



Land and Environment Court
New South Wales

Case Name: Realize Architecture Pty Ltd v Canterbury-Bankstown Council

Medium Neutral Citation: [2023] NSWLEC 1437

Hearing Date(s): 28 February, 1 and 2 March 2023

Date of Orders: 09 August 2023

Decision Date: 9 August 2023

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders:
(1) The appeal is upheld.
(2) Development Consent No DA-503/2013 is modified in the terms in Annexure A.
(3) Development Consent No DA-503/2013 as modified by the Court is Annexure B.
(4) All exhibits are retained.

Catchwords: DEVELOPMENT APPEAL – modification of development consent – whether substantially the same – character - height of building – design and amenity - orders

Legislation Cited: Canterbury Local Environmental Plan 2012, cll 1.2, 4.3, 4.4, 4.6
Environmental Planning and Assessment Act 1979, ss 4.55, 8.7, 96
Environmental Planning and Assessment Regulation 2000, cll 115, 121B
Land and Environment Court Act 1979, s 39
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, cll 28, 29

Cases Cited:	<p>193 Liverpool Road Pty Ltd ACN 163231810 v Inner West Council [2022] NSWLEC 1197</p> <p>Arrage v Inner West Council [2019] NSWLEC 85</p> <p>Big Property Group Pty Ltd v Randwick City Council [2021] NSWLEC 1161</p> <p>Feldkirchen Pty Ltd v Development Implementation Pty Ltd (2022) 254 LGERA 114; [2022] NSWCA 227</p> <p>HPG Mosman Projects Pty Ltd v Mosman Municipal Council [2021] NSWLEC 1243</p> <p>North Sydney Council v Michael Standley & Associates Pty Ltd (1998) 43 NSWLR 468; [1998] NSWSC 163</p> <p>Project Venture Developments v Pittwater Council (2005) 141 LGERA 80; [2005] NSWLEC 191</p> <p>SJD DB2 Pty Ltd v Woollahra Municipal Council [2020] NSWLEC 1112</p> <p>The Satellite Group (Ultimo) Pty Ltd v Sydney City Council [1998] NSWLEC 244</p> <p>Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115</p>
Texts Cited:	Apartment Design Guide
Category:	Principal judgment
Parties:	<p>Realize Architecture Pty Ltd (Applicant)</p> <p>Canterbury-Bankstown Council (Respondent)</p>
Representation:	<p>Counsel:</p> <p>A Galasso (Applicant)</p> <p>G Farland (Solicitor)(Respondent)</p> <p>Solicitors:</p> <p>Mills Oakley (Applicant)</p> <p>Canterbury-Bankstown Council (Respondent)</p>
File Number(s):	2022/99968
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act* 1979 (EPA Act) being an appeal against the refusal of Modification Application No DA-503/2013/B, which seeks to modify Development Consent No DA-503/2013, as previously

modified, included a reconfiguration of built form, adjusted and improved public domain works, a revised unit mix, and internal layout changes (Proposed Modification) at 1-13 Close Street and 242-258 Canterbury Road, Canterbury (the Site). The Site comprises eleven (11) lots (to be consolidated) which are identified as Lot 1, 2 and 3 DP 1259941, Lot 1 DP 963864, Lot C DP 110214, Lot B DP159980, Lot X and Lot Y DP160390, Lot 101 and Lot 102 DP 791054 and Lot 21 DP 595332 and known as 1-13 Close Street and 242-258 Canterbury Road, Canterbury.

- 2 The Proposed Development, as amended and as outlined in the Applicant's Statement of Environmental Effects (SEE), prepared by Planning Ingenuity, dated 11 November 2022 (Ex B), seeks consent for:

- “• Reconfiguration of the ground floor plan
- Reduction in the building form and footprint adjacent to the Cooks River and the parkland to the east of the site.
- Provision of 480 car parking spaces (including one car wash bay).
- Enhancement of the public domain through a redesigned landscape and public art concept.
- Adjustment to approved apartment mix.
- Increase in floor space ratio.
- Increase in building height to accommodate two additional floors on Building 2 and two additional floors on Building 3.
- Amendment to the design to address construction and consent compliance matters, including additional access requirements and alteration to adaptable apartment layout.
- Amended storage layout.
- Reduced garbage rooms.”

