



Land and Environment Court
New South Wales

Case Name: PDS Engineering Division Pty Ltd v North Sydney Council

Medium Neutral Citation: [2024] NSWLEC 1722

Hearing Date(s): 12-13 September and 16-17 September 2024

Date of Orders: 08 November 2024

Decision Date: 8 November 2024

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The Applicant is to pay the Council's costs thrown away as a result of the amending of the development application, as agreed or assessed, in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979.
(2) The appeal is upheld.
(3) Development application No. DA66/23 for the proposed development involving restoration of a heritage item, partial demolition works, and construction of a 11-storey mixed use building comprising two floors of commercial premises, 52 residential units, and four levels of basement parking, public domain and landscaping works, and other associated works, at Lot 1 in Deposited Plan 1279891, referred to as 286-294 Pacific Highway, Crows Nest, is determined by the grant of consent, subject to conditions of consent at Annexure A .
(4) All Exhibits are returned, except for Exhibits A, B, D and L.

Catchwords: DEVELOPMENT APPLICATION – mixed use development in MU1 and R2 zone – heritage

conservation – whether conservation incentives apply

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 3.30, 4.16, 8.7, 8.15(3)

Heritage Act 1977, ss 57, 59

Land and Environment Court Act 1979, s 39

Environmental Planning and Assessment (Special Infrastructure Contribution - St Leonards and Crows Nest) Determination 2020

Environmental Planning and Assessment (Special Infrastructure Contribution - St Leonards and Crows Nest) Direction 2020

Environmental Planning and Assessment Regulation 2021, ss 29, 38, 288A

North Sydney Local Environmental Plan 2013, cll 1.7, 2.3, 4.3, 4.4A, 4.6, 5.10, 6.12A, 7.6, Sch 5

Standard Instrument (Local Environmental Plans)

Amendment (Land Use Zones) Order 2021

Standard Instrument (Local Environmental Plans) Order 2006

State Environmental Planning Policy (Biodiversity and Conservation) 2021, ss 6.6, 6.7

State Environmental Planning Policy (Housing) 2021, ss 144, 145, 147, 148; Ch 4; Sch 9

State Environmental Planning Policy (Infrastructure) 2007 (repealed)

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy (Sustainable Buildings) 2022

State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.48, 2.119, 2.120, 2.121, 2.122

State Environmental Planning Policy Amendment (Land Use Zones) (No 3) 2022

Cases Cited:

Creative Academy Group Pty Ltd v White Pointer Investments Pty Ltd [2024] NSWCA 133

Holt Avenue Cremorne Pty Ltd v North Sydney Council [2023] NSWLEC 1736

Howe Architects Pty Ltd v Ku-ring-gai Council [2021] NSWLEC 1233

Initial Action Pty Ltd v Woollahra Municipal Council 2018) 236 LGERA 256; [2018] NSWLEC 118

Stamford Property Services Pty Ltd v Mulpha Australia Ltd (2019) 99 NSWLR 730; [2019] NSWCA 141
Swansea RSL Club & Rosecorp Pty Ltd v Council of the City of Lake Macquarie [2005] NSWLEC 755

Texts Cited: Apartment Design Guide
National Construction Code
North Sydney Development Control Plan 2013
NSW Department of Planning, Housing and Infrastructure, Explanation of Intended Effect, 'Crows Nest Transport Oriented Development Precinct' (July 2024)
NSW Department of Planning, Industry and Environment, St Leonards and Crows Nest 2036 Plan (August 2020)

Category: Principal judgment

Parties: PDS Engineering Division Pty Ltd (Applicant)
North Sydney Council (Respondent)

Representation: Counsel:
M Wright SC with D Harker (Applicant)
M Henry SC with S Berveling (Respondent)

Solicitors:
Holding Redlich (Applicant)
Matthews Folbigg Pty Ltd (Respondent)

File Number(s): 2023/185876

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** A two-storey Art Deco style building located close to the intersection of the Pacific Highway and Falcon Street in Crows Nest was once the site of a shop and showroom used by the North Shore Gas Company, that I will refer to as the Gas Showroom building.
- 2 The Gas Showroom building is identified as an item of local heritage significance for the association it has to the North Shore Gas Company, to its architects Rupert Villers Minnett and Charles Cullis-Hill, and to its builders Howie Moffat & Co., and Wunderlich Ltd.

- 3 The façade fronting the Pacific Highway consists of materials considered somewhat unique in the precinct, such as red granite, bronze and terracotta.
- 4 An area of hardstand used for car parking is located behind the heritage building, accessed from Sinclair Street to the site's rear.
- 5 Development proposed on the site involves partial demolition of the existing building, construction of a mixed use building with commercial tenancies and residential apartments over, public domain works and landscaping.
- 6 To this end, the Applicant in these proceedings, PDS Engineering Division Pty Ltd (PDS) lodged development application No. DA66/23 with North Sydney Council (the Council) on 8 March 2023.
- 7 As the development application was otherwise undetermined, on 9 June 2023, PDS filed an appeal in Class 1 of the Court's jurisdiction under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 8 On 17 July 2024, the Court granted PDS leave to rely upon amended plans and other documents that had the effect of amending the development application now characterised in the Amended Statement of Facts and Contentions prepared by the Council (Exhibit 4) in the following terms:
 - Partial demolition of existing buildings on site.
 - Retention of the significant fabric of the local heritage-listed Former North Sydney Gas Works Co office building.
 - Conservation and renewal of the remaining Former North Sydney Gas Works Co office building.
 - Basement excavation to accommodate four levels of basement parking for 67 car parking spaces. Vehicular access will be from Sinclair Street.
 - Construction of a 11 storey mixed use building comprising ground floor and level 1 commercial spaces with 52 residential apartments containing 8 x studio, 1 x 2-bedroom apartments and 9 x 3-bedroom, 16 x 4 bedroom and 10 x 5-bedroom apartments above. On the R2 land fronting Sinclair Street 8 X 4-storey, 5-bedroom townhouse are proposed.
 - Landscaped roof top communal open spaces.
 - A pedestrian walkway along the northern boundary linking the Pacific Highway to Sinclair Street.
- 9 At the outset of the hearing, PDS foreshadowed the amending of the development application, subsequently sought on the second day, which the

Council, as the relevant consent authority, approved pursuant to s 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation).

- 10 The amended documents contained in Exhibit D, include:
- (1) Letter of revised offer to enter a Planning Agreement prepared by PDS dated 6 September 2024.
 - (2) Heritage Management Document (Version 6) prepared by Heritage 21 dated 6 September 2024.
 - (3) Construction Management Plan (Rev 5) prepared by Manado Constructions Pty Ltd dated 11 September 2024.
 - (4) Operational Loading Dock Management Plan prepared by McLaren Traffic Engineering dated 5 September 2024.
 - (5) Letter re waste collection arrangements prepared by MRA Consulting Group dated 11 September 2024.
 - (6) Waste Management Plan (Rev 1.2) prepared by MRA Consulting Group dated 11 September 2024.
 - (7) Structural Engineering Plans (Rev B) prepared by CAM Consulting dated 11 September 2024.
 - (8) Driveway Plans (Rev F) prepared by CAM Consulting dated 6 September 2024.
 - (9) Revised Costs Estimate prepared by Rider Levett Bucknall dated 30 August 2024.
 - (10) Architectural Plans (up to Rev H) prepared by Fuse Architects dated 9 September 2024.
- 11 The parties agree the amendment to the development application (the amended DA) is more than minor and the Court directed PDS to pay the Council's costs thrown away as agreed or assessed in accordance with s 8.15(3) of the EPA Act.

The site and its context

- 12 The site is located on the western side of the Pacific Highway, south of Shirley Road, and presents a frontage that measures 24.4m to the Pacific Highway.
- 13 The site also has a frontage of 36.5m to Sinclair Street behind. As such, the site is irregular in shape, forming a kind of L-shape.
- 14 That portion of the site fronting Pacific Highway is located within the MU1 Mixed Use zone, and the wider portion of the site fronting Sinclair is located

within the R2 Low Density Residential zone, according to the North Sydney Local Environmental Plan 2013 (NSLEP).

- 15 The site is legally identified as Lot 1 in DP 1279891, with an area of 2790m².
- 16 The site is located within an area that contains a mix of multi-storey commercial and retail buildings that generally front the Pacific Highway, and largely single storey residential buildings fronting Sinclair Street to the rear, elevated above sandstone retaining walls and sandstone foundation walls above that.
- 17 To the west of Sinclair Street, development is more varied, with a mix of residential flat buildings and other lower scale residential dwellings reflecting the R3 Medium Density Residential zoning that applies.
- 18 The site is also in close proximity to the Crows Nest Commercial Centre and the Crows Nest Metro Station, and to the St Leonards Commercial Centre and the St Leonards Train Station.
- 19 The area is agreed to be in transition. Planning proposals have been prepared for a number of sites located close to the subject site, including:
 - (1) The adjoining site fronting the Pacific Highway to the immediate south of the site known as 270-272 Pacific Highway.
 - (2) 391-423 Pacific Highway, 3-15 Falcon Street and 8 Alexander Street otherwise known as the 'Five Ways Triangle'.

The St Leonards and Crows Nest 2036 Plan

- 20 The site lies within an area identified in the St Leonards and Crows Nest 2036 Plan (the 2036 Plan) (Exhibit 1, Tab 33). The 2036 Plan has been led by the Department of Planning, Industry and Environment (the Department), in consultation with North Sydney Council, Willoughby City Council, Lane Cove Council, other government agencies and through extensive community engagement (folio 748).
- 21 The 2036 Plan, dated August 2020, has been developed as a strategic land use and infrastructure plan to guide future development in the precinct and as a precursor to more detailed site specific planning investigations (folio 748).

- 22 The 2036 Plan outlines proposed changes to existing planning controls, that will be developed as part of any future rezoning process (folio 810).
- 23 Diagrams show the site, or part of the site, is located within the area of proposed changes to planning controls, such as the number of storeys which is identified for change to 8 storeys to the MU1 land (folio 813).
- 24 The Council submits that while the 2036 Plan is not an environmental planning instrument, it is open to the Court to take the document into account as a matter of public interest.

Explanation of Intended Effect, Crows Nest Transport Oriented Development Precinct

- 25 The parties agree the 2036 Plan is superseded by a document titled 'Explanation of Intended Effect, Crows Nest Transport Oriented Development Precinct', also prepared by the Department, dated July 2024 (the EIE) (Exhibit 2, Tab 4).
- 26 The boundaries of the EIE adopt the boundaries of the 2036 Plan in order to accelerate its rezoning (folio 143), and the objectives of the EIE seek to review and implement recommendations of the 2036 Plan.
- 27 The EIE, exhibited between 16 July and 30 August 2024, states its purpose is, in part, to outline proposed planning controls for the rezoning of the Crows Nest Transport Oriented Development Precinct. The EIE anticipates implementation through a self-repealing State Environmental Planning Policy that will amend, among other instruments, the NSLEP (folio 142).
- 28 The Council submits that while the site is subject to change, that change is not to the degree claimed by PDS. When reference is made to the EIE, and the documents prepared in support of it, the proposed change in zoning, height and floor space ratio (FSR) to that part of the site zoned R2 is clearly designed to support the delivery of new public open space.
- 29 Section 1.4 of the EIE states that a master plan and urban design review of the 2036 Plan has been undertaken, supported by technical studies to determine boundaries and opportunities for new housing (folio 146) depicted in Figure 3

of the EIE, in which the site is located. The site is marked in blue as 'Subject to rezoning – anticipated change' (folio 147).

