal for this frontage, is positively offset by what already exists.

41 While the proposal does not meet the Amended WLEP requirements for active street frontage, as defined in that instrument, it seems quite clear that the through site link and ground level entrance to the proposed community facilities which front both of the street frontages, as proposed in the amended plans, can help bring about significant pedestrian traffic along both Archer and Claude Streets in accordance with the aims of cl 6.7 of Amended WLEP (Ex E Drawing A03.00 Rev H).

42 The result, in my view, would be that the Claude Street presentation, to the lay observer, would be quite well aligned with the desired future character. While a better landscape response would be available were the site width greater, I am not so convinced that this factor is sufficient to, say, require the site to amalgamate with other sites before it can move forward with the intended manifestation of the essentials of the desired high density character in this locality.

43 On the topic of design excellence, my impression from the urban design and planning experts was that the proposed built form, generally, was a high calibre example of a slender tower. It was more the detail of Claude Street that was problematic (Mr Wells had a different opinion in regard to his views on the southern side boundary setback). Having made these findings in regard to Claude Street I generally agree with Mr Stanish’s conclusions that the building would exhibit design excellence (Ex 10 par 322).

44 When consider the wider strategic planning intent for the locality, I see the proposed built form as well aligned, so far as that goes. I consider the question of affordable housing later in the judgement.

Contraventions in relation to building height and FSR

45 The proposal would involve sizable contraventions of the applicable building height and FSR development standards under the cll 4.3 and 4.4 of Unamended WLEP. The applicant relies on cl 4.6 of Unamended WLEP to seek the grant of consent despite these contraventions. The applicant's position was supported by written requests under cl 4.6(3) prepared by Mr Mead (Ex A Tab 6 and Ex J, respectively).

46 The Court must form two positive opinions of satisfaction under cl 4.6(4)(a) of Unamended WLEP to enliven the permissive power under cl 4.6(2) to grant development consent in instances of a development standard contravention (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 (*Initial Action*) at [14]).

47 The first opinion of satisfaction (under cll 4.6(3) and 4.6(4)(a)(i) of Unamended WLEP), is in regard to a written request from the applicant seeking to justify the contravention of the development standard and, specifically, whether it has adequately addressed the two matters required to be demonstrated at cl 4.6(3) of Unamended WLEP. The second opinion of satisfaction requires a more direct finding by the Court, which I will come to. I work through the tests provided under cl 4.6 of Unamended WLEP. Unusually, because of the alignment in my findings, in this instance it makes sense to consider the statutory hurdles faced in regard to each of the contraventions in parallel.

Building height contravention

48 As already introduced, cl 4.3 of Unamended WLEP prescribes a maximum building height of 34m, which the proposal contravenes substantially with a maximum building height in the order of 90m. In turn cl 4.4 of Unamended WLEP prescribes a maximum FSR control of 1.7:1. The proposed FSR is some 6:1.

Whether compliance with development standard is unreasonable or unnecessary in the circumstances of the case

49 The test here is whether the written requests adequately demonstrate that compliance with the building height and FSR development standards are unreasonable or unnecessary in the circumstances. The written requests refer

to the fact that new building height and FSR standards now apply to the site and its surrounds. This has occurred following completion of Council's strategic planning endeavours for Chatswood centre. This strategic planning work assigned a height control of 90m and FSR control of 6:1 for the site. The written request notes that Amended WLEP now prescribes a 90m maximum building height and 6:1 FSR standard, with which the proposal complies. While the written request cited a number of other grounds, for me the proposal's essential accordance with established desired future character are sufficient grounds to prove that, in each case, compliance with the development standard is unreasonable or unnecessary in the circumstances.