- 3 The proceedings commenced onsite and an objector gave evidence in relation to their concerns regarding height of building and adverse traffic impacts.
- 4 The Respondent provided the following summary of the onsite view on the record (Transcript, 28 February 2023, pages 25 and 26):

“For the record, the hearing commenced onsite and the parties heard from Ms McLeod, an objector, whilst in Close Street. The Commissioner accompanied by the parties then proceeded south down Canterbury Road to Mary Mackillop park, paused in Mary MacKillop park, crossed over to the other side of Mary Mackillop park and observed the site from a location west of the playground. Then resumed the walk in a generally easterly direction to a

bridge crossing the Cooks River, and then returned to the site via the Lesley Muir park.

The Commissioner then accompanied by the parties proceeded again in a south-westerly direction up Canterbury Road to Fore Street, crossed the road, observed the site and the surrounds looking north, and then proceeded in a north-easterly direction, crossing Cooks River back up to the site, but this time on the westerly side of Canterbury Road, pausing at Charles Street. The Commissioner accompanied by the parties then proceeded in a north-westerly direction along Charles Street up until 11 to 15 Charles Street, and there was some discussion about the number of storeys for each of the subject properties. We then proceeded back to Canterbury Road, and continued towards the train station.

The Commissioner accompanied by the parties then proceeded past Canterbury Station, and paused to look at the site at the intersection immediately to the north of the train station. Then crossed the road to the east, and then proceeded again up Canterbury Road, walking up the hill, turned and observed the relationship between the site and the adjoining and adjacent properties, particularly 2A Charles Street and 211 Canterbury Road. Then proceeded down and paused at the intersection with the New Canterbury Hotel, and just made a further observation of the relationship between those three properties, at which time the site inspection was terminated."

- 5 The Respondent filed an Amended Statement of Facts and Contentions on 1 December 2022 (Ex 1) in response to which the Applicant sought to amend the Proposed Modification by way of Notice of Motion listed on the first day of the hearing, 28 February 2023.
- 6 The motion was granted and leave to amend the Proposed Modification was granted to the Applicant. The following orders were made on 28 February 2023:
 - (1) The Notice of Motion is granted;
 - (2) The Applicant is granted leave to rely on the Further Amended Application;
 - (3) The Court, in exercising the function of Canterbury Bankstown Council, as the relevant consent authority, under s 39(2) of the Land and Environment Court Act 1979, agrees, under cl 121B of the Environmental Planning and Assessment Regulation 2000, to the Applicant further amending Modification Application No. DA-503/2013/B in accordance with the Further Amended Application being the documents listed in Annexure A.
- 7 The documents listed in the Annexure A referred to in the Order at [6(3)] include the following documents and are marked Exhibit A in these proceedings:

- (1) Schedule of Amendments prepared by Realize Architecture
- (2) Architectural Plans for Modification Application (up to Rev C) prepared by Realize Architecture dated 19 December 2022 and 23 February 2023;
- (3) Unit Type Floor Plans (Rev B) prepared by Realize Architecture dated 13 February 2023;
- (4) SEPP 65 Design Verification Statement prepared by Realize Architecture dated 23 February 2023;
- (5) Waste Option CAD Plans (Rev A) prepared by Realize Architecture dated 24 February 2023;
- (6) Visual Impact Photomontage and Methodology Report prepared by Virtual Ideas dated 20 January 2023;
- (7) Summary of Development Table prepared by Realize Architecture;
- (8) Summary of Solar Access Analysis Table prepared by Realize Architecture;
- (9) Solar Access Addendum Memo prepared by Windtech;
- (10) Email chain with Windtech regarding details in relation to plenum design dated 25 October 2022;
- (11) BCA Report prepared by VPL Consulting dated 23 February 2023.

8 As result of amending the Proposed Modification, the experts were provided an opportunity to review and consider the amended Modification Application after the close of hearing on 28 February 2023 and the second day of hearing commenced at 11.30 am.

9 The Applicant foreshadowed in opening that a new updated BASIX certificate would be required because of the amended plans as there are less units and combined units, and the glass line has changed. (Transcript, 28 February 2023, page 23 (33)).