- 30 Such studies include an Open Space Investigation (folio 197), and Masterplan Testing of the Crows Nest Pacific Highway Corridor (Corridor Study) (folio 199).
- 31 The Open Space Investigation identifies the car park to the rear of the subject site, at 79-81 Sinclair Street, as a site of potential open space, notwithstanding its heritage listing and absent consideration of how such open space may be delivered.
- 32 The same area of the site is depicted in the Corridor Study as open space, and labelled as follows:

“Indicative location to provide much needed new open space along Sinclair Street for the growing local community. Maintain access to adjacent property fronting Pacific Highway.”
- 33 Figure 6 of the EIE (folio 151) appears to identify that part of the site occupied by the car park, and it must be said, part of the existing building that also occupies a portion of the R2 land, to be proposed for no change to the zoning. This is despite the land to the south being identified for rezoning to R4 High Density Residential.
- 34 Likewise, Figure 10 of the EIE (folio 155) depicts the proposed maximum height of buildings standards, in which that portion of the site zoned R2 is shown unchanged, and the portion zoned MU1 is shown with a height of 50m.
- 35 Section 2.8 of the EIE (folio 164) once again identifies the site at 79-81 Sinclair Street as potential open space, and explains the additional height and FSR on the land zoned MU1 would act as a development incentive, albeit further investigation is required into the delivery of potential open space.
- 36 Figure 13 of the EIE (folio 158) depicts a proposed change in FSR in the area, where none applies today, to an FSR standard of 2:1 on the land zoned R2, and a FSR standard of 6:1 to the MU1 zoned land.
- 37 Additionally, Masterplan Testing at folio 201 also explains the proposed arrangement for FSR on the site in the following terms:

“...The site has been split in two, with the portion at the front [MU1 land] identified as a heritage item and the portion at the rear [R2 land] flagged as an indicative location to provide much needed open space. If open space is delivered, the controls will thus only apply to the front of the lot, shown as 14 storeys with a total FSR of 6:1 to match surrounding developments. If open space is not provided to the rear of the lot, the site remains subject to the 2036 Plan controls that showed 8 storeys and an FSR of 4:1.”

- 38 Mr McDonald believes the EIE is not explanatory of a proposed instrument as understood in terms at s 4.15(1)(a)(ii) of the EPA Act, as the EIE is not more than a strategy document. At the most, the weight given to the EIE would be as a matter of public interest.
- 39 However, even if weight is given, Mr McDonald notes that whilever a taller building may be contemplated on the MU1 portion of the site, there can be no building on that portion of the site zoned R2 until the zoning of that area is clarified.
- 40 In my view, it is appropriate to give greater weight to the EIE than the 2036 Plan for three reasons. Firstly, because the 2036 Plan is clearly a strategy document that anticipates more detailed site-specific planning investigations, and secondly because the EIE states that it, in effect, supersedes the 2036 Plan by virtue of ‘reviewing’ the assumptions that lie therein. Thirdly, I accept the submission of PDS that the EIE is a document consistent with the terms of s 3.30 of the EPA Act that provides for the publicising of a document described as an “explanation of the intended effect of the proposed instrument” (subs (1)(a)) so as to seek and consider submissions from the public on the matter (subs (1)(b)).
- 41 As such, the EIE is a draft environmental planning instrument, which the 2036 Plan is not.
- 42 The 2036 Plan and EIE are particularly relevant in the circumstances of this case as the height of the proposed development exceeds the two height of building standards at cl 4.3 of the NSLEP.
- 43 However, before dealing with the question of the height exceedance, it is also helpful to set out the competing submissions advanced by the parties on whether the proposal is permissible in the R2 zone.

- 44 In short, this is because the Land Use Table at cl 2.3 of the NSLEP does not permit residential flat buildings on that part of the site zoned R2.

Whether the proposed development is permitted in the R2 zone

- 45 The Council contends that when principles of statutory construction are properly applied, the terms of cl 5.10(10) do not permit PDS to rely upon the heritage incentives contained therein because the site on which the development is proposed includes land that is not land on which the heritage item is erected.
- 46 In particular, that portion of the site located to the west of the former Gas Showroom building is land that was formerly occupied by dwellings fronting Sinclair Street until the 1970's, and so did not form part of the heritage item, nor act as a curtilage for it.
- 47 The Council's position is that when cl 5.10 is read as a whole, it is clear that the legislature adopted four different phrases within the provision referring to land:
- (1) "land on which a building is erected" (cl 5.10(10));
 - (2) "land on which a heritage item or Aboriginal object is located" (cl 5.10(2)(e) and (f));
 - (3) "land that is within a heritage conservation area" (cl 5.10(5)(b)); and
 - (4) "land that is within the vicinity of land referred to in paragraph (a) or (b)" (cl 5.10(5)(c)).
- 48 Only the text at cl 5.10(10) uses the language of land on which a heritage building is *erected*, as distinct from land on which a heritage item or Aboriginal object is *located* (emphasis added).
- 49 Such a distinction in the text of the provision must be intended by the legislature as it can be presumed to have used the same words when the same meaning is intended, and different words where a different meaning is intended: *Creative Academy Group Pty Ltd v White Pointer Investments Pty Ltd* [2024] NSWCA 133.
- 50 Likewise, as shown in *Stamford Property Services Pty Ltd v Mulpha Australia Ltd* (2019) 99 NSWLR 730; [2019] NSWCA 141 (*Mulpha*), land is a word of such general meaning it is necessary to consider the context in which the word

appears, and the scope and purpose of the relevant statutory provisions, in order to determine how the word 'land' is to be construed.

- 51 The context in which the provisions at cl 5.10 operate is found, in its entirety, within cl 5.10 of the NSLEP when the provision is read as a whole, including the objectives that are, relevantly, to conserve the environmental heritage of North Sydney, and the heritage significance of heritage items.
- 52 When so understood, the phrase "land on which [a building that is a heritage item] is erected" is the land to which that subclause applies, if it meets two criteria:
- (1) Firstly, that the land is land to which the NSLEP applies and,
 - (2) Secondly, it is land on which a heritage item is erected.
- 53 According to the Council, the land on which a building is erected is that land on which the building that is the subject of the heritage listing was completed absent any changes to the footprint of the building, by addition or demolition.
- 54 That said, the Council also entertains that the land on which such a building is erected may also comprise some element of curtilage. Aerial photographs (Exhibit B, Tab 5) and surveys (Exhibit A, Tab 23) indicate some land to the west of the Gas Showroom building that the Council submits may be considered to answer the description of 'curtilage' in the Dictionary of the NSLEP. However, even if that is the case, the curtilage would not extend to the Sinclair Street frontage because that land was formerly the location of three dwellings, and so could not serve as curtilage to the Gas Showroom building.
- 55 Likewise, Lot 4, Section 2 in DP 1649, located to the north of the Gas Showroom building is not land on which the heritage item is erected.
- 56 The inclusion of this land within the site was only effected in January 2022 (Exhibit 1, folios 297-299), at which time Lots 1-6 in DP 716494, and Lot 4 in Section 2, in DP 1649, were consolidated to form the site cited at [15].
- 57 To the extent that the reference in Sch 5 of the NSLEP is to Lots 1-6 in DP 716494, and the Heritage Map shows the land to which the heritage significance is affixed is that land shown on the consolidation plan above, there is no reference to the Heritage Map in cl 5.10 of the NSLEP.

- 58 Furthermore, there is no reference to the Heritage Map in the definition of 'heritage item' in the NSLEP, unlike the definition of 'heritage conservation area' that invokes the Heritage Map.
- 59 The Council argues that its Heritage Map at Sch 5 of the NSLEP cannot be relied upon to identify an item of heritage significance.
- 60 PDS submits that when the NSLEP is construed according to accepted principles of statutory interpretation, the Court would regard the meaning of the phrase "land on which the building is erected" to have no more than its ordinary and grammatical meaning, having regard to their context and legislative purpose, and where the text is considered as a whole, as well as the general purpose of the relevant provision.
- 61 So understood, the phrase adopts the present tense to invoke the land on which a building *is*, and not *was*, erected. The provision is not directed to the land at the time the Gas Showroom building was erected, but the land on which the building stands today.
- 62 As at [50], PDS likewise relies on *Mulpha* to affix the meaning of 'land' to a given context that must be understood by reference to the scope and purpose of the provision itself.
- 63 Schedule 5 of the NSLEP identifies the address and property description of heritage items. In this case, the heritage item is identified as the Former North Shore Gas Co office at 286-288 Pacific Highway, described as Lots 1-6 in DP 716494.
- 64 The heritage item is also identified as "Item No I0150", as it appears on the relevant Heritage Map which is adopted by the terms at cl 1.7 of the NSLEP.
- 65 The map, re-produced in part below, shows the land as described in Sch 5 to comprise Lots 1-6, as has been the case since 2001.



- 66 To read the provision at cl 5.10(10) to refer to land as defined at the time a building was completed, or as it was erected on the land at the time, is to ignore the express terms of Sch 5 and the Heritage Map and instead requires an expedition through historic documents, titles and deposited plans to identify the precise physical limits of the land on which the item was erected.
- 67 The factual circumstances and statutory regime relevant to the decision in *Mulpha* are distinguished from those in this case because, firstly, the text at s 57 of the *Heritage Act 1977* that is the focus in *Mulpha* acts as a prohibition and is not facultative as is the case with cl 5.10(10) of the NSLEP.
- 68 Secondly, because s 57(1)(e) of the *Heritage Act* contemplates orders in respect of a specific site or curtilage of a building – a question resolved in that case by reference to a plan that identified the curtilage of the heritage item: *Howe Architects Pty Ltd v Ku-ring-gai Council* [2021] NSWLEC 1233 (*Howe Architects*) at [64].
- 69 Thirdly, because the making of an application under s 59 of the *Heritage Act* is in respect of whether an item or land is situated on or comprises Crown land, unlike the situation in this case. In such a context, it was reasonable to find the application considered in *Mulpha* related to the footprint of a building on Crown land, and not the land itself.

