



Land and Environment Court New South Wales

Medium Neutral Citation:	Platinum Property Advisors No 1 Pty Ltd ATF The Trustee for Platinum Property Advisors No 1 Trust v Northern Beaches Council [2021] NSWLEC 1675
Hearing dates:	7 October 2021
Date of orders:	8 October 2021
Decision date:	08 October 2021
Jurisdiction:	Class 1
Before:	Clay AC
Decision:	See direction at [118]
Catchwords:	DEVELOPMENT APPLICATION – shop top housing – character of the neighbourhood – appropriate urban form – design quality – breach of height control – bulk and scale – loss of trees – traffic impacts – adequacy of parking – pedestrian access and safety – experts agreement as to issues – matters raised by objectors – public interest
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.15, 8.14, 8.17 Environmental Planning and Assessment Regulation 2000, cl 50 Land and Environment Court Act 1979, s 39 State Environmental Planning Policy No 55—Remediation of Land State Environmental Planning Policy No 65 – Design Quality of Residential Flat Development, cl 28 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Infrastructure) 2007, cl 45, 104 State Environmental Planning Policy (State and Regional Development) 2011, Sch 7 Warringah Local Environmental Plan 2011, cl 2.3, 4.3, 4.6, 6.2
Cases Cited:	Arco Iris Trading v North Sydney Council [2015] NSWLEC 1113 Hrsto v Canterbury City Council (2014) 204 LGERA 148; [2014] NSWLEC 121 Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115
Texts Cited:	NSW Department of Planning and Environment, Apartment Design Guide, (July 2015) Land and Environment Court of NSW, COVID-19 Pandemic Policy, (April 2021) Warringah Development Control Plan 2011

Category:	Principal judgment
Parties:	Platinum Property Advisors No 1 Pty Ltd ATF The Trustee for Platinum Property Advisors No 1 Trust (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: A Galasso SC (Applicant) S Patterson (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Wilshire Webb Staunton Beattie (Respondent)
File Number(s):	2020/283826
Publication restriction:	Nil

JUDGMENT

This decision was given as an extemporaneous decision. It was given orally and has been revised and edited prior to publication.

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7 of *Environmental Planning and Assessment Act 1979* (EP&A Act) against the refusal by Sydney North Regional Planning Panel (Panel) of DA2020/0393 (DA) for demolition of existing structures, construction of a mixed use development comprising retail uses and shop top housing containing 49 dwellings, basement car park for 238 vehicles, landscaping and a public square at lot 1 in Deposited Plan 1199795 known as 28 Lockwood Avenue, Belrose (site).
- 2 The proposal is regional development pursuant to sch 7 of State Environmental Planning Policy (State and Regional Development) 2011 as a project with capital investment value exceeding \$30,000. That is the reason it was determined by the Panel. The Council, however, is the appropriate Respondent to the appeal but is subject to the control and direction of the Panel in connection with the conduct of the appeal (s 8.14(4) of the EP&A Act.)
- 3 The DA has engendered significant local objection. The site is the site of the former Belrose Library, and to many, the prospect of shop top housing is an anathema to the expectation for this area of Belrose. It is entirely understandable that there is first, concern about the degree of change at the site, and second, where there is acceptance that change will occur, that it will occur in an orderly way, respectful of the planning controls, and without unreasonable impacts.
- 4 On 9 July 2021 leave was granted to the Applicant to amend its development application. Those amendments reduced the floor area of the development by in the order of 1,600 square metres, there was a modest reduction in the height and a reduced the number of units proposed from the then 51 to the current 49, removed a proposed gymnasium from basement 3 and increased the provision of onsite car parking spaces from 190 to 238.
- 5 It is now the fact that after that amendment and subsequent refinement of the proposal the expert evidence from the Applicant's and the Council's witnesses agree that all contentions previously in the case have been resolved. The Council does not submit that development consent should not be granted. Nevertheless, the Court does not act as a rubber stamp in these circumstances. The Court is exercising the power of the consent authority and must determine for itself whether it is appropriate to grant development consent having regard to the expert evidence, the planning regime and

the evidence or submissions from objectors. Having considered all the evidence before me, for the following reasons I consider it is appropriate that development consent be granted subject to conditions.

SITE AND SURROUNDS

- 6 The site is irregular in shape with an area of 5,322 square metres. It has three frontages, 61.97 metres to Lockwood Avenue to the south, 27.95 metres to Glen Street to the southeast and 75.7 metres to Glenrose Place to the north and northeast. The former Belrose Library is unoccupied and the site is vacant. There are about 80 trees and shrubs on the site.
- 7 The site is located adjacent to the Glenrose Village Shopping Centre which incorporates a Woolworths and Aldi supermarkets as well as a variety of food and retail stores, and a significant parking area. The local centre also comprises the Glen Street Cultural Hub which holds the new library and Glen Street Theatre. A Caltex service station adjoins the site to the east.
- 8 The area surrounding the site is characterised by a mixture of lower density residential development and more significant non-residential building forms, including, as I have said, the Glen Street Cultural Hub complex, which has a more significant scale than surrounding development. There are also significant recreational reserves to the east.
- 9 On the corner of Glen Street and Glenrose Place is a Caltex service station (or it may now be an Ampol station). Vehicular access and egress to the petrol station are via Glen Street. That property is predominantly hardstand with landscape planters extending along the street frontages. The Glen Street Cultural Hub is on the southern side of Glen Street and makes up part of the Glen Street Theatre revitalisation that is being undertaken by the Council. At grade parking is located in the eastern corner of that property and there are large trees along the property boundaries.
- 10 To the south across Lockwood Street is a dental practice and residential development is adjacent and continuing to the west. A small Council reserve about 11 metres wide adjoins about half of the western boundary of the site and the balance of the western boundary is a north-south pathway leading into the Glenrose Shopping Centre Village.
- 11 At the northern end of that western boundary across the path is a childcare centre, whereas at the southern end of the western boundary on the western side of the reserve commences single dwelling residential development.
- 12 The site slopes significantly from south to north, that is from Lockwood Avenue to Glenrose place, and the fall is a little over 6 metres. The site is zoned B2 Local Centre pursuant to Warringah Local Environmental Plan 2011 (WLEP 2011).