10 At the conclusion of hearing, the following further directions were made:

- (1) The parties to file consolidated Draft Conditions of Consent noting any disputes conditions and any such disputed conditions to be articulated as Respondents version and Applicants version, by 4 pm Monday 13 March 2023.
- (2) The Applicant to file and serve BASIX Certificate and any updated Design Verification Statement by 4 pm Monday 13 March 2023
- (3) Matter is listed for Online Court Response by Midday Tuesday 14 March 2023 for parties to advise of compliance with directions above or whether any matters outstanding. If directions are all complied with to

my satisfaction, then I will reserve judgment and adjourned hearing date will be vacated.

(4) Matter is Part Heard and Adjourned to 4:15pm Thursday 16 March 2023.

11 The matter was adjourned again to 3 April 2023.

12 The BASIX Certificate and SEPP 65 design verification statement by were filed on 24 March 2023 and marked Ex M and N respectively.

13 The consolidated Draft Conditions of Consent was filed on 29 March 2023, and marked Ex 14.

14 On 31 March 2023 the part heard hearing was vacated and I reserved my judgment.

The Site

15 The Site is located at the south-eastern corner of the intersection of Close Street and Canterbury Road. The Site is irregular in shape and has a combined site area of approximately 7,838.5m² or 7,598.6m², following the dedication of land on the corner of Canterbury Road and Close Street. Prior to the dedication, the Site had a total frontage to Canterbury Road of 74.8 m and a frontage to Close Street of 120.39m. I reproduce at Fig 1 an aerial photograph of the Site extracted from the Amended Statement of Facts and Contentions (ASOFAC) filed 1 December 2022 (Ex 1) below:



Image 1: Aerial photograph of 1-13 Close Street and 242-258 Canterbury Road, Canterbury (Nearmap, 2022)

Fig 1 Aerial photograph of the Site extracted from the ASOFAC, Ex 1

- 16 The ASOFAC helpfully includes a number of maps at par 18 with the Site outlined in each of the images. These images reveal that the Site traverses and is subject to a number of different controls relating to land use (Zone), maximum building height (HOB) and floor space ratio (FSR) pursuant to the provisions of the Canterbury Local Environmental Plan 2012 (CLEP). The Respondent helpfully provided to the Court amalgamated maps (Ex 10) compiling Maps 006 and 007 for each Zone, HOB and FSR from the CLEP and the parties assisted the Court by explaining that the three maps do not correlate. The Applicant explained as follows:

“Where you've got height increases, you don't have commensurate FSR, and where you've got zone differences you don't have a similar place of FSR or height conversions.” (Transcript, 28 February 2023, page 36 (40)).

- 17 The Site is zoned part B2 - Local Centre and part R4 – High-Density Residential under the CLEP. The Land Use Table of the CLEP confirms that *Shop top housing* is permissible with consent in the B2 zone and that a

residential flat building is permissible with consent in the R4 zone. I reproduce the Land Zoning Map from the ASOFAC below at Fig 2.