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- 70 In contrast to those provisions of the *Heritage Act* considered in *Mulpha*, the conservation incentives at cl 5.10(10) are facultative and are designed to facilitate conservation.
- 71 Next, the provision contemplates the grant of consent for either a building that is a heritage item, or the land on which a building is erected. However, the Council's preferred construction reduces the provision to not more than the footprint of the building on the land. As such, the incentives provided for by the legislature are confined to that footprint, and not to a wider application on the land.
- 72 If the understanding of 'land' is indeed highly contextual, as per *Mulpha*, then weight must be given to the listing of the site in Sch 5 of the NSLEP and to the relevant Heritage Map as these are particular creatures of the NSLEP, and are not features of the *Heritage Act*.
- 73 The arguments advanced by the parties in the circumstances of this case are not unlike those advanced in *Howe Architects*, although in that case Council argued the heritage item was the entirety of the site, and PDS sought to argue the heritage item was limited to the dwelling house on the site.
- 74 In *Howe Architects* at [70], the Commissioner found there to be a distinction between the factual circumstances in that case and those in *Mulpha* for reasons that are also relevant in the circumstances of this case. In *Mulpha*, the plan included on the heritage inventory sheet identified the building footprint and the curtilage of the item to be one and the same, and excluded the remaining portion of the cadastral lot (*Howe Architects* at [62]).
- 75 However, in the circumstances of this case, there is no such evidence that limits the heritage significance of the North Shore Gas Building to the footprint of the building itself. Instead, from the date of its construction, the building appears to have been erected on land comprising a portion of the lots originally set out to the west of Lot 5 fronting what is now known as the Pacific Highway, and formerly known as Lane Cove Road - a fact acknowledged by the Council in written submissions.

- 76 As was shown in *Howe Architects*, at [69], if 'land' is defined as the Council argues, then the land is confined to the footprint of the Gas Showroom building, and there is no purpose served by the phrase, "or the land on which such a building is erected" in the provision at cl 5.10(10).
- 77 As in *Howe Architects*, I consider Sch 5 of the NSLEP a relevant part of the NSLEP that identifies the location of the heritage item by reference to the cadastral lots being the lots on which the heritage item is erected. Those lots are Lots 1-6 in DP 716494, according to Sch 5.
- 78 The Council submits that the Commissioner in *Howe Architects* failed to consider the decision in *Swansea RSL Club & Rosecorp Pty Ltd v Council of the City of Lake Macquarie* [2005] NSWLEC 755 (*Swansea*).
- 79 I have considered the circumstances in *Swansea*. As I understand the circumstances of the case, it relates to a large site of 5.5 hectares on which multiple items of heritage were identified in the relevant local environmental plan. The proponent sought to convert one of the existing buildings on the site to a registered club with apartments over. The Court found, at [77], firstly that the heritage items were not sufficiently relevantly related to the proposed actual development site where physical works will occur, and secondly there was an "express lack of intention to physically use any one of the heritage items in connection with the development...".
- 80 I consider the finding in *Swansea* at [77] to sufficiently distinguish the facts in that case from those in this in two ways. Firstly, in *Swansea* the Court was asked to consider whether the site proposed for development was land on which a heritage item known as 'Wallarah House', is erected. This was necessary due to the number of heritage items identified on one lot. The Court chose to deal with the question by identifying the curtilage of Wallarah House. In the circumstances of this case, there is one heritage item identified on a site comprising multiple lots. Secondly, and significantly in my view, the Court found a lack of integration between the development proposed and any of the heritage items, unlike the proposal in this case which clearly seeks an integration with the Gas Showroom building.

- 81 The Council also submits that as the North Shore Gas Company was never the owner of Lot 4, the lot located to the north of the Gas Showroom building, that land is not land on which the heritage item was erected and so cannot benefit from the heritage incentives provision.
- 82 To accept such a submission would appear to limit the application of the provision at cl 5.10(10) to only those sites where the land bears an identical description to that land on which the building the subject of the listing was originally erected, presumably absent subsequent subdivision or consolidation as is the case here.
- 83 I do not understand the historical consolidation or subdivision of land on which an item of heritage significance is found today to preclude the operation of the incentive provisions. It is common for the land on which a heritage item is, or was originally erected, to be different from that evident today. To suggest that cl 5.10(10) should be read to apply only to land that is wholly unaltered from its original state at the time a heritage building was completed would appear to conflict with the otherwise facultative character of the provision and it is unlikely, in my view, that such a construction gives effect to the objective intention of Parliament in drafting the provision.
- 84 As I find the land on which the heritage item is erected to be the land so identified in Sch 5 of the NSLEP, it follows that the provisions at cl 5.10(10) apply to the site, including that portion of the site zoned R2, and to Lot 4.
- 85 The next question for the Court to determine is whether development consent may be granted, even though development for the purpose of a residential flat building is prohibited by the Land Use Table in the R2 zone. For it to be so, the Court must form an opinion of satisfaction as to those matters at cl 5.10(10)(a)-(e) of the NSLEP.
- 86 In respect of subcl 5.10(10)(a), Ms Trueman considers the architectural and structural drawings to lack the level of detail expected of development that has an acknowledged impact on a heritage item.
- 87 In broad terms, Ms Trueman's concerns are that new columns will penetrate the heritage item, grounded on pads below the lower ground floor, and that

structural supports will be visible over the heritage item from locations on the Pacific Highway.

- 88 However, I note the heritage experts agree that Schedule of Conservation Works prepared by Heritage 21 (Exhibit D, Tab 2) is comprehensive and covers the works necessary and appropriate to conserve the heritage item. Such consensus is qualified, at par 3.2 of the joint expert report with the proviso that annotations contained in the marked plans appended to the Heritage Management Document must be transposed on to the architectural plans, a task that has now been completed. To the extent that Ms Trueman expresses concern at the potential impact of structural columns and the support of a northern wall to the Gas Showroom building, I consider the explanation provided by Mr Bonus in his written response, filed with the Court on 18 September 2024, resolves Ms Trueman's concerns by identifying particular structural drawings that indicate the retention of heritage fabric.
- 89 In respect of subcl 5.10(10)(b), the Court must be satisfied that the proposed development is in accordance with a heritage management document that has been approved by the consent authority. A Heritage Management Document, prepared by Heritage 21 dated September 2024 (Exhibit D, Tab 2), includes a Schedule of Conservation Works that is the subject of agreement between the heritage experts.
- 90 Additionally, a Fabric Analysis dated 1 July 2024 (Exhibit B, Tab 12), and Statement of Heritage Impact dated July 2024 (Exhibit B, Tab 13), both prepared by Heritage 21, support the proposal.
- 91 While the Council has not approved the Heritage Management Document, Fabric Analysis or Statement of Heritage Impact, the agreement of the heritage experts at [86], and subsequent explanation by Mr Bonus, is sufficient, in my view, for the Court to exercise the functions and discretions of the Council under s 39(2) of the *Land and Environment Court Act 1979* (LEC Act) to so do.
- 92 The Court also has in evidence structural certification of the columns about which Ms Trueman expresses concern (Exhibit K), prepared by Mr Andrew Cutuk, Director and Senior Engineer with CAM Consulting, Structural and Civil Engineering. Finally, annotations contained in the marked plans appended to

the Heritage Management Document are now transposed on to the architectural plans in accordance with Ms Trueman's written evidence at par 5.48 of the joint expert report.

- 93 As the Heritage Management Document, architectural plans and structural drawings are identified in Condition A1 of the without prejudice conditions of consent, the Court reasonably expects that the necessary conservation works identified in those documents will be carried out in accordance with subcl 5.10(10)(c), should consent be granted.
- 94 As I consider the structural concerns held by Ms Trueman to be addressed, the remaining adverse effect on the heritage significance of the Gas Showroom building requiring consideration would appear to be the visual impact of the overhang by the proposed tower when viewed from the Pacific Highway.
- 95 In the joint expert report, Ms Powale cites examples of towers that overhang, or cantilever over heritage buildings below, or adjacent to such towers. However, Ms Powale also acknowledges these examples do not involve the penetrating of the heritage items by structural columns as is proposed here, and furthermore that the ideal heritage outcome is that there be no penetrating of the heritage item by structure.
- 96 The State Heritage Inventory records the statement of significance for the item on the site as follows:

"The former North Shore Gas Co Showroom and office has historical significance for its ability to give evidence to the supply and promotion of utility services (gas), and reflects the varied mix of commercial uses in the 1940s along the Pacific Highway in Crows Nest. The building has associative significance for its associations with the North Shore Gas Company, the architects Rupert Villiers Minnett and Charles Cullis-Hill, builders Howie Moffat & Co, and Wunderlich Ltd. A fine example of the Inter-war Art Deco style in a commercial shop/showroom settling with a use of high quality materials including red granite, bronze facade elements and architectural terracotta. Set within the wider Crows Nest precinct, the type and level of materials are almost unique.

The building is representative of the marketing and commercial activities of mid-Twentieth Century utility companies such as the North Shore Gas Company. The building exhibits high quality use and details of materials which are now increasingly rare. Such elements and details include: bronze facade elements, architectural terracotta, coloured terrazzo amongst others. This item is assessed as a rare example of an Inter-war Art Deco commercial building within North Sydney, particularly with its association as the showroom for the

utility company North Shore Gas Co, the modernity of the style being appropriate to the products displayed therein.” (Exhibit B, folio 469)

- 97 PDS submits that the proposal does not adversely affect, but may well enhance, the historical or associative significance as it is expressed in the statement of significance by virtue of the retention and restoration of the original showroom, and the façade fronting the Pacific Highway.
- 98 While some of the inclined structural supports will be visible from certain locations on the eastern side of the Pacific Highway, the first support is setback 5.5m behind the parapet of the Gas Showroom building, within a gap or void of two storeys between the topmost level of the parapet of the Gas Showroom building and the underside of Level 4 that overhangs, which is a factor that Mr McDonald believes serves to ameliorate the scale of the tower element, and outweighs the “unorthodox appearance of the struts”. I accept Ms Powale’s opinion that this arrangement, coupled with the retreat of the tower form along the curve in plan to the south east, will maintain the prominence of the Gas Showroom building when viewed from the Pacific Highway.
- 99 Those columns that do penetrate the Gas Showroom building, are limited to the rear of the primary showroom space on the ground floor, where the footprint of the building narrows to admit natural daylight in lightwells to the north and south. Furthermore, the proposed columns are aligned to the existing structural grid of the Gas Showroom building, adopting the existing rhythm so that the position of columns appears logical and not at odds or out of step with the existing fabric.
- 100 While the experts do not offer an opinion on the façade of the new commercial lobby on the site of 290-294 Pacific Highway, it also appears relevant, in my view, that the glass façade of the proposal reflects what the heritage experts describe as ‘faience’ or shallow fluted tile motif of the original Gas Showroom building. In showing deference to such a feature of the existing façade, free of mimicry, it follows in my mind that, for this reason and those summarised above, that the proposal does not adversely affect the heritage significance of the heritage item, pursuant to subcl 5.10(10)(d) of the NSLEP.