THE PROPOSAL

- 13 The location and topography of the site have presented design challenges. Whilst there are nominally three street frontages, there are in reality only two functioning street frontages: Lockwood Avenue and Glenrose Place. It is set out in the cl 4.6 exception - to which I will return - by Mr Harding the following description:

"The character of these two frontages varies significantly in terms of visual presentation and land use. The surrounding land use zoning and abovementioned topography also have a significant impact on the visual presence and character of the proposal. The differing character has informed the location of proposed variations to the building height standard by shifting scale and density across the building form to reflect the change in interface across two different public domains."
- 14 While I will set out the provisions of the planning instruments later, it is appropriate to observe at this point that the development is properly characterised as shop top housing, which means that the residential component must be above ground floor retail

or commercial premises. Residential development cannot be on the ground floor of shop top housing and residential flat buildings are a prohibited use in the B2 zone.

- 15 It is unnecessary to analyse the characterisation of the development. I only observe that it is not in issue that that is the proper characterisation of the development and I am satisfied the development is properly characterised as shop top housing (see for example *Arco Iris Trading v North Sydney Council* [2015] NSWLEC 1113, applying the principles in *Hrsto v Canterbury City Council* (2014) 204 LGERA 148; [2014] NSWLEC 121).
- 16 There are two levels of basement parking for both the retail and residential uses, the latter being accessed only through internal security gates. The next level up (described in the plans as basement 2) comprises retail, a central courtyard open space, vehicle and pedestrian entry and loading dock. Basement 2 is ground level at Glenrose Place but effectively two levels below ground at Lockwood Avenue because of the slope of the site. The access points are from Glenrose Place.
- 17 The next level up (called lower ground) provides residential units on the north, south and to the east of the courtyard, with retail along the southern boundary. The retail on this level is accessed from the retail shops above which are at street level. The residential units on this level are above ground floor retail/commercial uses.
- 18 The next level up is called ground floor but it is only at ground floor along the Lockwood Avenue frontage to the south. There is retail along that boundary as well as two voids which provide natural light to the retail spaces immediately below.
- 19 The next level up is the top level described as level 1 in which there are residential units only with some communal open space for the residential apartments, still embracing the central courtyards two levels below.
- 20 The building will present mostly as two or three storeys with an element of four storeys visible in part.

THE COURSE OF THE PROCEEDINGS

- 21 At a case management conference on 28 September 2021 the parties' representatives raised with me whether a site inspection would be permissible, given the present COVID pandemic. After discussion, it was agreed that I would inspect the site and surrounds by myself and in particular was directed to note the relationship of the site to adjacent and nearby residential dwellings.
- 22 I did conduct such a site inspection on 4 October 2021 and made observations consistent with my description of the site and surrounds above. I also informed the parties of that fact at the commencement of the hearing. The hearing was conducted by audio visual means and in accordance with the Court's COVID-19 pandemic policy of April 2021.

ISSUES

- 23 I will summarise the issues from the 13 contentions in the Council's statement of facts and contentions.

Contention 1 - Design Quality

- 24 The proposed development should be refused as it fails to demonstrate design quality having regard to the Design Quality Principles to be taken into consideration by virtue of cl 28(2)(b) of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65) and other provisions of SEPP 65 and the Apartment Design Guide (ADG).

Contention 2 - Inconsistent with Zone Objectives

- 25 The proposed development should be refused as it is inconsistent with the objectives of the B2 local centre in WLEP 2011 in that it failed to provide a safe, comfortable and interesting pedestrian environment, create an appropriate urban form and failed to minimise conflict between land uses.

Contention 3 - Height

- 26 The proposed development should be refused due to its excessive height and failure to comply with the maximum building height development standard set out in cl 4.3 of WLEP 2011, and the applicant's written request to vary the development standard under cl 4.6 of WLEP 2011 is not well founded.

Contention 4 - Bulk and Scale

- 27 The proposed development should be refused due to its excessive bulk and scale.

Contention 5 - Amenity

- 28 The proposed development should be refused as it will have an unacceptable impact on the amenity of neighbouring properties due to noise.

Contention 6 - Trees

- 29 The proposed development should be refused as it will result in an excessive impact on existing trees on the site as the proposal involves the removal of all 80 existing trees onsite and there is insufficient replacement tree planting proposed.

Contention 7 - Excavation

- 30 The proposed development should be refused as it requires excessive excavation and the impacts arising from the excavation have not been adequately addressed, having regard in particular to cl 6.2(3) of WLEP 2011 and Part C7 of Warringah Development Control Plan 2011 (WDCP 2011).

Contention 8 - Traffic

- 31 The proposed development should be refused as it will result in unacceptable traffic impacts and consequential safety impacts, including unsatisfactory vehicular access to Glenrose Place, failing to mitigate the adverse impacts for the additional traffic and pedestrian volume on traffic and road safety, and the onsite loading areas design is inappropriate.

Contention 9 - Parking

- 32 The proposed development should be refused as it fails to provide sufficient and satisfactory off-street parking.

Contention 10 - Stormwater

- 33 The proposed development should be refused as it fails to make adequate provision for the disposal of stormwater.

Contention 11 - Waste

- 34 The proposed development should be refused as it fails to make adequate provision for the collection, storage and disposal of waste.

Contention 12

- 35 The proposed development should be refused as it is not in the public interest.