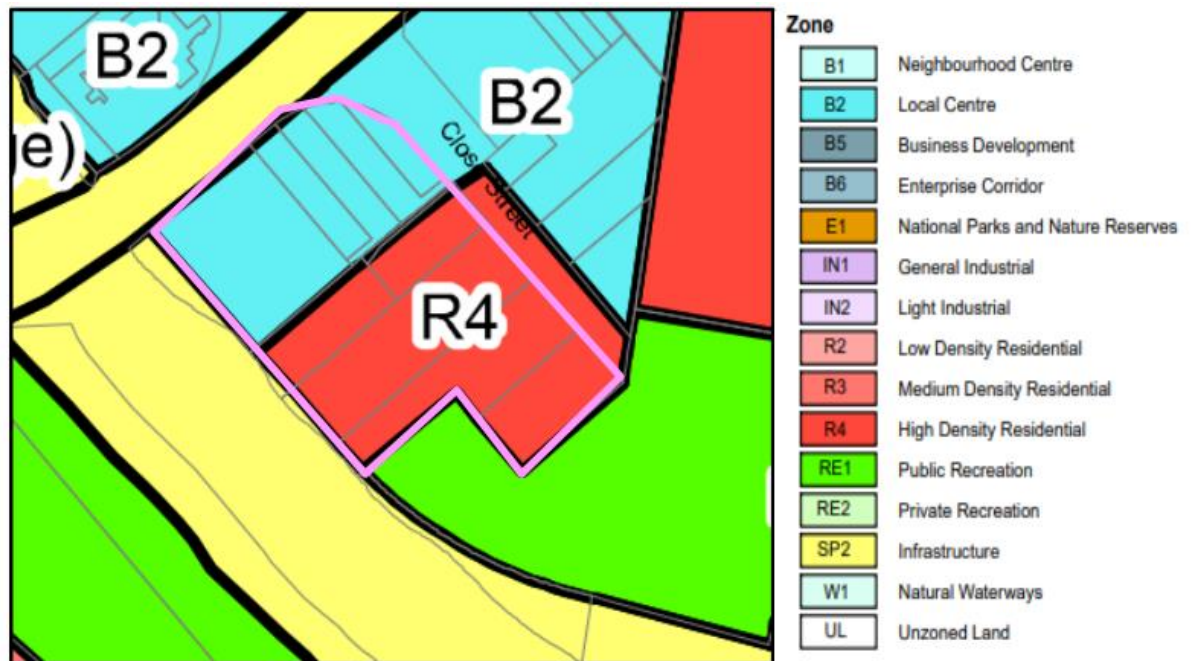


Image 13: Land Zoning Map - Sheet LZN_007

Fig 2: Land Zoning Map from ASOFAC, Ex 1

18 The Height Map in the CLEP reveals that the Site is subject to four different maximum building heights namely:

- (1) T2: 27m
- (2) N2: 14m
- (3) L1: 11m
- (4) R: 21m

For the purpose of these proceedings, the relevant HOB control is T2 at 27m. I reproduce the Height Map from the ASOFAC below at Fig 3.

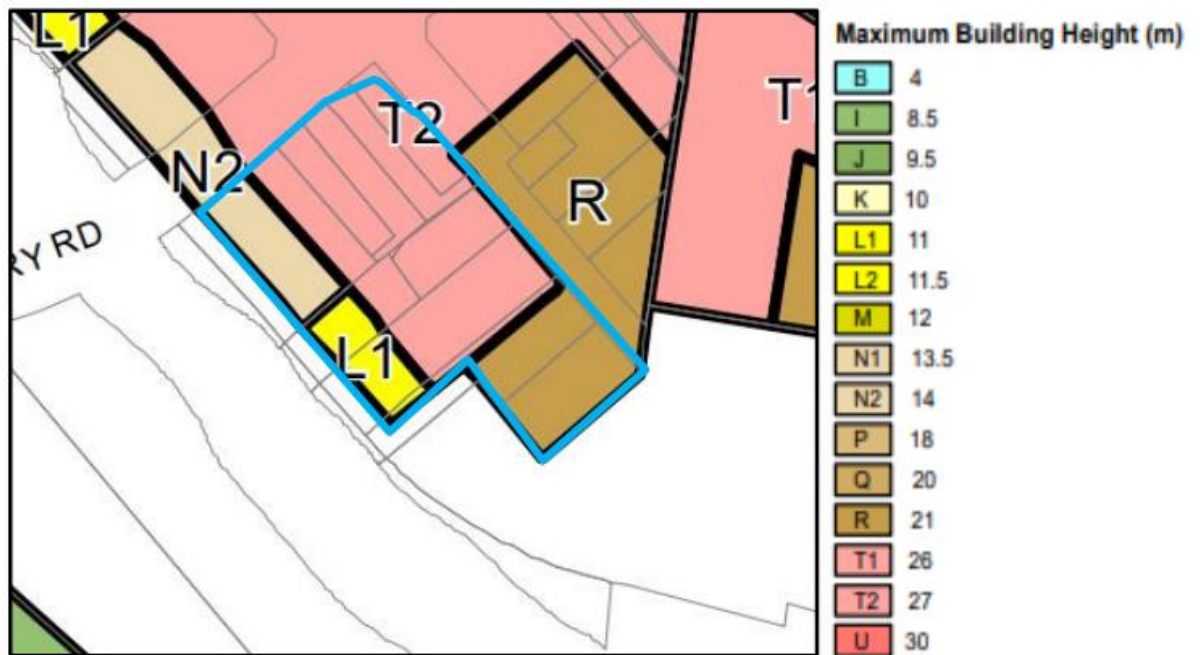


Image 15: Height Map - Sheet HOB_007

Fig 3: Height Map from the ASOFAC, Ex 1

- 19 The FSR Map in the CLEP reveals a similar, but not the same, delineation compared with the Land Zoning Map and the Site traverses whereby area V has a FSR of 3:1 on the B2 zone and area U2 has a FSR of 2.75:1 on the R4 zone. I reproduce the FSR Map from the ASOFAC below at Fig 4.