- 101 The final matter about which the Court needs to be satisfied, at cl 5.10(10)(e) of the NSLEP, is that the proposal would not have any significant adverse effect on the amenity of the area.
- 102 An Amenity Impact Assessment prepared by Bonus + Associates dated 31 May 2024 (AIA) (Exhibit B, Tab 9) assesses existing views currently enjoyed from 10 residential flat buildings in the area, and the potential impact arising from the proposal.
- 103 The AIA concludes views from sites in the area are either unaffected, or are affected to a negligible extent, and that view sharing is achieved.
- 104 Shadow diagrams contained in the architectural plans consider existing development in the area, and relevant open space, as well as shadows cast from the approved building height and envelopes proposed for development at 270-272 Pacific Highway and the Five Ways Triangle as foreshadowed in the 2036 Plan, and other building envelopes anticipated by the 2036 Plan. The planning and urban design experts agree that the proposal does not result in unacceptable shadow impacts on adjoining properties (Exhibit 5, par 76).
- 105 In terms of privacy for residents of new and existing dwellings, Mr McDonald cites the perception of overlooking to properties in the R2 zone. I accept the submissions made by PDS that such amenity is maintained by the zero setback to the northern boundary and locating openings in inset light courts, or to the front and rear elevations and where the tower element is limited to that part of the site zoned MU1 so that sightlines into existing apartments at 300 Pacific Highway are prevented.
- 106 Privacy to properties to the rear of the site, and opposite in Sinclair Street, is maintained by the degree of building separation achieved. In particular, privacy between the tower element and that part of the site zoned R2 does not result in privacy loss to No 77 Sinclair Street because the building separation measures between 9m and 14.35m, in excess of the relevant guidance found in the Apartment Design Guide (ADG), and because sightlines are obstructed by planter boxes to outdoor terraces where those terraces generally address the northern boundary facing the Fire Station.

- 107 Accordingly, when views, overshadowing and privacy are considered, I am satisfied that the proposed development would not have any significant adverse effect on the amenity of the area.
- 108 Furthermore, as I am satisfied on those matters at cl 5.10(10)(a)-(e) of the NSLEP, I conclude that the provisions of cl 5.10(10) of the NSLEP operate to permit the development the subject of the development application, notwithstanding that residential flat buildings are prohibited in the R2 zone.
- 109 However, the proposed development also exceeds the height standard at cl 4.3 of the NSLEP. Having found the proposal to be permitted within the zone by operation of the conservation incentives, the Court must now be satisfied that the exceedance of the height is justified, pursuant to cl 4.6 of the NSLEP.

The height standard is exceeded

- 110 As stated previously, the height of the proposal exceeds the height permitted on the site.
- 111 The height standard applicable to the MU1 land is 16m, and the height standard applicable to the land zoned R2 is 8.5m.
- 112 The written request, authored by Mr John Wynne of Urbis, dated 17 July 2024 (Exhibit B, Tab 30) and prepared in accordance with cl 4.6 of the NSLEP, states that the proposed development comprises:
- (1) 11 storey development in the MU1 zone that measures 44.8m to top of lift overrun, resulting in an exceedance of the height standard by a maximum of 28.8m.
 - (2) 4 storey development in R2 zone that measures 15.5m to top of lift overrun, resulting in an exceedance of the height standard by a maximum of 7m.
- 113 In summary, the written request identifies the following factors as relevant to consideration of the exceedance:
- (1) The fall in the land of around 4.75m from the frontage to the Pacific Highway to the lowest point at Sinclair Street. As such, the exceedance of the height standard varies according to the slope of the land, and because of the two height standards applicable to the site.
 - (2) The strategic planning context of which the site is a part, including the relevance of the 2036 Plan and the EIE that both suggest the area is proposed to undergo significant change reflect in increased built form,

density and land use activation that vary from the planning controls that apply today.

- (3) The changes foreshadowed to planning controls recommended by the 2036 Plan, in terms similar to those at [20]-[24], the planning proposals that apply to sites in the vicinity of the subject site, similar to those at [19], and changes foreshadowed in the EIE, similar to those set out at [25]-[29].
- (4) Excerpts from the Urban Design Report prepared in support of the EIE (Exhibit C, Tab 4d) include reference to the block in which the site is located, and its potential for increased height along Sinclair Street to improve the height transition from the Pacific Highway.

114 The written request relies on two primary grounds to argue that compliance with the height standards applicable to the site is unreasonable or unnecessary in the circumstances of this case (cl 4.6(3)(a)) as, firstly, the objectives of the standard are achieved notwithstanding the non-compliance with the height standard and, secondly, because the numerical height standard is inappropriate in the context of the changed strategic planning circumstances of the site.

115 The objectives of the height standard at cl 4.3 of the NSLEP are as follows:

- (a) to promote development that conforms to and reflects natural landforms, by stepping development on sloping land to follow the natural gradient,
- (b) to promote the retention and, if appropriate, sharing of existing views,
- (c) to maintain solar access to existing dwellings, public reserves and streets, and to promote solar access for future development,
- (d) to maintain privacy for residents of existing dwellings and to promote privacy for residents of new buildings,
- (e) to ensure compatibility between development, particularly at zone boundaries,
- (f) to encourage an appropriate scale and density of development that is in accordance with, and promotes the character of, an area,
- (g) to maintain a built form of mainly 1 or 2 storeys in Zone R2 Low Density Residential, Zone R3 Medium Density Residential and Zone C4 Environmental Living.

116 In submissions, the Council considers objectives (e), (f) and (g) to be the objectives that are not achieved. However, as the Court must form the necessary opinions of satisfaction to enliven the power to grant consent in terms set out in cl 4.6, I will summarise the reasons PDS relies on to assert that all objectives are achieved.

- 117 In respect of objective (a), the written request asserts that the land slopes 4.75m from a high point at the Pacific Highway frontage to a low point at Sinclair Street, and that, notwithstanding the variation to the height standard, achieves the objective because of the step in the height proposed.
- 118 In respect of objective (b), the written request relies on an assessment of existing views currently enjoyed from 10 residential flat buildings in the area, and their potential impact as a consequence of the proposal, contained in the AIA (Exhibit B, Tab 9). As stated at [103], the AIA concludes views from sites in the area are either unaffected, or are affected to a negligible extent, and that view sharing is achieved.
- 119 In respect of objective (c), the proposal is said to maintain solar access to existing dwellings according to shadow diagrams that depict the extent of overshadowing at 15 minute intervals between 9am and 3pm, in mid winter.
- 120 The shadow diagrams cited by the written request consider existing development in the area, and relevant open space, as well as shadows cast from the approved building height and envelopes proposed for development at 270-272 Pacific Highway and the Five Ways Triangle site as foreshadowed in the 2036 Plan, and other building envelopes anticipated by the 2036 Plan.
- 121 In essence, the conclusion drawn by the written request of the shadow diagrams is as follows:
- (1) Most of the properties to the south of the site are already subject to overshadowing from existing buildings located to the north and east fronting the Pacific Highway, and from other adjoining properties including the dwellings on the eastern side of Sinclair Street.
 - (2) Future development along Pacific Highway anticipated by the 2036 Plan and EIE cast additional shadows onto properties south of the site. The private open space to the rear of the Sinclair Street dwellings is already largely overshadowed by existing buildings, and will be additionally overshadowed by proposed building envelopes. However those areas affected by the additional height proposed on the subject site are free of such affectation by 1.30pm.
 - (3) Likewise, additional shadow generated by the proposal falls on the residential flat buildings at 42 and 46 Sinclair Street until 11am, after which there is no affectation from the proposed development, and a small area of public open space at the intersection of Morton Lane and

Sinclair Street opposite the subject site is unaffected from 9.45am to 1pm.

- 122 In respect of objective (d), privacy for residents of new and existing dwellings is said to be maintained by replicating the zero setback to the northern boundary and locating openings in inset light courts, or to the front and rear elevations and where the tower element is limited to that part of the site zoned MU1 so that sightlines into existing apartments at 300 Pacific Highway are prevented.
- 123 As stated at [106], privacy to properties to the rear of the site, and opposite in Sinclair Street, is maintained by the degree of building separation achieved.
- 124 The exceedance of the 8.5m height standard to that part of the site zoned R2 does not result in privacy loss to No. 77 Sinclair Street because the building separation measures between 9m and 14.35m, in excess of the relevant guidance found in the ADG, and because sightlines are obstructed by planter boxes to outdoor terraces where those terraces generally address the northern boundary facing the Fire Station.
- 125 In respect of objective (e), compatibility between development at zone boundaries is relevant because of the mix of zones evident on, and in close proximity to, the site. The site itself comprises land zoned MU1, and R2. To the approximate north, the Fire Station is on land zoned SP2 Infrastructure, and the land to the west of Sinclair Street is zoned R4 High Density Residential.
- 126 The written request provides the following four reasons for asserting the objective is achieved:
- (1) The tower element is restricted to the land zoned MU1, and a much lower built form is proposed to the land zoned R2, consistent with the zone objectives, the 2036 Plan and EIE which anticipate taller built form with greater density to land fronting the Pacific Highway.
 - (2) The scale and design of the built form to Sinclair Street reflects the scale and form of adjacent buildings such as the Fire Station and the single storey dwellings to the south.
 - (3) The proposed separation between the development and existing buildings on Sinclair Street ensures an appropriate physical relationship of built form in the lower density part of the site.
 - (4) The proposed building height of 12m or 3 storeys on the land zoned R2 is consistent with the height of existing residential apartment buildings

located on the opposite side of Sinclair Street in the R4 zone, supported by Figure 29, reproduced below.



- 127 In respect of objective (f), the written request relies on the 2036 Plan and EIE as indicative of an area undergoing significant change. As such, the character of the area to be promoted by the scale and density of development is dramatically different to that evident in the controls found in the NSLEP. In this context, the proposal is supported by an urban design analysis that assists in determining the appropriate scale and density that achieves the compatibility required by the objective.
- 128 According to the written request, the proposal adopts a contextual design approach that responds to the following site conditions:
- (1) The site is located centrally within the area that is the focus of the 2036 Plan and EIE, and in the vicinity of properties subject to planning proposals that all vary significantly from the controls applicable to the area under the NSLEP.
 - (2) In particular, the proposed development to the immediate south of the site at 270-272 Pacific Highway is for a vastly different land use and built form in the area when compared to what exists today.
 - (3) A diverse range of land uses and built form surrounding the site, including the heritage listed Fire Station, residential flat buildings, low density housing in Sinclair Street and commercial development along the Pacific Highway.
 - (4) The site is large, with sloping terrain that falls between two frontages, across two zones and adjoins both residential and non-residential uses, and has itself heritage status while also adjoining a site that is listed for its heritage significance.

- (5) Adopting a contextual response to the rapidly evolving character of the area is more likely to achieve development that is compatible, rather than rely on controls in the NSLEP that are rendered largely redundant by those changing controls on adjoining sites.