PLANNING REGIME

- 36 As I have indicated above, the site is zoned B2 Local Centre pursuant to WLEP 2011. I set out below the objectives of the zone and the land use table.

Zone B2 Local Centre

1 Objectives of zone

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To provide an environment for pedestrians that is safe, comfortable and interesting.
- To create urban form that relates favourably in scale and in architectural and landscape treatment to neighbouring land uses and to the natural environment.
- To minimise conflict between land uses in the zone and adjoining zones and ensure the amenity of any adjoining or nearby residential land uses.

2 Permitted without consent

Home-based child care; Home occupations

3 Permitted with consent

Boarding houses; Centre-based child care facilities; Commercial premises; Community facilities; Educational establishments; Entertainment facilities; Function centres; Information and education facilities; Medical centres; Oyster aquaculture; Passenger transport facilities; Recreation facilities (indoor); Registered clubs; Respite day care centres; Restricted premises; Roads; Service stations; Shop top housing; Tank-based aquaculture; Tourist and visitor accommodation; Any other development not specified in item 2 or 4

4 Prohibited

Advertising structures; Agriculture; Air transport facilities; Animal boarding or training establishments; Boat building and repair facilities; Boat sheds; Camping grounds; Caravan parks; Cemeteries; Charter and tourism boating facilities; Correctional centres; Crematoria; Depots; Eco-tourist facilities; Environmental facilities; Exhibition villages; Extractive industries; Forestry; Freight transport facilities; Heavy industrial storage establishments; Highway service centres; Home occupations (sex services); Industrial retail outlets; Industrial training facilities; Industries; Marinas; Mooring pens; Moorings; Open cut mining; Pond-based aquaculture; Port facilities; Recreation facilities (major); Recreation facilities (outdoor); Research stations; Residential accommodation; Rural industries; Sex services premises; Storage premises; Transport depots; Vehicle body repair workshops; Vehicle repair stations; Waste or resource management facilities; Water recreation structures; Wharf or boating facilities; Wholesale supplies

- 37 I observe that shop top housing is a permitted use in para 3 to the table. *Shop top housing* is defined in the dictionary to WLEP 2011 in the following terms:

Shop top housing means one or more dwellings located above ground floor retail premises or business premises.

- 38 Clause 4.3 of WLEP 2011 relates to the height of buildings and provides as follows:

4.3 Height of buildings

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

- (a) to ensure that buildings are compatible with the height and scale of surrounding and nearby development,
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access,
- (c) to minimise any adverse impact of development on the scenic quality of Warringah's coastal and bush environments,
- (d) to manage the visual impact of development when viewed from public places such as parks and reserves, roads and community facilities.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

(2A) If the Height of Buildings Map specifies, in relation to any land shown on that map, a Reduced Level for any building on that land, any such building is not to exceed the specified Reduced Level.

- 39 The height of buildings map to which cl 4.3 refers provides that the subject site, and in (d) the surrounding land, has a maximum height of 8.5 metres. Clause 4.6 of WLEP 2011 applies to development standards, and I will set that out and deal with that a little

bit later.

- 40 WDCP 2011 applies to the development. Section C2 deals with traffic access and safety and unsurprisingly has objectives to minimise traffic hazards, vehicle queuing, a number of vehicle crossings, traffic, pedestrian and cyclist conflict, interference with other transport facilities and the loss of "on-street" kerbside parking.
- 41 The requirements of Part C2 are to demonstrate when that the proposal meets the objectives, to which I have just referred, and also that on onsite loading and unloading is appropriate to the size and nature of the development. Part C3 relates to parking facilities and in requirement 4 provides that car parking is to be provided effectively in accordance with the Road and Traffic Authority's Guide to Traffic Generating Development.
- 42 Section F1 of WDCP 2011 deals with local and neighbourhood centres. There are general requirements relating to such centres as well as specific requirements relating to particular centres. There are no specific requirements for Belrose B2 local centre zoned land.
- 43 A relevant requirement of Part F1 is that:
- "5. The built form of development in the local or neighbourhood retail centre is to provide a transition to adjacent residential development, including reasonable setbacks from side and rear boundaries, particularly above ground floor level.
6. Buildings greater than two storeys are to be designed so that the massing is substantially reduced on the top floors and stepped back from the street front to reduce bulk and ensure that new development does not dominate existing buildings and public spaces."

EXPERT EVIDENCE

- 44 Expert evidence was given on planning and urban design by Mr S Harding, a consultant planner retained by the applicant, Mr G Goodyer, a consultant planner retained by the Council, and Mr D Chung, an urban designer in the employ of the Council. (I shall refer to the witnesses generally as the planning and urban design witnesses.) The planning and urban design witnesses provided a joint report and gave oral evidence.
- 45 Landscape evidence was given by Mr A Powe, a landscape officer employed by the Council, who was not required to give oral evidence but provided a statement of evidence.
- 46 Traffic expert evidence was provided by Mr C McLaren, retained by the Applicant, and Ms R Saket, employed by the Council. The traffic experts provided a comprehensive joint report and also gave oral evidence. Rather than summarise the experts' evidence, I will refer to it when dealing with the issues in due course.

OBJECTIONS

- 47 The DA (and the DA as later amended) were notified to the local community in accordance with the council's policy. In the first notification, there were 134 submissions made of which 20 were in support and 114 objecting to the proposal. There had been further submissions from the subsequent renotifications which are also in significant numbers.
- 48 The issues raised by objectors were summarised in the council's assessment report to the Panel and which are:
- Excessive height, bulk and scale;
 - Inadequate building set backs;
 - Out of character with the area;
 - Excessive density;

- Traffic impacts;
- Lack of car parking;
- Pedestrian safety;
- Loss of trees;
- Construction impacts, including noise;
- Overshadowing;
- Unnecessary shops;
- Precedent;
- Flooding; and
- Economic impacts.