Whether there are sufficient environmental planning grounds to justify contravening the development standard

50 The written requests argue that compliance with the Unamended WLEP height standard (34m) and FSR (1.7:1) would be directly at odds with the planning intentions for this locality and, in turn, that the building height and FSR as proposed would contribute to the desired future character of the locality, as set by the adoption of the more recent controls. Council's ambitions for this part of Chatswood can be understood from the recently implemented planning provisions. It seems to me these grounds, as argued in the written request, are sufficient to justify contravening the building height standard and FSR standard.

Whether proposed development will be in the public interest because of consistency with objectives of the development standard and objectives for development within the zone

51 This test, relating cl 4.6(4)(a)(ii) of Unamended WLEP, require direct findings of the Court.

Considering building height standard objectives

52 Firstly, I will consider the objectives at cl 4.3(1) of Unamended WLEP relating to building height, which are reproduced as follows:

> (a) to ensure that new development is in harmony with the bulk and scale of surrounding buildings and the streetscape,
>
> (b) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

(c) to ensure a high visual quality of the development when viewed from adjoining properties, the street, waterways, public reserves or foreshores,

(d) to minimise disruption to existing views or to achieve reasonable view sharing from adjacent developments or from public open spaces with the height and bulk of the development,

(e) to set upper limits for the height of buildings that are consistent with the redevelopment potential of the relevant land given other development restrictions, such as floor space and landscaping,

(f) to use maximum height limits to assist in responding to the current and desired future character of the locality,

(g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,

(h) to achieve transitions in building scale from higher intensity business and retail centres to surrounding residential areas.

53 In relation to Objective 4.3(1)(a), I do note, and as put in the written requests, the test here is one of being 'in harmony", rather than have some equivalence with "the surrounding buildings and the streetscape". In harmony would essentially require the proposed development to provide an agreeable or pleasing combination with that which exists. Given that the proposed built form can be understood as a desirable outcome in terms of current planning ambitions for this part of Chatswood, and noting that the same objective applies to the current 90m control, I can find that the development is consistent with this objective.

54 In relation to Objective 4.3(1)(b) and 4.3(1)(d), my interpretation of the advice of the majority of the planning and design experts is that the proposal does minimise impacts on adjoining or nearby properties in relation to disruption of views, loss of privacy, overshadowing and visual intrusion. I accept this position and find the that the development is consistent with this objective.

55 It seems to me the main point of dispute in expert evidence relating to Objective 4.3(1)(c) is the presentation of the proposal to Claude Street, and particularly at the streetscape level. I have drawn my own conclusions into this matter above. I would understand the proposal as of high visual quality when

viewed from the nominated areas. The proposal is consistent with this objective.

56 It seems to me Objective 4.3(1)(e) and 4.3(1)(f), are examples of those objectives best understood as explanatory of the purpose of the building height standard (*Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 (*Baron*) at [49]). These objectives are already achieved through the prescription of the height standard itself, and its adoption in relation to floor space and landscaping restrictions. To the extent relevant, the development seems to me to be consistent with these objectives in that it is consistent with the development potential of the land and the desired future character.

57 The proposal can be seen to be consistent with Objective 4.3(1)(g) and 4.3(1)(h), which concern land use and built form relationships between different areas within Chatswood, given that these objectives also apply to the Amended WLEP building height standard, with which the proposal complies.

Considering FSR development standard objectives

58 I turn to the objectives of cl 4.4(1) of Unamended WLEP relating to FSR, which are as follows:

> (a) to limit the intensity of development to which the controls apply so that it will be carried out in accordance with the environmental capacity of the land and the zone objectives for the land,
>
> (b) to limit traffic generation as a result of that development,
>
> (c) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,
>
> (d) to manage the bulk and scale of that development to suit the land use purpose and objectives of the zone,
>
> (e) to permit higher density development at transport nodal points,
>
> (f) to allow growth for a mix of retail, business and commercial purposes consistent with Chatswood's sub-regional retail and business service, employment, entertainment and cultural roles while conserving the compactness of the city centre of Chatswood,
>
> (g) to reinforce the primary character and land use of the city centre of Chatswood with the area west of the North Shore Rail Line, being the commercial office core of Chatswood, and the area east of the North Shore Rail Line, being the retail shopping core of Chatswood,