129 Adopting such a contextual approach achieves the objective at (f) by restricting the tower element to the land zoned MU1, which also serves to mediate between higher scale development proposed at 270-272 Pacific Highway and lower scale development in the vicinity of Shirley Road, as depicted in Figure 31 of the written request, re-produced below:



- 130 In respect of objective (g), which relevantly seeks to maintain a built form of mainly 1 and 2 storeys in the R2 zone, the written request states that the proposal does not undermine the objective.
- 131 In doing so, it notes the current use of the land zoned R2 is for the purposes of a car park servicing a non-residential use whereas the proposal is to reinstate a residential use into the R2 zone, which is sympathetic to the scale of the area as it exists today and assists with attaining an appropriate height interface with an area identified in the EIE to be rezoned R4 High Density Residential.
- 132 The written request reiterates the impact of state government strategic planning and infrastructure initiatives on the area in which the site is located, including the proximity of the recently opened Crows Nest Metro Station, 2036 Plan and EIE.
- 133 Next the written request argues the area zoned R2 is a relatively small 'island' within those other zones cited at [125] which has produced development at varying scales in the immediate vicinity of the site.

- 134 As stated at [114], in addition to arguing the proposal is consistent with the objectives of the height standard, the written request also argues that it is unreasonable or unnecessary to comply with the height standard as the numerical standards at [111] are inappropriate when the strategic planning initiatives at [20]-[36] are properly understood. In particular, the EIE proposes a building height for that part of the site zoned MU1 of 50m that would permit 12 storeys. While the EIE does not identify change to the that part of the site in the R2 zone, but for as a place of potential open space, all other land in the R2 zone on the eastern side of Sinclair Street is proposed to have a height of 29m, or 8 storeys in height, applied via rezoning to R4 High Density Residential.
- 135 In such a context, a height standard of 16m and 8.5m is argued by the written request to be inappropriate.

Expert evidence on written request

- 136 The Court was assisted on issues of planning and urban design by the following experts, identified by the parties, who conferred in the preparation of a joint expert report (Exhibit 5):
- (1) Mr Brian McDonald on behalf of the Council in respect of urban design and planning.
 - (2) Mr Geoff Bonus, in respect of urban design, and Mr John Wynne in respect of planning on behalf of PDS.
- 137 The experts agree that a 16m height standard for development on the MU1 land is inconsistent with the desired future character of the area set out in the strategic planning documents such as the 2036 Plan and the EIE are considered.
- 138 The experts also agree that adequate regard has been had to the objectives set out in the ADG, that the amenity of the proposed development is also acceptable, and that the shadow impact and visual impact of the proposal are also acceptable.
- 139 Mr McDonald's evidence is that such a height standard is also unrealistic when recent approval of development at 270-272 Pacific Highway nearby is considered. This is because it is reasonable to adopt a height equivalent to such a recent approval, despite it not being a development standard in any

environmental planning instrument, and because, conversely, it is unreasonable to be constrained by a height of 16m, as required by cl 4.3 of the NSLEP.

- 140 However, as the proposal is for an 11-storey tower, Mr McDonald considers the exceedance on that part of the site zoned MU1 to be the three storeys in excess of the eight he regards as reasonable, otherwise expressed by Mr McDonald as an exceedance of 9.6m.
- 141 Mr McDonald cites the Urban Design Principles in Part 2 of the 2036 Plan to the effect that a transition in height, bulk and scale are envisaged from St Leonards Station and the Crows Nest Metro Station, reducing in height to eight storeys at the intersection of Pacific Highway and Shirley Road.
- 142 That said, Mr McDonald also states that a departure from an eight storey building is not in itself out of the question, but that for such a departure to be reasonable is a question of degree. While fourteen storeys would be unreasonable, an eleven storey building may maintain some degree of transition from the thirteen storey height permitted at 270-272 Pacific Highway, to the eight storey height anticipated on Shirley Road.
- 143 Mr McDonald's primary concern with the tower as proposed is not so much a matter of the overall height, but its lack of transition in height at the zone boundary where that part of the site zoned MU1 meets that part zoned R2.
- 144 A tower of such height, with nil setback to the R2 land, does not minimise conflict between land uses as required by the objectives for development in the MU1 zone, nor is a transition in scale achieved, as would be the case if the taller built form was setback so as to moderate the overlooking to single storey dwellings in Sinclair Street.
- 145 A consequence of this, according to Mr McDonald, is likely to be a perception for the residents of the single storey dwellings in Sinclair Street that private open space to the rear of their dwellings is overlooked.
- 146 While sharing many characteristics of the proposal on the subject site, Mr McDonald considers development proposed on the adjoining site at 270-272 Pacific Highway to be acceptable because the setbacks proposed to the R2

zone behind are virtually consistent with those setbacks required by Part C3.2.3.5 of the North Sydney Development Control Plan 2013.

- 147 I note here that the proposal does not locate any windows or balcony openings in a position for Mr McDonald's perception at [145] to be warranted – a point made by Mr Bonus in his oral evidence. Windows are not proposed in the vicinity of the south west corner for a distance along the southern elevation of around 10m (between Gridlines J and L). I accept the evidence of Mr Bonus that where openings are proposed, a direct sightline is so oblique that would make it difficult to obtain, and is from a distance that exceeds the guidance provided at Part 3F of the ADG.
- 148 In essence, I understand Mr McDonald's evidence to be that the tower proposed on that part of the site zoned MU1 to be largely acceptable, if the development proposed to that part of the site zoned R2 complies with the 8.5m height standard, given neither the 2036 Plan nor EIE propose to alter this standard.
- 149 According to Mr McDonald, the written request fails to establish that compliance with the height standard on that part of the site zoned R2 is unreasonable or unnecessary because insufficient evidence is provided to establish that the additional yield in the R2 land is commensurate with the cost of conservation works proposed to the Gas Showroom Building.
- 150 I accept the submissions of PDS that cl 5.10(10) of the NSLEP does not require the Court to apply a test as to whether the yield proposed on the land, whether additional or not, is commensurate or proportional to some aspect of the conservation of an item.
- 151 Additionally, for the reasons set out at [108], I am of the view that the proposed development is permissible on that part of the R2 land.
- 152 However, the Council and its experts also contend that the height, bulk and scale of that portion of the development proposed on that part of the site zoned R2 is not compatible between development, particularly at zone boundaries (objective (e)), is not an appropriate scale or density that promotes the

character of the Sinclair Street area (objective (f)), and does not maintain a built form of mainly 1 or 2 storeys in the R2 zone.

- 153 Absent a definition of 'low density', Mr McDonald considers an appropriate scale and density may be derived by reference to the FSR control and height standard applicable in the R2 zone in other local government areas, and where the height in the R4 zone opposite the site on Sinclair Street is 12m.
- 154 Mr McDonald's opinion is that development of five storeys, consisting of apartments with five bedrooms at a height of 15.5m, in an area zoned for low density residential with a height standard of 8.5m is development that is inconsistent with an existing low density residential context, and is not, of itself, of a low density character.
- 155 Instead, the development proposed on the R2 land is consistent with a 4-5 storey residential flat building with a bulk and scale that is incompatible with the bulk and scale of single storey dwelling houses with private open space located to the rear.
- 156 On Mr McDonald's assessment, while the site is not subject to a FSR standard, the gross floor area on that portion of land zoned R2 is equivalent to an FSR of 1.6:1 where land zoned similarly in adjoining local government areas prescribe an FSR of 0.5:1 or, where zoned R3 Medium Density residential, an FSR of 0.7-0.9:1 with which the proposal is clearly at odds.
- 157 Mr Bonus argues that if the number of dwellings proposed on the site is a measure of density, only 8 dwellings are proposed on that portion of the site zoned R2.
- 158 Mr Wynne observes the minimum lot size applicable to the site is 450m² and so it is conceivable that 4 dwellings may be proposed on this portion of the site. Furthermore, as the Land Use Table permits dual occupancy development with consent, in written submissions, PDS submits that 8 units would likely be permitted on the site.
- 159 Mr Wynne's evidence is that compatibility, being different to sameness, is achieved in the development fronting Sinclair Street by restricting the tower element to that portion of the site zoned MU1; providing a smaller scale built

form to Sinclair Street, with detailed design and articulation sympathetic to buildings either side of the subject site; by providing adequate separation to adjoining sites so that the physical relationship is appropriate and; the primary built form is four storeys at around 12m in height, consistent with the height permitted in the R4 zone opposite.

160 Mr McDonald also regards the bulk of the building, evident in the unrelieved side elevations visible from Sinclair Street, will be easily distinguished from the single storeys dwellings adjacent.

161 According to Mr Bonus, the presentation of the development fronting Sinclair Street is in the form of two townhouses, with direct access through landscaped setbacks, in a manner not dissimilar or incompatible with the single storey dwellings adjacent, and where upper levels are setback.

162 I am satisfied the proposed development achieves the objectives of cl 4.3 of the NSLEP for the reasons that follow:

- (1) I consider the arrangement of built form on the site generally reflects the natural landform by stepping the development in the direction of the slope of the land, that is the focus of objective (a). The taller development is limited to the high point of the site zoned MU1, and fronting Pacific Highway. The lower form is limited to that part of the site zoned R2. I note that part of the existing heritage building currently located on the R2 land exceeds the height permitted on the site today and serves as a kind of additional step that likewise reflects the fall of the land.
- (2) I accept the conclusions of the View analysis that forms part of the AIA prepared by Bonus + Associates (Exhibit B, Tab 9). In so doing, I note the view from some properties in the area will benefit from the development, such as Apartments 307, 308, 309, 310 and 405 at 300 Pacific Highway with the removal of built form. As such, I accept that the proposal promotes the retention of, and sharing of views, consistent with objective (b).
- (3) Similarly, I accept the solar access analysis, commencing at p 62 of the AIA, and the agreement of the experts, that the proposal does not do other than maintain solar access to existing dwellings, public reserves and streets, consistent with objective (c) when the built form of development anticipated by the EIE is considered.
- (4) On the basis of the location of openings to the tower form described at [147], and the building separation distances shown in Figure 27 of the written request, I accept the proposal maintains privacy to existing

dwelling and promotes privacy for new buildings consistent with objective (d).