49 Oral evidence was given by Mrs J Haerland, who lives in Lockwood Avenue; Mr M Tanner of Beckman Parade; Mr M Smith of Ashworth Avenue, Ms P Barnes of Ashworth Avenue, Mr R Whiley also of Ashworth Avenue, and Mr Moreland of Lowanna Street. The oral evidence reflected the written submissions in general but emphasised:

- Unnecessary retail on Lockwood Street and the effect on the character of the area on the nil setback for the retail on Lockwood Avenue;
- There should be compliance with the planning controls;
- The traffic conflicts for Glenrose Place;
- The lack of on-street parking putting this commercial centre at a disadvantage to others in the local government area;
- Overshadowing of communal open space;
- Insufficient basement parking;
- Bulk and scale and out of character;
- Too many dwellings, having regard to the strategic planning of Frenchs Forest;
- The proposal should not breach the height control;
- Poor pedestrian movement; and
- Preference for a residential flat building rather than retail.

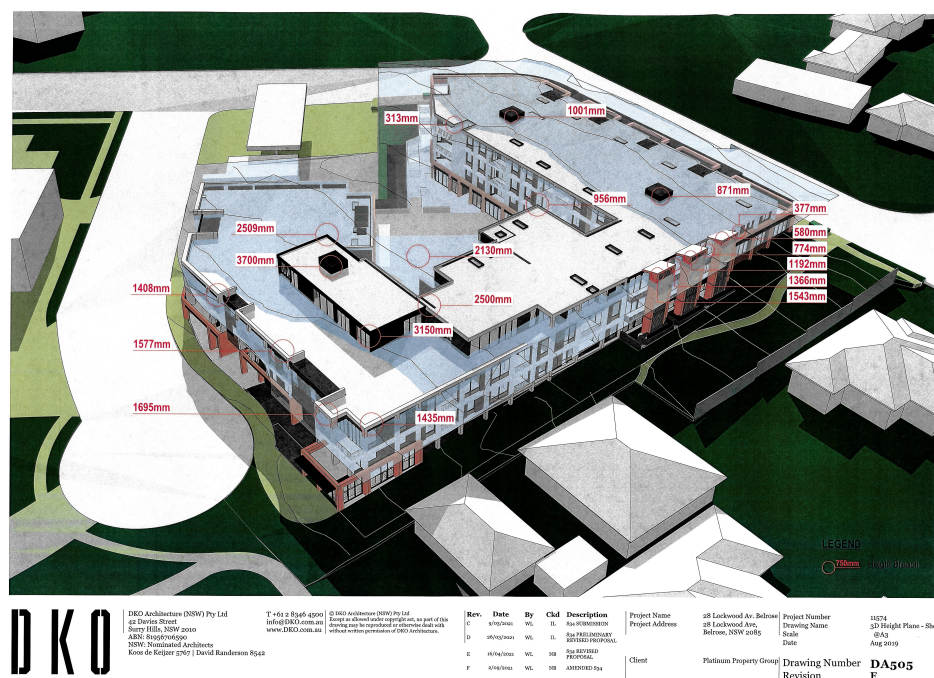
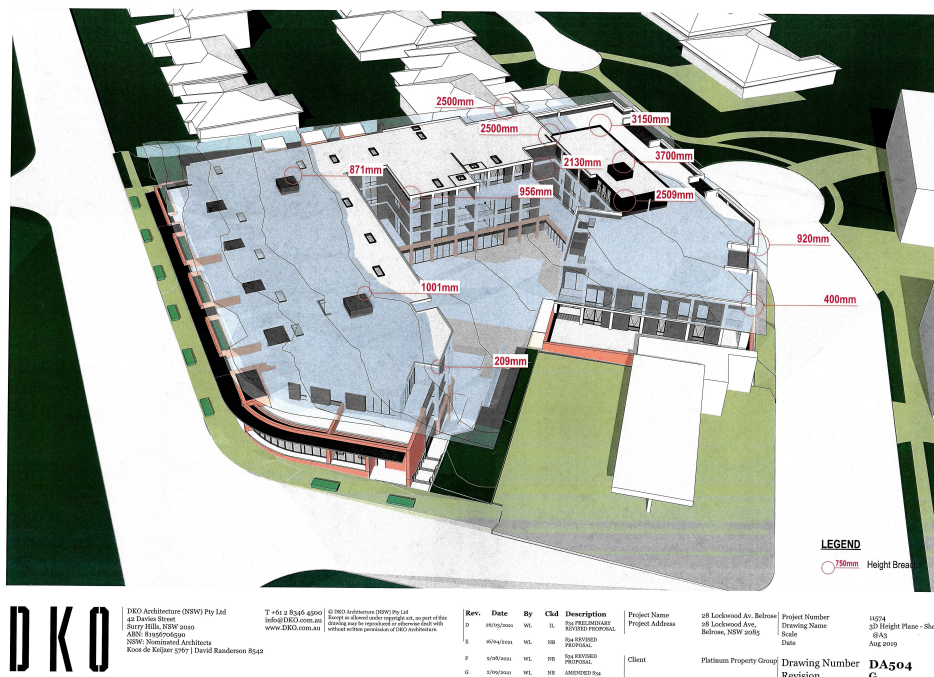
CONSIDERATION

50 I will deal with each of the contentions in turn and then the additional jurisdictional matters. I will, however, commence with contention 3 which relates to height and the cl 4.6 objection.

Height and Clause 4.6 Objection (Contention 3)

51 It is well known that where there is a non-compliance with a development standard, unless the provisions of cl 4.6 are satisfied, there is no power in a council or the Court to grant development consent. Pursuant to cl 4.3, the maximum height permissible is 8.5 metres, whereas the maximum height of the development is 12.2 metres, although it must be said that the height exceedances are not consistent over the whole of the site, and vary according to location and indeed the extent of the breach.