(h) to provide functional and accessible open spaces with good sunlight access during key usage times and provide for passive and active enjoyment by workers, residents and visitors to the city centre of Chatswood,

(i) to achieve transitions in building scale and density from the higher intensity business and retail centres to surrounding residential areas,

(j) to encourage the consolidation of certain land for redevelopment,

(k) to encourage the provision of community facilities and affordable housing and the conservation of heritage items by permitting additional gross floor area for these land uses.

59 When I compared these objectives to those applying under Amended WLEP, I found no differences in the two sets of objectives.

60 In relation to Objective 4.4(1)(a) and 4.4(1)(d), I note strategic planning work has now identified that there is a capacity for development of the bulk and scale as now proposed. I consider the zone objectives below, finding positively in that regard. The proposal is consistent with these objectives.

61 In relation to Objective 4.4(1)(b), previous concerns relating to what was interpreted as an oversupply of private parking have been addressed. The proposal is consistent with this objective in recognition of its high quality public transport accessibility.

62 When considering the building height, I have already made a positive finding of consistency in relation to Objectives 4.4(1)(c), 4.4(1)(g) and 4.4(1)(i)

63 Objectives 4.4(1)(e) and 4.4(1)(k) are explanatory of the purpose of the FSR standard (*Baron* at [49]) and are already achieved.

64 While not directly relevant, the proposal is not at odds with Objective 4.4(1)(f) and would be seen as helping conserve the compactness of the city centre of Chatswood, or Objective 4.4(1)(j) as it is not reasonably seen as otherwise prejudicing site consolidation possibilities.

65 In relation to Objective 4.4(1)(h), I accept the advice in the written request that the proposal would not overshadow public open space areas. The proposal provides its own communal open space, and a public through site link to assist public movement through Chatswood which seems to me related to the

intentions behind this objective, which I see the proposal as generally consistent with.

Zone objectives

66 The R4 zone objectives under Unamended WLEP are as follows:

> • To provide for the housing needs of the community within a high density residential environment.
>
> • To provide a variety of housing types within a high density residential environment.
>
> • To enable other land uses that provide facilities or services to meet the day to day needs of residents.
>
> • To allow for increased residential density in accessible locations, while minimising the potential for adverse impacts of such increased density on the efficiency and safety of the road network.
>
> • To encourage innovative design in providing a comfortable and sustainable living environment that also has regard to solar access, privacy, noise, views, vehicular access, parking and landscaping.

67 The proposal directly provides further housing, in this identified high density area, to assist meeting housing needs. The proposal provides a modest mix of housing types, mostly two and three bedrooms. The proposal includes provision for community facilities development which has potential to assist meet facilities and services needs of residents. The proposal is not seen to adversely affect efficiency or safety of the road network. My interpretation was that the proposal provided a higher quality urban design response for future residents and was generally accepted by the experts to provide reasonable responses to neighbour amenity considerations. It is my finding that the proposal is consistent with each of these R4 zone objectives.

Conclusions in relation to development standard contraventions

68 On the basis of the above, I can make the following findings in relation to the development standard breaches.

69 Relating to the building height standard at cl 4.3 of Unamended WLEP:

- The applicant's written request adequately demonstrates that: (1) compliance with that standard is unreasonable in the circumstances of the case and (2) there are sufficient environmental planning grounds to justify contravening the development standard.

- I am directly satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the building height standard and the objectives for development within the zone in which the development is proposed to be carried out.

70 Relating to the FSR standard at cl 4.4 of Unamended WLEP:

- The applicant's written request adequately demonstrates that: (1) compliance with that standard is unreasonable in the circumstances of the case and (2) there are sufficient environmental planning grounds to justify contravening the development standard.
- I am directly satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the FSR standard and the objectives for development within the zone in which the development is proposed to be carried out.