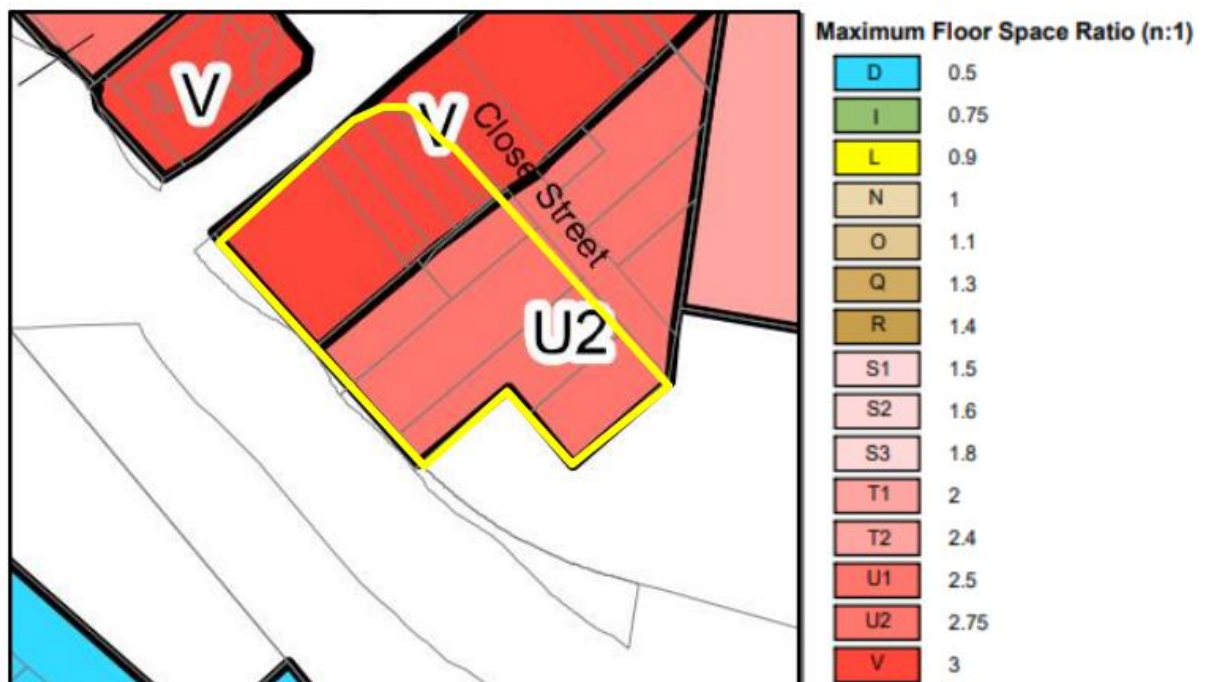


Image 14: FSR Map - Sheet FSR_007

Fig 4: FSR Map from the ASOFAC, Ex 1

- 20 The Respondent's case is set out in the contentions particularised in the ASOFAC (Ex 1). The council's position in relation to those contentions is that they remain outstanding, save for the contention dealing with waste and unloading, which is contention 6. The Respondent presses the balance of the contentions in the ASOFAC and contends that the Proposed Modification should be refused because:
- (1) After undertaking a qualitative and quantitative assessment of the modified development versus the originally approved development, it is considered that the modified development is not substantially the same development (Contention 1);
 - (2) The Proposed Modification is not consistent with the desired future character (DFC) and excessive floor space (Contentions 2 and 3); and
 - (3) The modifications provide for a sub-standard level of amenity and design quality (Contentions 4, 5, 7 and 8)(Respondents Written Submissions, page 6 at par 10).
- 21 The parties rely on the Joint Expert Waste Report (JER Waste) prepared by Michael Gheorghiu for the Applicant and Narelle Bowly for the Respondent, filed 22 February 2023 (Ex 2) which has led to the waste contention 6 being resolved.
- 22 The Applicant's case is that the contentions fall into two issues to be determined:
- (1) Firstly, the threshold or jurisdictional matter of s 4.55(2)(a) of the EPA Act which involves a comparison between the development as originally approved and the Proposed Modification. The Court needs to be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified
 - (2) Secondly, the remaining merit related contentions are to be assessed on their merits and not limited to the comparison with the original development as approved. That is, the other modifications approved by the Respondent council can and should be taken into account when assessing the merits of the Proposed Modification.
- 23 I will deal with the matter by firstly addressing the jurisdictional prerequisite (Contention 1) and then the merit contentions (Contentions 2 to 7).

- 24 The Respondent provided written submissions in relation to contention 1 and dealt with the merit contentions in oral submissions. Relevantly, the Respondent submits that “at the outset, the Respondent says that the required jurisdictional threshold is not met. However, if the Court finds that the threshold is passed, then a merit assessment of the proposal demonstrate that the Application should be refused.” (Respondent Written Submissions, par 11)
- 25 The parties rely on the oral evidence in Court and the written evidence contained in the Joint Expert Town Planning Report (JER Planning) prepared by Town Planners Jeff Mead for the Applicant and Anthony Betros for the Respondent, Urban Designers Rohan Dickson for the Applicant and Peter Smith for the Respondent filed 21 February 2023 (Ex 3). The Court was further assisted by Mr Smith and Mr Dickson in their concurrent evidence and preparation of the marked up Unit Type Floor Plan Booklet (Issue C) (Ex H) (Annexure D).