- (5) While PDS submits the development on that portion of the site zoned R2 is four storeys, I do not read the definition to limit the development to four storeys. The topmost floor contains more than a lift shaft, stairway or meter room, is not a mezzanine or an attic. The development is five storeys, albeit limited in footprint at the uppermost level. That said, on the basis of the stepped setbacks to Sinclair Street, generous side setbacks that afford appropriate building separation and the predominance of face brick to the lower two levels that approximates the parapet level of an outbuilding with zero setback to the south west corner of the Fire Station site, with which the development is likely to be viewed in context, I accept the development is compatible with development in Sinclair Street. Likewise, and while not in dispute, I also state here that the tower element is also, in my view, compatible in scale and form to development likely to emerge on the Pacific Highway. As such, I consider the development compatible with development evident today or likely in the future, consistent with objective (e).
- (6) I accept the consensus of the experts, supported by the Urban Design Analysis prepared by Bonus + Associates (Exhibit B, Tab 24), that the tower provides a degree of transition between the height permitted on 270-272 Pacific Highway and the height anticipated at the intersection with Shirley Road. Assisted by the relationships in built form depicted in Figure 31 at [129], I also accept the proposal is an appropriate scale and density that accords to the character of the area as sought by objective (f), which includes the taller residential flat buildings located in the R4 zone but which are in the immediate visual catchment. I also accept that the single storey dwellings in the R2 zone are not the sole determinant of character in the area, which is highly mixed and deserving of the 'mediating' so described in the written request.
- (7) Finally, while Mr McDonald may be correct in his assertion that a residential flat building may generally be regarded as medium or high density development, I note that the Dictionary of the NSLEP defines such development as comprising as few as 3 dwellings which goes to scale and density, being an aspect of objective (f), which I find is appropriate when those elements that contribute to scale are considered, such as setbacks, massing and materials, and the presentation of two townhouses frontages to Sinclair Street. I also accept the submission by PDS that up to 8 dual occupancy dwellings appear permitted on the site, which is a scale and density matched by the proposal.
- (8) I also accept that the proposal is not required to adopt a form that is either 1 or 2 storeys in order to achieve objective (g) for reasons similar to those in *Holt Avenue Cremorne Pty Ltd v North Sydney Council* [2023] NSWLEC 1736 at [57], as the objective "to maintain a built form of mainly 1 or 2 storeys" does not require all buildings in those zones to be two storeys. That said, the development fronting Sinclair Street

presents a two-storey form in face brickwork, albeit with levels above that are somewhat setback.

Whether sufficient environmental planning grounds

163 Five environmental planning grounds are advanced by the written request that are said to be sufficient to justify the contravening of the height standard.

These grounds may be summarised as follows:

- (1) Firstly, when the strategic vision for the area is understood, it is clear that the built form envisaged by the 2036 Plan and EIE is dramatically different to that expressed by the controls in the NSLEP. Strict application of the controls in place today would have the effect of undermining the transition already underway, evident in those sites subject to planning proposals. The proposal is for development on a large site spanning two street frontages with building height standards that are 'largely redundant'. It is for this reason that the proposal adopts a highly contextual approach that responds to the site's location within the areas subject to the 2036 Plan and EIE, surrounded by a highly diverse range of zones, and to adjoining development that has a vastly different land use and built form than is evident today.
- (2) Secondly, the development facilitates the conservation of the heritage item on the site, consistent with cl 5.10(10) of the NSLEP that would otherwise not be financially viable if the height standard at cl 4.3 of the NSLEP is strictly applied. Funds from the proposed development, including additional space created as a result of the height exceedance, make possible the conservation set out in the Heritage Management Document.
- (3) Thirdly, the written request relies on achieving the objectives of the height standard notwithstanding the noncompliance with the standard, as summarised at [117]-[135].
- (4) Fourthly, when the likely impacts of the development are understood, there are negligible impacts on view loss, overshadowing and privacy. As such, the proposal does not give rise to unacceptable off-site impacts.
- (5) Fifthly, as the proposal facilitates the restoration and reuse of the site for contemporary purposes, the development promotes the orderly and economic use and development of the land, the sustainable management of built and cultural heritage, and the good design and amenity of the built environment that are all objects of the EPA Act with which the proposal is consistent.

164 Mr McDonald rejects the planning grounds as they apply to development proposed on that portion of the site zoned R2, because that portion of the development is not low residential density, is not permitted in the zone and

because it does not adequately justify the value of the additional yield against the cost of conservation works.

- 165 For reasons set out earlier, I find the development proposed on that portion of the site zoned R2 to be permissible, and do not understand the text at cl 5.10(10) of the NSLEP to require the financial justification of the conservation in terms expected by Mr McDonald.
- 166 In his oral evidence, Mr Wynne acknowledges there is no basis for the assertion made in the written request that the conservation of the heritage item is not financially viable if strict compliance with the height standard at cl 4.3 is required. I do not understand this statement to be fundamental to the second environmental planning ground advanced in the written request. The position being advanced is simply that the exceedance facilitates the conservation and rejuvenation of a heritage item, which is a point I accept.
- 167 I also accept that where the experts agree the height standard on at least part of the site should set aside, and where that site is within an area acknowledged to be not only in transition, but also where the applicable controls are agreed to be in a state of flux, that it is appropriate for the EIE to carry some weight in respect of the character of the area, that is promoted by the scale and density of development.
- 168 Furthermore, I accept the argument put by PDS that, where the experts agree it would be essentially perverse to expect the height standard in the MU1 zone to be strictly applied, a highly contextual site analysis and urban design study, prepared by Bonus + Associates (Exhibit B, Tab 24) that assesses the potential off site impacts of a development that departs from the controls is an appropriate means of assessing the degree of impact likely to result from such a departure. But for privacy impacts and concern at whether and how a transition between the MU1 land and R2 land is addressed, the experts are essentially agreed that the development as proposed does not result in unacceptable offsite impacts to the amenity of surrounding residents or otherwise. For reasons stated earlier, I do not consider the concerns as to privacy or transition to be warranted.

- 169 It is necessary here to address the identification of a portion of the site for potential open space by the 2036 Plan and in the studies that support the EIE. The proposed maximum height applicable to the site, as depicted in Figure 10 of the EIE, is for a height standard of 50m to the land zoned MU1.
- 170 No height is identified on the land zoned R2, and it may be inferred that no change is proposed to this discrete portion of Sinclair Street, notwithstanding the proposed increase in height to the remainder of the street, except for the Fire Station site, to a height of 28m, and its rezoning to R4 High Density Residential.
- 171 At the very least, the character of the area, when the EIE is given weight, is dramatically different to that evident today. In such a context, a height of 15.5m on that portion of the site zoned R2 does not seem unreasonable. There is no proposal in the EIE to rezone that part of the site to a different zone, such as RE1 Public Recreation, in which residential development is prohibited.
- 172 For these reasons, I am satisfied that the environmental planning grounds advanced by the written request are sufficient to justify the contravention of the height standard, and accordingly, that the written request adequately addresses those matters to be demonstrated by cl 4.6(3) of the NSLEP.
- 173 The written request also tabulates an assessment of the proposal against the objectives of development in the MU1 and R2 zones, with which the proposal is said to be consistent and so be in the public interest, in accordance with cl 4.6(4)(b) of the NSLEP.
- 174 In written submissions, the Council asserts that the requirement at cl 4.6(4)(a)(ii) to consider the public interest no longer applies and that as a consequence, contention 3(d)(ii) which only invokes the objectives of the R2 zone, is no longer pressed. However, it is my understanding that the effect of cl 8 of the Standard Instrument (Local Environmental Plans) Order 2006 preserves the provision at cl 4.6(4) for any development application made, but not determined, before the commencement of the relevant amending order on 1 November 2023.

- 175 It is also relevant to note once again that the development application was lodged on 8 March 2023. At the time, the 'Mixed Use' zone in the NSLEP was designated 'B4'.
- 176 It is my understanding that on 26 April 2023, the commencement of the Standard Instrument (Local Environmental Plans) Amendment (Land Use Zones) Order 2021, and State Environmental Planning Policy Amendment (Land Use Zones) (No 3) 2022 resulted in a change of the designation from 'B4 Mixed Use' to 'MU1 Mixed Use' with its attendant zone objectives.
- 177 The Amended Statement of Facts and Contentions filed with the Court in August 2024 (Exhibit 4) cites the objectives of the MU1 zone that took effect on 26 April 2024, at par 36 and in Contention 2, particular (b). Likewise, the Council bundle of documents inserts those same objectives (Exhibit 1, folio 341).
- 178 The objectives of the MU1 zone in the NSLEP are as follows:
- To encourage a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
 - To ensure that new development provides diverse and active street frontages to attract pedestrian traffic and to contribute to vibrant, diverse and functional streets and public spaces.
 - To minimise conflict between land uses within this zone and land uses within adjoining zones.
 - To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
 - To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.
 - To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses concentrated on the lower levels and residential uses predominantly on the higher levels.
- 179 The objectives of R2 zone are as follows:
- To provide for the housing needs of the community within a low density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To encourage development of sites for low density housing, including dual occupancies, if such development does not compromise the amenity of the surrounding area or the natural or cultural heritage of the area.

- To ensure that a high level of residential amenity is achieved and maintained.

Expert evidence on zone objectives

- 180 The experts agree that the proposal includes development for the purposes of a residential flat building and commercial and retail spaces within the land zoned R2, and that development for such purposes is prohibited development in the R2 zone.
- 181 However, the same experts do not agree on whether the proposed development is consistent with the certain objectives of the R2 or MU1 zone.
- 182 In respect of the R2 zone, the Council contends the proposal does not provide for the housing needs of the community within a low density residential environment (the first objective), nor encourage development of sites for low density housing, including dual occupancies, because the development does in fact compromise the amenity of the surrounding area and cultural heritage of the area (the third objective), and that it does not ensure that a high level of residential amenity is achieved and maintained (the fourth objective).
- 183 In respect of the MU1 zone, the Council also contends the proposal fails to minimise conflict between land uses within this zone and land uses within adjoining zones (the third objective).
- 184 My Wynne's evidence is that a conflict between land uses with adjoining zones is minimised in three ways:
- (1) Firstly, by the abrupt change in height between the tower and the development proposed on that part of the site zoned R2 in the east-west direction, and the transition in the north-south direction between the taller form of the Fire Station, and the lower form of the single storey dwellings on Sinclair Street to the south.
 - (2) Secondly, that the built form adopted in the proposal reflects the underlying topography west of the Pacific Highway.
 - (3) Thirdly, for the reasons similar to those at [147], by ensuring no privacy impact arises.
- 185 As I have already found development on that part of the site zoned R2 is permissible results in no adverse privacy impacts and demonstrates an abrupt transition of a kind seemingly anticipated by the controls, I accept Mr Wynne's opinion that conflict between the MU1 zone and R2 zone is minimised.