71 Having a mind to cl 4.6(4)(b), concurrence of the Secretary is not required by virtue of the Court's powers under s 39(6) of the Land and Environment Court Act 1979 (LEC Act) but, in any event, I find that no matters of significance for State or regional environmental planning are raised by the height contravention.

72 Together, these findings mean that the satisfaction pre-requisites of cl 4.6(4) have been met in relation to both the building height and FSR standard contraventions and there is power to grant consent notwithstanding the contravention of these standards.

Affordable housing

73 Were it to apply to this DA, cl 6.8 of Amended WLEP would empower the consent authority to impose an affordable housing condition in the grant of any consent. While (the applicable) Unamended WLEP includes affordable housing provisions under its cl 6.8, the site is outside the areas affected by such provisions.

74 Nonetheless the applicant has made an offer to enter into a planning agreement with Council towards the provision of affordable housing. The letter of offer, as finally put, was dated 28 February 2024 and involves a monetary contribution of $5,863,548, payable prior to the issue of the Construction Certificate. I am aware that a previous letter of offer dated 1 November 2023 involved a lesser monetary contribution which I understand was rejected by Council.

75 Within COS (pars 55-62), Council outlined a number of concerns in relation to affordable housing as an evaluation consideration in the appeal. The conclusion at par 62 was that one of the reasons for refusing the DA is because it did not provide affordable housing. As I understood it a point raised at this time was that a consent authority lacked power to impose a condition relating to affordable housing under Unamended WLEP and this was one reason that the applicant's offer was not acceptable. Council also drew my attention to *IPM Holdings Pty Ltd v Council of the City of Sydney* [2020] NSWLEC 1593 (*IPM*) (at [95]-[101], [102]-[116] and [117]-[126]), where the findings of Dixon SC went against a proposed planning agreement offer by an applicant.

76 It was the applicant's position that powers under s 7.4(2)(b) of the EPA Act provided an avenue for a planning agreement to be entered into relating to affordable housing. In addition reference was made to the provisions at s 4.15(1)(iii) of the EPA Act, which in part provides that a matter for consideration in the evaluation of a development application is "any draft planning agreement that a developer has offered to enter into under section 7.4". As put by the applicant, I must take into account the fact that the applicant has offered to enter into the agreement as per the letter of offer dated 28 February 2024.

77 The significant increase in the offer between 1 November 2023 and 28 February 2024 is notable. While it is not necessary for me to have looked at this with great precision, I understood the applicant to argue the current letter of offer (28 February 2024) as lining up, essentially, with the 10% affordable housing rate which Council now seeks for this area under Amended WLEP. The previous letter of offer referenced a 6% rate which had an application in some areas of Chatswood under Unamended WLEP.

78 In its Outline of Supplementary Submissions (COSS) filed on 5 March 2024, Council did not indicate a rejection of the offer, nor did it directly indicate support for the offer. There was an indication of a dispute about whether a planning agreement should be imposed as a deferred commencement condition (as Council proposes) or whether it should be payable prior to the issue of a construction certificate (as the applicant proposes). Council argued

that Council's officers do not have delegated authority to enter into the planning agreement. Rather, that it would need to be accepted by Council's elected councillors.

> A planning agreement has been entered into in accordance with section 7.4 of the Environmental Planning and Assessment Act 1979, and registered on title for Lot SP4747, in the terms of the offer made by Wilbec Chatswood Pty Ltd dated 28 February 2024 (being the Applicant) to enter into a planning agreement with Council in connection with DA-2022/240 in relation to the making of a monetary contribution towards affordable housing calculated using a mapped percentage of 10%, in accordance with clause 6.8(5) and (7) of the Willoughby Local Environmental Plan 2012, as at the date this consent is granted the parties to the planning agreement are to include the owner of the site.