- 26 Below I give my reasons why the threshold or jurisdictional prerequisite is satisfied and why on balance, I conclude that the Proposed Modification warrants approval following a merit assessment.

**Is the Proposed modification substantially the same as the consent?
(Contention 1)**

- 27 Starting with the provisions of s 4.55(2)(a) of the EPA Act, the Respondent submits that the Court has no jurisdiction to consider the application as the development is not substantially the same as that which was originally approved and that this conclusion “is plainly evidenced by (among other things):
- Removing the ground floor visitor car park;
 - Complete reconfiguration and relocation of the only driveway serving 439 space carpark;
 - More than doubling the size of the “Community Open Space”;
 - Completely reconfiguring the “Community Open Space”;
 - Adding two extra floors to the approved development (over 50% of the floor plate).”
- 28 The Applicant submits that what is important is:

“the development, not micro components of the development. You don't mischievously, as the respondent has done in the contention, list level-by-level what the differences are. You're entitled to in context - so it's a contextual comparison. You embark upon the same exercise, because the test is the same in the Act, but conceptually you would do it differently for a development involving some 400 units as opposed to something that involves 10 or 15 units, or you would do it differently for a development consent that was for an addition of a room at the back of a dwelling house, than you would do for the 10 or 15 units. It's a conceptual difference as a function of what you've got before you, is the first thing. The second thing we need to constantly remind ourselves is you're not looking for identical. You're looking for substantially the same.

...

An exercise in comparison, or as contention 1 in the particular seeks to do contrast, doesn't assist you. There are authorities with which, as I understand it you're aware, that talk about "qualitative" and "qualitative assessment", but again, for the ultimate aim of substantially the same. For that purpose, as I thought was of utility this morning, which is why I've brought it, can I commend to you in exhibit CA, tab 3, presents on each level. Not the basements, because the basements are not relevant to the exercise. But at tab 3, it gives you that comparison exercise in terms of the built form, and that is relevant solely to the first contention.” (Transcript 28 February 2023, page 43).

29 Exhibit C-A is further discussed below at [60].

30 The test to be applied is set out in the statutory provision in s 4.55(2)(a) of the EPA Act (*Arrage v Inner West Council* [2019] NSWLEC 85 (*Arrange*), Preston CJ at [18]). However, it is useful to reproduce s 4.55 of the EPA including subss (2) and (3) which provides for the merit assessment, below:

4.55 Modification of consents—generally

...