- 186 In respect of the remaining objectives of the MU1 zone identified by the written request, I also accept the assessment at pp 52-53 of the written request that the development proposes a mixed-use development comprising retail/commercial spaces in the podium/lower levels and residential accommodation that is consistent with the mix of compatible land uses sought by the first objective of the MU1 zone; integrates a mix of land uses in a location that is well served by public transport (the second objective), and contributes to a vibrant mixed use centre that is safe and with high residential amenity (the third objective). It achieves this mix in a manner that is consistent with the fourth objective by maintaining non-residential uses on the lower two levels of the development fronting the Pacific Highway.
- 187 While not the subject of submissions, it is evident that the objectives dealt with in the written request are not those objectives relied on by the Council, nor evident in the Land Use Table today.
- 188 The four objectives dealt with in the table at pp 52-53 of the written request are in the following terms:
- To provide a mixture of compatible land uses.
 - To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
 - To create interesting and vibrant mixed use centres with safe, high quality urban environments with residential amenity.
 - To maintain existing commercial space and allow for residential development in mixed use buildings, with non-residential uses concentrated on the lower levels and residential uses predominantly on the higher levels.
- 189 I am not required by cl 4.6(4)(a)(ii) of the NSLEP to find that the written request has adequately addressed the objectives of the zone. Instead, the opinion of satisfaction at cl 4.6(4)(a)(ii) differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that an applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii) (see: *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [26]).

190 When the assessment at pp 52-53 of the written request is considered against the zone objectives at [178], which closely resemble those objectives assessed by the written request, I am of the opinion that the Court can be satisfied that the development is also consistent with the objectives of the MU1 zone for the reasons that follow:

- (1) In respect of the first objective, I understand the mix of compatible uses described in the written request represents a diversity of business, retail, office and light industrial land uses that generate employment opportunities.
- (2) In respect of the second, fourth and fifth objective, the positioning of retail uses and entry to both residential and commercial uses at the lower levels fronting Pacific Highway clearly provides an active street frontage that also includes heritage interpretation that will attract pedestrian traffic and contribute to a vibrant, safe, diverse and high quality street life with residential amenity.
- (3) My finding as to consistency with the third objective is set out at [185].
- (4) In respect of the sixth objective, the development proposes to maintain ground floor commercial uses in the form of the retail within the former Gas Showroom building, additional commercial uses above, and residential uses above that.

191 Turning once again to the objectives of the R2 zone that are contested by the Council at [182], the proposal clearly provides for the housing needs of the community in a low density residential environment and, by proposing retail and commercial uses at the lower levels fronting Pacific Highway, also provide facilities to meet the day-to-day needs of residents. For reasons I have already set out, I consider the amenity of the surrounding area, including the cultural heritage of the area, to not compromised by the proposal, and is likely to provide a high level of residential amenity on the site, and to maintain the residential amenity of adjoining and nearby properties.

192 As I find the development is consistent with the objectives of the height standard and of the relevant zone objectives, I am satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the height standard at cl 4.3 of the NSLEP, and with the objectives of the MU1 and R2 zone.

193 In arriving at this opinion of satisfaction, I also note the Council's own submissions in response to the EIE characterises the allocation of open space

on this site as 'compromised' (Exhibit E, folio 687), and proposes funding for such an outcome to be behind two other options that appear preferred (folio 688).

- 194 I have also considered whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the NSLEP. As I find there to be no such matters of significance, the Court, exercising its power under s 39(6) of the LEC Act deems the Secretary's concurrence and so I find there are no grounds on which the Court should not uphold the written request.

Design quality of residential apartment development

- 195 Chapter 4 of State Environmental Planning Policy (Housing) 2021 (Housing SEPP) applies by virtue of s 144(2) and (3).
- 196 The DA was referred to the Design Excellence Panel which I understand is constituted by the Council, and not the Minister under s 288A of the EPA Regulation. As such, s 145 of the Housing SEPP does not apply.
- 197 Section 147 of the Housing SEPP requires that certain matters be considered, including relevantly, the design principles at Sch 9 of the Housing SEPP and the ADG. The experts agree that adequate regard has been had to the objectives set out in the ADG, that the amenity of the proposed development is also acceptable, and that the shadow impact and visual impact of the proposal are also acceptable.
- 198 I accept Mr Wynne's view that the building separation required by Objective 3F of the ADG to achieve visual privacy does not apply where the development has been considered as an integrated whole, so that matters of privacy and other interfaces can be considered in the design and where there is little or no need to factor in the sort of contingencies required when future adjoining development on a site, or between sites under different ownership, are unknown or subject to change.
- 199 In this case, the arrangement of built form on the site is in the form of one building, and is not a series of separated buildings as is depicted in Figure 3F.2

of the ADG, to which separation distances between apartments within the same site apply.

- 200 That said, visual separation between the proposed development on that part of the land zoned R2 and the Fire Station site to the north, and No 77 Sinclair Street to the south, comply with the guidance at Part 3F of the ADG.
- 201 While the guidance at Part 3F also advises for an additional 3m setback to be applied where a residential flat building is proposed on a site adjoining a zone boundary, I note this generally applies to circumstances that once again assume separate ownership between sites held in different ownership unlike the situation here where those parts of the site that are differently zoned have been considered holistically.
- 202 I am assisted in considering those matters required to be considered at ss 147 and 148 of the Housing SEPP by a statement prepared by Mr Rachid Andary (Arch Reg No 8627) and dated 15 July 2024, in accordance with s 29 of the EPA Regulation that attests Mr Andary directed the design of the proposal, and sets out the means by which the design principles at Sch 9 of the Housing SEPP have been applied in the proposed development, and how the objectives in Parts 3 and 4 of the ADG are addressed.(Exhibit B, Tabs 31-32).

Traffic

- 203 The Court was assisted in considering traffic matters by the evidence of experts in traffic engineering, Mr Tom Steal for PDS and Mr Paul Corbert for the Council. Together, the experts conferred in the preparation of a joint expert report (Exhibit 8) in which a number of the particulars initially in contention were agreed to be resolved.
- 204 The primary issue that remains in dispute is whether car parking numbers provided for in the basement car park are adequate.
- 205 According to PDS, the parking rates specified in the NSDCP are expressed as a maximum. The experts agree the maximum number of parking spaces in the circumstances of this case is apportioned as follows:
- (1) 46.1 residential parking spaces are required;
 - (2) 2.54 commercial spaces are required; and

(3) 2.14 retail spaces are required.

206 The final number of parking spaces depends on whether the precise numbers are rounded up or down. While Mr Steal, traffic expert on behalf of PDS, acknowledges there no such thing as 0.1 of a vehicle, Mr Corbett, the Council's traffic expert, cites certain provisions at Section 10.2.1 of the NSDCP to the effect that Council encourages proponents to provide fewer parking spaces than the maximum.

207 Mr Corbett agrees the site is located in an area of high accessibility, being close to public transport.

208 Given the newly opened Crows Nest Metro Station lies just 150m to the north of the site, and the proposal is accompanied by a Green Travel Plan (Exhibit 8, Annexure E) that identifies the site is well served by bus routes, and proposes initiatives in Section 6 to encourage future residents and staff of the development to choose travel arrangements that are other than by private vehicle, I consider the provision of car parking spaces in the development to be sufficient.

EV Charging is provided

209 The proposal also provides for 12 electric vehicle charging spaces in Basement 02 that Mr Corbert believes are currently unregulated so that residents may park in the charging space without a capacity for the strata body to enforce shorter timeframes, while Mr Steal believes such an issue can be addressed through by-law adopted by the strata body upon completion.

210 I accept that the terms of the National Construction Code (NCC) are met by the electrical infrastructure being provided in the basement to enable EV charging. As it is put by Mr Corbert, the variety of different and specific chargers is so broad that it may be appropriate for individual owners to carry the responsibility of installing the charger of their choice. I also accept that Mr Corbert's concerns as to the protocols for use of the EV charging spaces are capable of being regulated by by-laws adopted by the strata body, or by a Plan of Management that is the subject of a condition of consent at Condition C13.

The turntable issue

- 211 Access to the basement is proposed from Sinclair Street. The ramped driveway falls firstly in an easterly direction, before turning north. In the elbow of these two ramps, is a flat area in which a turntable is proposed.
- 212 The turntable is proposed to be used when a Medium Rigid Vehicle (MRV) is used for waste collection or any other delivery or collection that may be needed by residents or the commercial tenancies proposed on the site. The proposal is for such a vehicle to be parked at 45 degrees in plan on the turntable to allow other vehicles to pass while in position.
- 213 The primary concern that arises from the location of the turntable as proposed is that the Council contends the path of travel for personnel moving bins between the waste room and a waste collection vehicle conflicts with vehicles exiting the basement, placing personnel at risk.
- 214 The Waste Management Plan (Exhibit D, Tab 6) states that residential waste requires 10 bins of 660L capacity, and that commercial waste requires 13 bins of 1,100L capacity.
- 215 The traffic experts provide calculations as to the time likely to be required for the transport and collection of bins at the MRV, parked in a 45 degree position on the turntable to allow vehicles to exit.
- 216 I am of the view that operators of waste vehicles are familiar with, and regularly operate within, dynamic environments involving risk in undertaking their task. I accept Mr Steal's opinion that vehicles in the car park will be moving slowly as they navigate exit ramps requiring two 90 degree turns in proximity of each other. I also accept that visual and aural cues will be available to waste contractors in moving bins within the car park and that the distance in which conflict is likely, is relatively short. Finally, I also acknowledge waste contractors do not generally stand behind a waste vehicle during waste collection, but to the side where controls are commonly located. So understood, such a position puts a waste contractor in a location where a sightline to vehicles in proximity to the MRV is possible.

Public submissions

- 217 At the onsite view, the Court, in the company of the legal representative, experts and representatives of PDS, heard an oral submission from a resident of a neighbouring residential flat building, and observed the apartment owned by the submitter.
- 218 The concerns expressed are primarily to do with the loss of light to two bedrooms with windows facing into a lightwell, shared with Units 105, 205, 305 and 405 according to the submission.
- 219 The lightwell in question faces generally south and the proposal rises on the boundary. Given its orientation, height and dimensions, I do not understand the lightwell to receive direct sunlight for most of the day in mid winter. In my judgment, the effect of the development, if any there is to be one, is that sunlight from the north may be reflected by the proposal into the lightwell as daylight.

Other jurisdictional issues

- 220 For reasons stated at [190(2)], I am satisfied the proposal complies with the non-residential FSR by having a non-residential FSR of not less than 0.5:1 on the relevant map at cl 4.4A of the NSLEP, and that the building will have an active street frontage to Pacific Highway after its erection, pursuant to cl 4.4A(5) of the NSLEP. As cl 6.12A of the NSLEP seeks similar outcomes, I record here that I am satisfied that no part of the development that is a residential flat building proposes residential accommodation on the ground floor facing a street in the MU1 zone.
- 221 I have considered the effect of the proposal on the heritage significance of the site in terms set out at cl 5.10 of the NSLEP and, as stated at [108], I conclude the proposed development is acceptable.
- 222 Assisted by the Stormwater Plans and Hydraulic Compliance Certificate prepared by CAM Consulting dated July 2024 (Exhibit B, Tabs 5-6), the amended architectural plans prepared by Fuse Architecture and Geotechnical Site Investigation Report prepared by Soilsrock Engineering (Exhibit B, Tab 27), I have considered those matters at cl 7.6(3) of the NSLEP in respect of earthworks, and conclude those matters to be satisfactorily addressed. I note

the Stormwater Plans depict the onsite detention and treatment of stormwater in Stormwater filter chamber and Music Modelling results record the reduction of suspended solids, phosphorous, nitrogen and gross pollutants. As such, I am satisfied the potential for adverse impacts on Sydney Harbour to be adequately addressed.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

223 The site is located within the Sydney Harbour Catchment as identified by the Sydney Harbour Catchment Map. The parties agree the site is not a strategic foreshore site, a heritage item on the Sydney Harbour Heritage Map or land within a wetlands protection area.