Consideration

79 In this instance, I believe the circumstances are distinguishable from *IPM*. In *IPM*, it was found that the proposed planning agreement was "not authorised under the EPA Act": at [126]. Among other things, in that case it was found that the proposed planning agreement "would not be used or applied for a "public purpose" within the meaning of subs 7.4(1) and (2) (of the EPA Act). There were a number of additional complications to the planning agreement proposed in *IPM*. There is no doubt that, insofar as the planning agreement question before me is concerned, there is a public purpose afoot with its direct relationship with s 7.4(2)(b) of the EPA Act. None of the other complications, as presenting in *IPM*, arise.

80 It is my finding that were a consent to be granted, it would be entirely appropriate to impose a condition consistent with the 28 February 2024 letter of offer from the applicant to enter into a planning agreement. The offer has been made; and to impose such a condition would be within power consistent with the provisions of s 7.7(3) of the EPA Act.

81 It seems to me the point of s 4.15(1)(iii) of the EPA Act is to link such offers (provided they are authorised under the EPA Act) to the DA evaluation process. It is notable that Mr Wells and Mr Zenardo agreed that it made sense that the significant building height and FSR uplift which the proposal sought (aligning with the desired future character under Amended WLEP provisions) should be accompanied by other public benefits such as affordable housing

(Ex 10 par 135). It seems to me that acceptance of the 28 February 2024 offer would be in the public interest and bring the proposal more wholly in line with the planning intentions for the area. That is not to say, on way or the other, that a positive determination of the appeal for the applicant is contingent on the planning agreement, per se. This is not a decision I need to make in the circumstances. However, it is clear that strictly speaking there is no obligation or power to provide for affordable housing under the environmental planning instrument applying to the DA (ie Unamended WLEP).

82 In Class 1 appeals of this kind, the evaluative decision (to impose a condition consistent with the 28 February 2024 offer) is to be made directly by the Court, exercising the function of Council pursuant to s 39(2) of the LEC Act. It is noteworthy that, while a decision in this matter to impose a condition requiring a planning agreement to be entered into binds the applicant. It does not, of itself, bind the Council (as the "planning authority" under s 7.4(1) of the EPA Act) to enter into the planning agreement. The entering into such an agreement by a planning authority is "a separate and distinct function" and not within the Court's powers when it exercises the function of Council in relation to Class 1 appeals (*Progress & Securities Building Pty Limited v Burwood Council & Anor (No 2)* (*Progress & Securities*) [2008] NSWLEC 135 [31]). However, "the fact that a condition may not be performed other than with the cooperation of a third party does not make it invalid" (*Progress & Securities* [28]). While I am aware of the possibility of Council deciding not to enter into the planning agreement, I am not convinced that this is a likely event. In the role I have in this matter it seems to me entirely appropriate to include a condition allowing such an agreement to be made.

83 While I accept Council's point that it will be a matter for elected Council to enter into the actual agreement in due course (COSS par 4), this would be the case whether or not the condition applied as a deferred commencement matter or otherwise. I am not convinced this reasoning justifies inclusion as the condition as a deferred commencement matter and see no reason that the applicant's approach to this condition not be adopted.

Other matters

Community facility use

84 The plans (Ex E) show almost all of the ground, first and second levels and the eastern side of the third level to be taken up as “community facility”.

85 Unamended WLEP defines community facility as follows:

> community facility means a building or place—
>
> (a) owned or controlled by a public authority or non-profit community organisation, and
>
> (b) used for the physical, social, cultural or intellectual development or welfare of the community,
>
> but does not include an educational establishment, hospital, retail premises, place of public worship or residential accommodation.

86 Council contended that (COSS par 20):

> … in the absence of more specific information regarding the nature of the proposed use of the “”community facilities”, at the time of determination of the appeal, the Court cannot be satisfied that the proposed use is correctly characterised as a “community facility” as defined in the WLEP, and cannot carry out the evaluation required by section 4.15 of the EP&A Act.