52 The breach is illustrated in the following two images:



53 Clause 4.6 provides as follows

4.6 Exceptions to development standards

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

- to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

(3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—

- that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

(i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

54 Without reciting the authorities which are now well known, in order to grant development consent, I must be satisfied that:

- The cl 4.6 objection adequately addresses that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard;
- As a matter of fact, that compliance with the development standard is unreasonable or necessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify contravening the development standard; and
- The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

55 While subcl 4.6(4)(b) of WLEP 2011 requires concurrence of the planning secretary, such power can be exercised by the Court pursuant to s 39 of the *Land and Environment Court Act 1979* (Court Act). Further, it is clear that there are no matters of significance for State or regional environmental planning and there are no broader matters of public benefit in maintaining the development standards if the other matters in cl 4.6 are satisfied.

56 It should not be forgotten that a control such as the height control is not an end in itself, but a tool to achieve the objectives of the control (see for example *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 per Preston CJ).

57 The cl 4.6 exception prepared by Mr S Harding, the expert retained by the Applicant, is a comprehensive analysis of the site and its context and followed by a justification of the variation to the height control. It says that compliance with the height control is unreasonable or unnecessary, in summary because:

- The proposed design is the result of well-considered design development seeking to provide an integrated public realm network across the site. The design retains a similar density of a bulk in a compliant building with greater site coverage that does not have any floor space ratio controls by appropriately locating units near Glenrose Place away from Lockwood Avenue;
- The relocation of gross floor area away from the Lockwood Avenue frontage allows the bulk and scale of the portion of the building that presents to Lockwood Avenue to be reduced to two levels, where it could have been reasonably expected that a three storey building be provided;

- The proposed breach of the height control as a result of the distribution of the bulk enables a high-quality design to be provided that is restricted as a result of the constrained topography which includes the site's irregular shape and the significant fall;
- The distribution of the bulk across the site and the proposed breach of the height control facilitates the provision of a high quality open space within the centre of the site that is accessible for all residents, visitors, staff and customers of the retail space; and
- The proposed breach has no unreasonable impacts, nor does the development in terms of amenity, character or environmental matters.

58 The cl 4.6 exception states that the proposal meets the objectives of the control in the following way:

- In terms of compatibility with the height and scale of surrounding and nearby development, the buildings are scaled down and set back and have more residential interfaces while providing a mix of commercial and residential opportunities as part of the Belrose Local Centre;
- The development provides a successful transition from the residential areas to the local centre identity;
- In terms of minimising visual impact, obstruction of views, loss of privacy and loss of solar access, it says the proposal is compliant with the requirements of the ADG and does not disrupt any significant view lines;
- It says that landscaped areas and the positioning of the built form optimises amenity for the site and neighbouring properties;
- In terms of minimising adverse impact on the scenicquality, the 4.6 exception says that the proposal retains a compliant proportion of deep soil and landscaped open space with landscaping located to soften interface of adjoining properties and the streetscape; and
- In terms of managing the visual impact of development when viewed from public places, the cl 4.6 exception says that the development presents a compliant two storey height at the street frontage to Lockwood Avenue with an upper level significantly recessed, landscaped private open spaces are provided above this ground element to further soften the built form.

59 The environmental planning grounds relied upon in the cl 4.6 exception include (I will not set them all out):

- The improved urban design outcomes referred to in the preceding sections;
- The provision of a high-quality centralised landscape public open space in the middle of the site;
- Enables the development to respond to a varying scale of built forms surrounding the site;
- Enables the built form to appropriately respond to the site's constraints; and
- No adverse impacts in terms of visual privacy or view loss.

60 The cl 4.6 exception says that the proposal is in the public interest because it is consistent with the objectives of the control and of the zone for the preceding reasons and that:

- It provides a range of new retail and business tenancies to serve the people who live and work and visit in the area;

- It provides uses to encourage employment; and
- It provides additional housing and commercial opportunities in close proximity to public transport options and provides landscaped pedestrian links and bicycle parking.

61 The planning and urban design experts in their joint report said the following:

"The amended request to vary the building height standard is well founded, demonstrating that the proposal satisfies the underlying objectives of the control and of the zone in which the property is located and that there are sufficient environmental planning grounds to justify the proposed variation."

62 Mr Chung adds that in his view the proposed height breach area is well set back from the building edges and additional shadow cast would not affect public domain areas and neighbouring developments.

63 Mr Goodyer adds that the massing of the development is such that it provides areas of public open space that would not be available if the buildings complied with the building height control, but were distributed across the entire site and this is a significant environmental planning ground that justifies the variation to the control. He further notes that the breaches are located centrally such that the lines of sight are screened by the building parapets.

64 Mr Harding, who unsurprisingly supports his own cl 4.6 exception, emphasizes that the movement of the mass around the site provides the most desirable design solution which justifies the variation of the height development standard. He says that for the reasons set out in the cl 4.6 exception, it demonstrates a superior outcome than a complying development.

65 I agree with the conclusion of the planning and urban design experts for the reasons that they give. The site is challenging but the design deals sympathetically with the residential frontages, particularly providing a two-storey presentation on the Lockwood Avenue frontage. On the western side, the setbacks are generous and there is a significant area of deep soil planting.

66 For those reasons there is an appropriate transition between the development and the residential development to the south and to the west. The provision of a public communal space is significant in a local centre, it gives opportunity for human interaction and for a sense of community within a local centre. The relatively minor breaches of the height control allows a redistribution of the mass of the building so as to permit the creation of the courtyard communal area, transition well to the neighbouring residential area and properly address the Glenrose Shopping Centre, including Glenrose Place.