224 Section 6.6 of State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) precludes the grant of consent unless the Council, or the Court on appeal, is satisfied that the proposed development ensures that, firstly, the effect on the quality of water entering a natural waterbody will be as close as possible to neutral or beneficial, and secondly, that the impact on water flow in a natural waterbody will be minimised.

225 I am satisfied that s 6.6 of the Biodiversity SEPP is achieved by providing sediment control and filtration to water in the post-development scenario in a manner that achieves a neutral or beneficial effect on the water quality and water flow into the harbour.

226 For similar reasons, I have also considered those matters at s 6.7 of the Biodiversity SEPP and am satisfied that the retention of water and post-development flows will keep any direct, indirect or cumulative impact on terrestrial, aquatic or migratory animals or vegetation to a minimum, and will not have an adverse impact on aquatic reserves, or in terms of erosion.

State Environmental Planning Policy (Transport and Infrastructure) 2021

227 As development is proposed in close proximity to electrical powerlines, written notice was provided to the electricity supply authority, Ausgrid, in accordance with s 2.48 of the State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP).

- 228 Ausgrid's response is undated (Exhibit 1, Tab 20) but records that no objection is taken to the proposal.
- 229 Section 2.119 stipulates that the consent authority must not grant consent to development on land that has a frontage to a classified road unless it is satisfied that vehicular access to the land is provided by a road other than the classified road and the safety, efficiency and ongoing operation of the classified road will not be adversely affected. The development fronts the Pacific Highway which is a classified road, and vehicular access will be via Sinclair Street.
- 230 Section 2.120 precludes the grant of consent unless the consent authority, or Court on appeal, is satisfied that appropriate measures will be taken to ensure that certain noise levels are not exceeded. I note here that the Environmental Noise Assessment prepared by TTM Consulting dated 6 June 2024 (Noise Assessment) addresses State Environmental Planning Policy (Infrastructure) 2007 that was repealed on 1 March 2022, which may be observed to pre-date the lodgement of the DA by more than a year. Precisely why an apparent expert in the field would address a repealed instrument was not explained. Nevertheless, the requirements of the repealed SEPP are transferred and addressed by the Noise Assessment in Table 14 such that the Court can be satisfied that appropriate measures are proposed, subject to the recommendations of Section 8 of the Noise Assessment being implemented. I note Condition C50 of the without prejudice conditions of consent requires the implementation of those recommendations.
- 231 Section 2.121 applies to development that involves the penetration of ground to a depth of at least 3m below ground level (existing) on land that is the road corridor of any of the roads or road projects described in Sch 2 of the Transport and Infrastructure SEPP. I note the land does not answer the description of 'road corridor' as defined in s 108 of the Transport and Infrastructure SEPP.
- 232 Section 2.122 requires that DAs for certain traffic generating development, as set out in Column 1 Sch 3 of the Transport and Infrastructure SEPP be referred to TfNSW and that any submission from the TfNSW be considered prior to the determination of the application.

233 The application was referred to TfNSW and conditions provided by TfNSW are incorporated in to the without prejudice conditions of consent at Condition C1.

State Environmental Planning Policy (Resilience and Hazards) 2021

234 On the basis of the Preliminary Site Investigation (PSI) prepared by Environmental Consulting Services dated 9 March 2023 (Exhibit A, Tab 21) which concludes the site is considered suitable for the proposed development, I accept the site is unlikely to be contaminated and is suitable for the purpose for which development is proposed to be carried out, pursuant to s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021.

State Environmental Planning Policy (Sustainable Buildings) 2022

235 The application is accompanied by a BASIX certificate (Cert No. 1179591M_04 dated 27 June 2024) prepared by Credwell Energy Pty Ltd in accordance with State Environmental Planning Policy (Sustainable Buildings) 2022.

Conditions are disputed

236 At the close of the proceedings, parties were directed to confer on without prejudice conditions of consent that were provided to the Court on 27 September 2024.

Condition C13

237 The precise terms of Condition C13, cited at [210], are disputed and so it is necessary for the Court to resolve the final form of the condition.

238 The Council seeks to impose a condition requiring the installation of Level 3 “Fast” Chargers, and a requirement for vehicles to be in those charging bays for no longer than one hour. I understand the two to be related. The duration of time permitted for a vehicle to occupy a charging bay is dependent on the time taken to charge a vehicle.

239 Absent guidance in the NSDCP on the type of EV Charging infrastructure required by Council, I conclude it is reasonable to rely on the terms of the NCC that the Court understands may be found at Section J9D4: Facilities for electric vehicle charging equipment, and provides for electrical infrastructure to support an EV charger able to deliver a minimum of 12kWh in Class 2 and Class 5 buildings.

240 So understood, I accept the condition should not prescribe a particular EV charger. As such, neither should a duration be set.

241 Furthermore, absent published guidance by Council against which an assessment would be undertaken, I cannot see the basis for Council to approve a Plan of Management.

242 The wording of the condition C13 preferred by PDS is adopted.

Condition G16

243 Not unrelatedly, the Council proposes a condition at Condition G16 requiring a restriction as to user and positive covenant in favour of North Sydney Council burdening 290 Pacific Highway, Crows Nest (Lot 1 DP 1279891) requiring the EV charging spaces to be solely used as EV charging spaces only and not to be used as additional private car parking spaces.

244 I consider the use of EV charging spaces capable of regulation by a Plan of Management, a matter contemplated by the terms of Conditions I2 and I4. I also recognise the likelihood that EV charging infrastructure may be adopted more widely by future residents of the development. Such appears the intent of the relevant section of the NCC.

245 The proposed condition at Condition G16 is deleted.

Condition C57

246 The parties agree that the site is within the 'St Leonards and Crows Nest Special Contributions Area' defined in the Environmental Planning and Assessment (Special Infrastructure Contribution – St Leonards and Crows Nest) Determination 2020 (Determination).

Council's position

247 The Council submits that it has consulted with the Department of Planning, Housing and Infrastructure (the Department) in this regard and has been advised that the special infrastructure contribution (SIC) has been correctly imposed by Council. Council has also been informed that it is not Council's role to assess and determine if the SIC is applicable, but that this is the role of the Department.

248 The condition has been worded such that PDS is to contact the Department to confirm the applicability of the SIC for the subject site. If it is not applicable, the Department will provide PDS with a clearance certificate within 5 working days. If a SIC is applicable, a notice of assessment will be provided.

The PDS position

249 PDS submits that cl 4 of the Environmental Planning and Assessment (Special Infrastructure Contribution - St Leonards and Crows Nest) Direction 2020) requires that a consent authority only impose a condition requiring the payment of a SIC if:

‘a special infrastructure contribution is required to be made under the Environmental Planning and Assessment (Special Infrastructure Contribution - St Leonards and Crows Nest) Determination 2020 ‘

250 That is, a SIC condition is not required to be imposed merely because the development is within a special contributions area, but if it is required to be made under the Determination.

251 Under cl 6 of the Determination, a contribution is only required to be paid with respect to, relevantly:

‘development on land that is intensive residential use land’

252 Under cl 5 of the Determination, ‘intensive residential use land’ means land that is:

(a) within an ‘intensive urban development area’ shown on the NSLEP Intensive Urban Development Area Map;

(b) identified as ‘intensive residential use land’ on the St Leonards and Crows Nest SCA Intensive Residential Use Areas Map; or

(c) land included in Schedule 3 of the SIC Determination.

253 PDS submits that the subject land does not meet, and has never met, any of the above descriptions. As such, because no contribution is payable under the determination, no SIC condition should be imposed.

254 Nevertheless, should the Court decide to impose a condition in relation to the making of a SIC, PDS proposes a form of words to clarify that the condition may be satisfied by providing a clearance certificate issued by the Department if a SIC is not payable.

- 255 The Court notes the Determination is dated 27 August 2020, with the object of the Determination being to “require special infrastructure contributions to be made for the provision of infrastructure in connection with the intensification of residential development in St Leonards and Crows Nest, as generally outlined in the 2036 St Leonards and Crows Nest Plan...”.
- 256 While I have noted earlier that the 2036 Plan appears to be effectively superseded by the EIE, the question is whether the site is ‘intensive residential use land’ appears to be answered by cl 5 of the Determination.
- 257 The site is within the Special Contributions Area on the Intensive Residential Use Areas Map at Schedule 1 of the Determination that would appear consistent with the descriptor at [252]. On this basis, I accept there are grounds for the imposition of a condition in respect of a SIC.
- 258 However, as I understand, the final assessment of whether a SIC is required by PDS is a decision for the Department. The parties appear to agree that the Department may decide there is no SIC for PDS to pay, confirmed by the issuing of a certificate to that effect. While both the competing conditions appear to provide for such an alternative, I consider the form of words proposed by PDS at Condition C57 to be more abundant in clarity on this point and so the condition as is proposed to be amended by PDS is adopted.

Conclusion

- 259 For the reasons set out above, the Court finds the proposed development deserving of the grant of consent in accordance with s 4.16 of the EPA Act, subject to conditions of consent.
- 260 In addition to the documents at [10] that are the subject of approval by the Council in accordance with s 38 of the EPA Regulation, PDS relied, unopposed, on the following amended plans and other documents in closing. To the effect the following documents further amend the application before the Court, the Court exercises its power under s 39(2) of the LEC Act to approve the further amending of development application No. DA66/23 by the following documents:
- (1) Amended Structural Plans prepared by CAM Consulting (Exhibit J)

- (2) Amended East Elevation, DA 201 Revision I (Exhibit L)

Orders

261 The Court orders that:

- (1) The Applicant is to pay the Council's costs thrown away as a result of the amending of the development application, as agreed or assessed, in accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- (2) The appeal is upheld.
- (3) Development application No. DA66/23 for the proposed development involving restoration of a heritage item, partial demolition works, and construction of a 11-storey mixed use building comprising two floors of commercial premises, 52 residential units, and four levels of basement parking, public domain and landscaping works, and other associated works, at Lot 1 in Deposited Plan 1279891, referred to as 286-294 Pacific Highway, Crows Nest, is determined by the grant of consent, subject to conditions of consent at Annexure A .
- (4) All Exhibits are returned, except for Exhibits A, B, D and L.

.....

T Horton

Commissioner of the Court

Annexure A (609223, pdf)

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