87 The Council saw it as essential to know the identity of the entity which is to “own or control” the designated building or place, in order to determine whether that satisfied the requirement for the owner or controller of a “community facility” as defined in the WLEP. Council cited the following authorities in support: *Cranbrook School v Woollahra Municipal Council* (2005) 144 LGERA 21 and *Cranbrook School v Woollahra Council* [2006] NSWCA 155; 66 NSWLR 379 at [80]-[82]. The applicant essentially argued that nomination of the use was sufficient.

88 It is very rare to have ownership or control as a pre-requisite in land use definitions. As far as Unamended WLEP is concerned (and one might think generally with respect to the standard instrument), it was only in the definition of community facility that the term “owned or controlled” was used based on my expeditious word search. I do also note the definition of research station includes a requirement for operation by a “public authority”.

89 While I appreciate the authorities provided by Council as an effort to assist me, I did not see the referenced findings to be on point. They seemed to me more concerned about the definition of an entity which may operate a community facility rather than whether it was proper to nominate a use for community facility in a DA without specifying particulars.

90 It seems to me the baseline position is that proffered by the applicant. That is to say, it is regular practice to nominate various land uses in plans without full knowledge of who might own or operate that land use; and with no particular concern about that. Nonetheless, if there is a consent to operate a shop (in accordance with the approved plans) and the area is taken over by an industrial use, then enforcement provisions can come into play. I cannot see much different here. While it will be important for the areas earmarked as community facility to be owned or controlled by a public authority or non-profit community organisation that, and the other related requirements, can be made good in the reasonable course of time as for any use, or challenged if necessary in accordance with normal enforcement provisions. Draft condition 11, agreed by the applicant, required the details relating to the future community facilities to be provided prior to the issue of a construction certificate. Draft condition 128 requires a general commercial office fit out for the community facility areas and draft condition 129 seem to adequately address Council's concern about impact assessment for future uses within the designated spaces.

91 I am satisfied that the lack of nomination of particulars of occupation of proposed community facility areas does not hinder my evaluation of the DA, and find for the applicant in regard to this issue.

Disputed consent conditions

92 There were a number of consent conditions which were disputed. While I had heard some direct submissions during the hearing of relevance, I requested the parties provide further particulars in writing which were received on 6 March 2024. For reference purposes they are indicated as follows:

- Council's Outline of Supplementary Submissions which I have already introduced and referenced as COSS.

- Council's Conditions of Consent dated 5 March 2024 (CCC)
- Applicant's submissions on outstanding conditions received 6 March 2024 (ASC)
- Applicant's mark-up of CCC received 6 March 2024 (ACC).

93 Again, for reference purposes, when introducing the contested conditions I refer to Council's numbering.

Proposed deferred commencement condition 3 – affordable housing

94 This has been addressed above. The subject condition should be included as an operational condition in Schedule 2.

Proposed condition 6 - contamination

95 Council's condition 6 is concerned with contamination, remediation and validation. While the wording of this proposed condition is agreed between the parties, there is a dispute as to whether this condition should be required to be satisfied by the applicant following demolition but prior to making an application for a construction certificate (as Council proposes), or whether it should be imposed as a condition to be satisfied prior to the issue of an occupation certificate (as the applicant proposes).

Consideration

96 As a matter of principle, I see Council's position as appropriate. It seems important that remediation be properly implemented after demolition and prior to Construction Certificate so that any contamination issues are dealt with prior to the construction of the proposed development. The applicant's principal concern, at least, is that there may be a possibility that the approved remediation plan may actually require the construction of the tanked basement as part of the remediation works necessary for the site. The fine tuning of this requirement can be assessed with the finalisation of the RAP. I generally accept Council's response to this position which is that (COSS par 7):

> … if there are aspects of the RAP that can only be addressed during or following construction of the proposed development, those matters should be included in a staged RAP with key hold points and approval stages, rather than imposing the condition proposed by the applicant.