67 Accordingly, I am satisfied that: the cl 4.6 objection adequately addresses that compliance with a development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard; that compliance with the development standard is, in fact, unreasonable or unnecessary in the circumstances of the case, and that there are, in fact, sufficient environmental planning grounds to justify contravening the development standard; and that the proposed development will, in fact, be in the public interest, being consistent with the objectives of the standard and of the design.

Building design quality - Contention 1

68 I should observe first the provisions of cl 50 of the Environmental Planning and Assessment Regulation 2000:

50 How must a development application be made?

(1) A development application, other than an application for State significant development, must—

- (a) be in the form that is approved by the Planning Secretary and made available on the NSW planning portal, and
- (b) contain all of the information that is specified in the approved form or required by the Act and this Regulation, and
- (c) be accompanied by the information and documents that are specified in Part 1 of Schedule 1 or required by the Act and this Regulation, and
- (d) be lodged on the NSW planning portal.

.....

(1A) If a development application that relates to residential apartment development is made on or after the commencement of the *Environmental Planning and Assessment Amendment (Residential Apartment Development) Regulation 2015*, the application must be accompanied by a statement by a qualified designer.

(1AB) The statement by the qualified designer must—

- (a) verify that he or she designed, or directed the design, of the development, and
- (b) provide an explanation that verifies how the development—
 - (i) addresses how the design quality principles are achieved, and
 - (ii) demonstrates, in terms of the Apartment Design Guide, how the objectives in Parts 3 and 4 of that guide have been achieved.

(1B) If a development application referred to in subclause (1A) is also accompanied by a BASIX certificate with respect to any building, the design quality principles referred to in that subclause need not be verified to the extent to which they aim—

- (a) to reduce consumption of mains-supplied potable water, or reduce emissions of greenhouse gases, in the use of the building or in the use of the land on which the building is situated, or
- (b) to improve the thermal performance of the building.

.....

(Emphasis added)

- 69 The Court was provided with a SEPP 65 Design Statement and certification by Nicholas Byrne, a director of DKO Architecture, the architect firm for the proposal. The design statement dealt with the objectives and principles of SEPP 65 and the ADG and provided an analysis of those matters.
- 70 In the joint report of the planning and urban design experts the experts agree that following the amendments to the plan the proposal satisfactorily addresses matters of design quality, but for two matters. Those two matters related to the design of two apartments where there was one bedroom in each, an internal bedroom without access to natural light, and above-ground planters on the street-front at the Lockwood Avenue frontage. Each of those minor matters have been dealt with by amendment to the plan or the provision of a relevant condition.
- 71 There is no detailed explanation of how those experts came to their view. However, having regard to their observations concerning the cl 4.6 exception and the detailed analysis in the SEPP 65 design statement, I am satisfied that matters of urban design have been dealt with appropriately.

Inconsistency with Zone Objections - Contention 2

- 72 The planning and urban design experts agree that the proposal satisfied the objectives of B2 zone. At para 15.2 of their joint report they say the following:
- “The proposal addresses the various interfaces that result from this large site. The design outcome appropriately addresses the scale of architecture in Lockwood Avenue differently to how it addresses the more commercial interface with Glenrose. The design also provides an acceptable solution to the change in topography of the site which provides challenges to ensure appropriate interfaces with the public domain.”
- 73 I have set out the objectives of the zone earlier in these reasons and I should also observe that cl 2.3 requires the decision-maker to have regard to the zone objectives in determining a development application. There is not a search for consistency or inconsistency, but rather the obligation is to have regard to those objectives.

Nevertheless, it is not infrequently said that finding an inconsistency with zone objectives would lead to a compelling reason to refuse a development application. Nevertheless, that is an observation ought not cause a departure from the statutory requirement to have regard to as distinct from find consistency.

- 75 Having regard to the objectives of the zone, I agree with the planning and urban design experts for the reasons which have been provided already and will later be referred to when dealing with traffic. I am satisfied that the environment for pedestrians is safe, comfortable and interesting, that the urban form is appropriate in scale and architecture, and the landscape treatment to the land, neighbouring land uses, particularly the sensitive land uses of residential development is appropriate.
- 76 Further, there is no evidence of conflict between land uses in the zone and adjoining zone, having regard to the manner in which the setbacks are provided to the residential zone to the south and the west and the treatment of the building at the Lockwood Avenue frontage.

Bulk and Scale - Contention 4

- 77 In essence, for the same reasons that the planning and urban design experts considered the height acceptable, they consider that, following the amendments which reduced the bulk and scale of the building, the proposal is acceptable. I agree with their conclusion and it is not necessary, having regard to what has already been said, to add to that observation.

Amenity - Noise - Contention 5

- 78 The planning and urban design experts point out that there is now sufficient separation between the communal open space on level 1 of the building and the residential properties to the west. That is the private communal open space in the sense that it serves the users or the occupants of the residential units in the development; it is not a publicly accessible place. There is a significant separation between that area and other residential development.
- 79 An updated acoustic report by Acoustic Noise and Vibration Solutions Pty Ltd dated 9 September 2021 confirms that noise from all components of the development will be within acceptable levels, subject to one matter. The author made a recommendation that in order for the use of what it described as a communal rooftop to comply with the relevant New South Wales noise policy, that two conditions should be imposed, giving effect to the following: access to the communal rooftop is restricted to day and evening hours only (7am to 10pm); that signs are to be installed advising that access to the rooftop is only permitted during the day and evening.
- 80 On the assumption that that acoustic report, as it appears to, deals with the latest plans with respect to the present location of that communal area, it would seem appropriate that those conditions be imposed. I will deal with that with the parties after the judgment is delivered.