97 Condition 6 retains its status as a requirement prior to Construction Certificate.

Proposed condition 7 – temporary ground anchors

98 This condition lines up with Contention 1 raised by Council in Ex 1, relating to owners' consent. The evidence of Mr Oitmaa, not disputed, in my understanding, was that there were means to undertake development without the use of ground anchors within adjoining property. Council's condition 7 would require adoption of "a construction methodology that does not require the installation of ground anchors in neighbouring private property". The applicant submits it "should not be precluded from utilising this method, should the need arise". Noting if this step was required owner's consent would be needed.

Consideration

99 The matter of landowner's consent was given consideration in *Stokes v Waverley Council (No 2)* [2019] NSWLEC 174, and I paraphrase from [69]-[70], as follows:

> 69 It follows that landowner's consent from adjoining owners is required where a development application proposes work on adjoining land.
>
> 70 For the purpose of landowner's consent to a development application, there is a distinction between the works the subject of the relevant development application, and off-site works that may be carried out pursuant to conditions of consent: s 4.17(1)(f) of the EPA Act.

100 When I look closely at the DA there is an indication of at least a potential requirement for ground anchoring involving neighbouring land in the "Douglas Partners Report on Geotechnical Investigation" (Ex D Tab 9 folio 248). The report does note the need to obtain permission from neighbouring landowners. There was no evidence that this permission has been obtained at the point of the hearing. What I took to be the applicant's response to this during the hearing was the evidence brought to bear from Mr Oitmaa that alternatives were available. Here, for me, the applicant was arguing against the need for owner's consent in relation to the suggestions of works on adjoining land in Ex D Tab 9.

101 Nevertheless, mindful of s 4.17(1)(f) of the EPA Act, it seems to me that the effect of adopting the applicant's suggested condition would be to essentially open the door to the approach indicated in the Douglas Partners Report (including the requirement to obtain owner's consent remains). The Council's

approach would seem to preclude rock anchors without modification to the development consent at least as far as my jurisdiction is concerned.

102 Generally, these matters relate to construction details which will come to a resolution further down the construction track. In the circumstances and on balance, there seems no good reason to not adopt the applicant's approach which merely opens the door to what might be a preferred construction option. This "preferred construction option" would not just relate to the perception of those undertaking the project. There is a need for a positive decision by the adjoining owners to allow such works. Here I think it necessary that I assume the adjoining owners are, or can be, fully informed of their powers to refuse and that a decision in their best interests would be available to them. I mention here that I have no particular understanding, and there were no submissions in relation to, any other statutory procedures relating to this question of neighbouring land access.

Proposed condition 27 – waste and recycling management in residential lobbies

103 There is a disagreement in regard to Council's proposed condition 27, titled "Waste service compartment room at every residential level".

104 The applicant's proposal is for a dual chute system (one chute each for general waste and "comingled" recycling (Ex D Tab 10 par 4.3). This would be supplemented by a "cardboard storage slot" next to the chutes at each residential level. Mr Morgan indicated in his evidence that a slot system could be considered compliant with WDCP 2012 requirements, because it could be considered to be a "compartment" (Joint Expert Report by waste specialists Ex 7 p 9). I understood Mr Morgan's concerns, as put in Ex 9 to relate to (1) ensuring that the slot would not be hazardous (eg associated with leaks), (2) the practicalities of emptying it and (3) ensuring the waste recycling system goes beyond bulky cardboard to include (and perhaps encourage) general paper recycling.

105 The applicant indicates in its submission on conditions that it:

> "is willing to provide waste chutes for each level however is unable to provide a bin room on each level of the development as proposed by Council …".

Consideration

106 Council's proposed condition 27 indicates a requirement for a single chute as well as a capability to accommodate a recycling bin of 80L. While the term "waste service compartment room" is used, I would understand from Mr Morgan's comments that this "compartment room" could be similar to that proposed for waste and recycling in the plans before the Court (eg highlighted in Revisions 15 and 22 in Drawings A03.4 Rev H and A03.12 Rev C). This is borne out in COSS at par 9:

> Mr Morgan is of the opinion that the applicant could comply with this condition by carrying out a minor redesign of the waste service compartment room on each level of the proposed building.

107 Given these comments, I also do not understand a recycling bin as being a requirement or appropriate on each residential level on the evidence before me.

108 The applicant does not oppose condition 26 which requires the submission of an updated waste management plan for Council "review, comment and written approval" prior to issue of the Construction Certificate. Matters a) and b) in Condition 26 relate to the final design of the waste and recycling area on each floor. Addressing such matters in the updated waste management plan for Council approval seem to readily bring the capacity to address the concerns of Mr Morgan as indicated above (at [106]), and the timing of the meeting of this requirement allows for any "minor redesign" in relation to final Construction Certificate plans for residential levels.

109 It is my finding that there is no requirement for Council's proposed condition 27.

Proposed condition 66 and 83 – noise and vibration management

110 The sticking point in these conditions relates to an objection made on behalf of a nearby property (38B Albert Avenue, Chatswood) at which medical procedures (in particular eye operations and the like) occur. The objector argued that there was a high degree of precision involved in these medical procedures and associated risks. The objector's submission was that a limit be set in relation to vibrations as experienced at the objector site. The identified vibration maximum at the receptor was 2.0mm/s. This position was supported by Council. The applicant argued that it is not reasonable to impose a limit on

the development with respect to a property “which is not adjoining the subject site and is occupied by a tenant subject to a lease” (ACS lines 5, 6)).

Consideration

111 The potential for the proposed works to impact on this medical practice should be considered as a not insignificant factor. I do not see the applicant’s arguments as persuasive. It is agreed that Mr Oitmaa’s evidence was that the proposed works would comply with the 2.0mm/s requirement. The Council’s approach to conditions 66 and 83 is adopted.

Proposed condition 124 - waste collection agreement

112 Council’s proposed condition 124 would require the applicant to enter a waste collection agreement with Council. This was a matter of some discussion in the proceedings. My understanding of the hub of it was that while Council policy now generally sought that turning paths be accessible for longer waste trucks, Council’s contractors still used 10.5m trucks for waste collection. This is made clear in COSS par 14 where Council indicates that Council’s contractor can access and service the waste collection facilities proposed by the applicant. Condition 124 will stand.

Conclusion

113 This proposal is well aligned with desired future character under the new planning controls which have been established for Chatswood centre in terms of building height and density. A key question for this evaluation is whether the proposal is of sufficient design quality. I was impressed with the expert evidence from both urban design specialists on this topic. I understood these design experts to have high regard for the proposal as a slender tower element. Dr Zenardo was against the proposal most particularly because of the streetscape response to Claude Street. I explain above why I disagree with Dr Zenardo on this point and see this response as of a high standard, in part because of the designing in to this frontage of a through site link, of some considerable likely importance to the locality as intensification of development ensues. When I consider the wider strategic planning intent for the locality, the through site link is again important, along with the applicant’s response to the

topic of affordable housing. The proposal seems to me in an overall sense to be consistent with this wider strategic planning intent.

114 My evaluation is that the proposed development is acceptable in the circumstances of the case with conditions as generally agreed between the parties (without prejudice on Council's part); and in accordance with my findings with respect to the conditions which were not agreed.

Orders

115 The Court directs that:

(1) The parties are to prepare final settled conditions of consent, consistent with the findings in this judgment, and to file these by no later than 15 May 2024;

(2) With completion of the direction at (1) above, final orders will be made granting development consent;

(3) Liberty to restore is available in the usual way.

P Walsh

Commissioner of the Court

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