Loss of Trees - Contention 6

- 81 This contention related to the loss of trees and inadequate replacement vegetation and provision of landscaping. A tree impact assessment report dated 19 April 21 was provided by an arborist Mark Bury, retained by the Applicant. Mr Bury described the current tree environment as a mixture of inappropriate plantings consisting of, "Weed species, pollarded trees, and dead trees which surrounded the previous library on the site".

He also said there are a number of poorly-planned planting of pittosporum, camphor laurel, London planetrees and coastal banksia. He described the indigenous gums on the site as in poor condition. He said that the proposed landscaping, as compensatory planting for removal of trees on the site would create a much better planned treed environment with long-term species that provide minimal risk issues in the future and minimal maintenance issues.

- 83 The loss of trees and the proposed landscaping was considered by Mr A Powe, the council's landscape advisor, who, as I indicated, provided a statement of evidence. He provided a response to the current proposal and concluded that the contentions relating to landscape issues have been resolved and the appropriate landscape conditions can be or should be imposed. Those conditions have been imposed.
- 84 In particular, Mr Powe pointed out that there are now ten existing trees on the site to be retained and there is planting of 61 new trees adjoining existing and proposed ground levels and a further 19 small trees to the upper-level landscape areas. He referred to the appropriateness of the increased density of trees, shrubs and ground covers along the western boundary, including two canopy trees, screen planting and the retention of existing trees.
- 85 He also pointed to the provision of extended roof garden and planting containing trees and shrubs and ground covers above basement 2 retail areas between the service station and the residential component. He described the roof garden as extending from Glenrose Place through to the plaza adjacent to residential units on the lower ground floor level, providing a softening of the interface with the service station and amelioration of the bulk and scale of building components to the west when viewed from Glenrose Place from Glen Street and other public areas to the east.
- 86 Having considered the landscape plan and the report from the arborist and the statement of evidence from Mr Powe I am satisfied that the tree loss is not a reason for refusal and that the outcome of the retention of some significant amount of vegetation, together with the new planting, is an appropriate landscape response for the site.

Excavation - Contention 7

- 87 The impacts of excavation have been addressed by a geotechnical investigation report by Atlas Geotechnical Services dated 16 September 2021. The recommendations in the report are imposed as conditions of consent, and I accept that the excavation required is appropriate and can be safely carried out. In so concluding I have had regard to the matters to be considered pursuant to cl 6.2 of WLEP 2011, and it is not necessary to set them out here.

Traffic and Parking - Contentions 8 and 9

- 88 I have previously adverted to the issues relating to traffic and pedestrian safety. A number of objectors gave evidence of really what could be described as a mess of traffic in Glenrose Place as well as concerns about pedestrian safety. Mr McLaren indeed described the present situation in Glenrose Place as chaotic.
- 89 What is unlikely to have been known by objectors is the solution to that chaotic situation which the traffic joint experts have considered is appropriate, necessary and acceptable. There is to be a roundabout provided within the Glenrose Place cul-de-sac so as to formalise left-in, left-out access arrangement for the proposed site and for the Glenrose Village car park. The experts explained this arrangement in their oral evidence.

All access to and from the site will be left-in, left-out. Those leaving the site will turn left, travel a little distance, then go around the roundabout and then exit Glenrose Place. Traffic accessing the loading dock and other parking facilities of the Glenrose Village Shopping Centre from Glenrose Place will also be regulated by the roundabout. The traffic experts have described the roundabout as the solution to the issues which are presently in Glenrose Place and which would have the potential to be exacerbated by the introduction of the access points for the subject site.

- 91 It should also be observed that the experts said in their oral evidence that Glenrose Place is, in effect, the only proper place to provide access to and egress from the subject site. That is, it would not be appropriate to provide access from either Glen Street or Lockwood Avenue because of their proximity to their respective intersections and the nature of the adjacent development.
- 92 That evidence is compelling and, indeed, common sense suggests that access to this development should be from Glenrose Place and, therefore, the obligation is to ensure it is safe. The traffic experts have provided the solution, which has been encompassed in conditions of consent. Mr McLaren, I think, reminded us in his oral evidence that the local traffic committee will be required to consider the ultimate design of the roundabout and approve it before it can be constructed.
- 93 In relation to pedestrian safety, the experts agreed that it is appropriate to rely on the existing raised pedestrian crossing on Glenrose Place as a safe pedestrian crossing measure.
- 94 They also indicated that the additional work should be undertaken, again subject to the approval of the local traffic committee, being: a pedestrian refuge island within Glen Street near its intersection with Lockwood Avenue; improved pedestrian safety and replacement of the existing zebra crossing on Lockwood Avenue outside the subject site with a raised pedestrian crossing lit in compliance with Australian standards. The traffic experts are then satisfied that pedestrian safety is appropriate and satisfactory. I accept their evidence for the reasons they have given.
- 95 In relation to parking numbers provided in the basements of the proposal I have referred to the provisions of the WDCP 2011 above. The standard required by the Council is for a minimum of 237 spaces being required. The proposal provides 238. Therefore, there is compliance with WDCP 2011. There is no basis upon which any additional parking could be required.
- 96 It is true that two at grade disabled parking spaces will be removed. The traffic experts said that they were provided for users of the library, which has since moved and which now provides disabled parking at its new location. Council does not object to their removal as a consequence of this development.
- 97 Mr McLaren made a detailed traffic and parking impact assessment in his report dated 21 June 2021. His assessment was accepted by the Council and included his assessment of the impact of the development on the local road network. He concluded, having conducted the appropriate modelling, that all intersections related to the site will provide a level of service largely unaltered from the present level of service and which is satisfactory. That is, he concludes, and I accept, that there is no reduction in the level of service provided in the local road network as a consequence of this development.
- 98 I should also note that, pursuant to cl 104 of the State Environmental Planning Policy (Infrastructure) 2007 (SEPP (Infrastructure)), the proposal is a traffic-generating development, notice of which was given to Transport NSW. Subclause 104(3)(b) of SEPP (Infrastructure) provides that I must take into consideration any submission that is provided by TNSW as well as the accessibility of the site and any potential traffic safety, road congestion or parking implications.

- 99 By letters dated 27 July 2020 and 24 December 2020, TFNSW indicated it has no objection to the proposal. I have also considered the matters required under cl 104 in the previous analysis.

Stormwater - Contention 10

- 100 The provision of additional information relating to stormwater has led to the resolution of this issue. A memorandum from Mr A Kwak, senior development engineer of the council, dated 6 October 2021 confirmed that there is no longer an issue in relation to stormwater subject to the imposition of what I could describe as the usual stormwater disposal conditions. Such conditions have been incorporated in the proposed conditions of consent.

Waste - Contention 11

- 101 Mr Ray Creer, the Council's waste services officer, has provided a memorandum dated 6 October 2021 indicating he has reviewed the amended plans and documentation and is satisfied the issues relating to waste had been addressed.
- 102 An important element of the waste management is the Operational Waste Management Plan (OWM Plan) dated 6 September 2021 by Elephants Foot Recycling Solutions.
- 103 It is a comprehensive plan achieving what it is said to be the three key objectives of waste management: promote responsible source separation to reduce the amount of waste that goes to landfill by implementing convenient and efficient waste management systems; ensure adequate waste provisions and robust procedures that will cater for potential changes during the operational phase of the development; compliance with all relevant Council codes, policies and guidelines.
- 104 I accept that having regard to the contents of the OWM Plan and Council's consideration of the issue that the contention is resolved.

Public Interest - Contention 12

- 105 The council limited the contention to the matters raised in the objections which are embraced by its contentions. To that extent, I have dealt with those matters above. However, the submissions made to the council are a mandatory relevant consideration pursuant to s 4.15(1)(d) of the EP&A Act. I have read the written submissions and listened carefully to the oral evidence of the objector witnesses. Their evidence was clearly and carefully given, expressing a real and genuine concern about the matters that they raised.
- 106 I have had the benefit of expert evidence on most of the matters raised, to which I have referred to in these reasons, but I do make the following additional observations.
- 107 The type of development now before the Court comes about as a consequence of the zoning of the land - it is zone B2 Local Centre. Shop top housing is a permissible use. Retail and business uses are an objective of the zone.
- 108 By virtue of the definition of shop top housing there must be retail uses on Lockwood Avenue. According to Mr Chung, the Council's urban design expert, it should be at a nil setback so as to encourage the activation of the street and promote the viability of the retail offerings. There is inevitably a change in the character of the site. It will no longer be the library and a low-key use with vegetation to the extent that it presently has. The change is, again, a consequence of the zoning of the land and the Council controls.
- 109 The expert's evidence is that the future character of the site will be compatible with its context. I have accepted and do accept that evidence. That does not mean that the change in character will not be immediately noticeable and to some may be unexpected. Indeed, some may find it offensive. However, planning is for the long-term

and the judgments to be made are within the construct of the planning controls, the EP&A Act, and the particular challenges posed by the location and topography of the site. The character, whilst changed, will be compatible with its context for the reasons which I have previously set out, whilst it will be different from its present character.

- 110 The traffic conflicts in Glenrose Place have been both recognised and resolved, as have the pedestrian paths. It is no criticism of the objector evidence that at the point they gave their evidence they may not have been aware of the solution which had been considered, nor, indeed, of the constraints of providing access to the site.
- 111 The lack of on-street parking is not a disqualifying factor and Council's requirement is that parking be provided on-site. That is the impacts of motor vehicles are internalised within the site rather than externalised by placing them on the street. That is typical and responsible planning and consistent with the planning controls. Any potential economic disadvantage is not a relevant consideration for me.
- 112 It was said that there should be compliance with the planning controls. Planning controls are read as part of a package. That is, the height control is but one part of the local environmental plan, as is the flexibility in the application or development standards given by cl 4.6 of WLEP 2011. Developments should meet the objectives of controls and, where appropriate, an individual development standard or control can be relaxed, provided there is compliance with cl 4.6. As I have already pointed out, it is appropriate that there be a relaxation of the height control in this case so as to produce an improved form of development than if that control was strictly complied with.
- 113 Having considered the evidence from objectors, there is nothing which dissuades me from accepting the expert evidence and my consideration of the material before me such that it is appropriate to grant development consent.

OTHER JURISDICTIONAL MATTERS

- 114 Notice of the DA was given to Ausgrid as the electricity supply authority, pursuant to cl 45 of SEPP (Infrastructure). Ausgrid have responded and their requirements are incorporated in conditions of consent. I am satisfied that the site is suitable for the proposed development as required by State Environmental Planning Policy 55—Remediation of Land, which relates to land contamination, having regard to material classification investigation reports by Atlas Geotechnical Services dated 24 October 2019 and 1 April 2020. Those reports were also accepted as fulfilling that role by the responsible council officer Mr T Collier.
- 115 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the development. A BASIX certificate number 1061176M_03 dated 10 September 2021 has been provided in satisfaction of the requirement of that State policy.
- 116 I also note, although not necessarily a matter going to jurisdiction, that matters of accessibility have been satisfactorily dealt with, as demonstrated by an access report by Vista Access Architects dated 1 September 2021.

CONCLUSION

- 117 Having regard to the whole of the evidence, it is appropriate to grant development consent, subject to conditions.
- 118 I make the following direction:
- (1) agreed conditions of consent taking into account these reasons in a form capable of being lodged on the portal be filed by 5pm, 11 October 2021.

.....

P Clay

Acting Commissioner of the Court

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Decision last updated: 03 November 2021