(2) **Other modifications** A consent authority may, on application being made by the applicant or any other person entitled to act on a consent granted by the consent authority and subject to and in accordance with the regulations, modify the consent if—

(a) it is satisfied that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified (if at all), and

(b) it has consulted with the relevant Minister, public authority or approval body (within the meaning of Division 4.8) in respect of a condition imposed as a requirement of a concurrence to the consent or in accordance with the general terms of an approval proposed to be granted by the approval body and that Minister, authority or body has not, within 21 days after being consulted, objected to the modification of that consent, and

(c) it has notified the application in accordance with—

- (i) the regulations, if the regulations so require, or
- (ii) a development control plan, if the consent authority is a council that has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and

(d) it has considered any submissions made concerning the proposed modification within the period prescribed by the regulations or provided by the development control plan, as the case may be.

Subsections (1) and (1A) do not apply to such a modification.

(3) In determining an application for modification of a consent under this section, the consent authority must take into consideration such of the matters referred to in section 4.15(1) as are of relevance to the development the subject of the application. The consent authority must also take into consideration the reasons given by the consent authority for the grant of the consent that is sought to be modified.

- 31 The Chief Justice of the Land and Environment Court, Preston CJ articulated the type of comparison required to satisfy the terms of the precondition to approving the modification of a consent as set out in s 4.55(2)(a) of the EPA Act in the decision of *Feldkirchen Pty Ltd v Development Implementation Pty Ltd* (2022) 254 LGERA 114; [2022] NSWCA 227 (*Feldkirchen*), where Preston CJ at [112] said as follows:

“[112] The comparison required by s 4.55(2)(a) is simply between two developments: the development as modified and the development as originally approved: *Scrap Realty Pty Ltd v Botany Bay City Council* (2008) 166 LGERA 342; [2008] NSWLEC 333 at [16] and *Arrage v Inner West Council* [2019] NSWLEC 85 at [24]. Case law on the precondition, both in earlier statutory provisions, such as s 102(1), and the current statutory provision of s 4.55(2), has suggested ways in which this comparison between the two developments might beneficially be undertaken. This includes identifying and comparing the “material and essential features” of the two developments: *Moto Projects (No 2) Pty Ltd v North Sydney Council* at [55], [56] and [58] and *Arrage v Inner West Council* at [26]. These suggested ways of undertaking the comparison between the two developments, however, do not displace the statutory test in s 4.55(2)(a) or demand that the required comparison be undertaken in those ways: *Arrage v Inner West Council* at [27], [28].”

- 32 It is helpful to include what Preston CJ said in *Arrage*, at [26] to [28] as follows:

“[26] The choice of language in the judicial decisions of “material and essential features” or a “material and essential physical element” of the development (see, for example, *Moto Projects* at [58], [59] and [64]) derives from judicial interpretations of the statutory test that the modified development be “substantially the same” development as the originally approved development. In *Vacik Pty Ltd v Penrith City Council* [1992] NSWLEC 8, p 2 Stein J interpreted the word “substantially” in the former s 102(1)(a) of the EPA Act to mean “essentially or materially or having the same essence”. That

interpretation of the word “substantially” was accepted in *North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468 at 475 by Mason P (with whom Sheppard AJA agreed at 403) and at 481-482 by Stein JA and in *Moto Projects* by Bignold J at [30] and [55].

[27] This interpretation of the statutory test that the modified development be substantially the same development as the originally approved development, that the modified development be “essentially or materially” the same or “having the same essence” as the originally approved development could support an inquiry to identify the material and essential features of the originally approved and modified developments in order to undertake the comparative exercise required, but it does not demand such an inquiry.

[28] That is one way, probably in most cases the most instructive way, to identify whether the modified development is substantially the same development as the originally approved development, but it is not the only way to ascertain whether the modified development is substantially (in the sense of essentially or materially) the same development as the originally approved development. For example, comparison could be made of the consequences, such as the environmental impacts, of carrying out the modified development compared to the originally approved development: see *Moto Projects* at [62] and *Tipalea Watson Pty Ltd v Ku-ring-gai Council* (2003) 129 LGERA 351; [2003] NSWLEC 253 at [17].”

- 33 The test therefore is factual, that is to say that I need to be satisfied, as a finding of fact, that the development to which the consent as modified relates is substantially the same development as the development for which consent was originally granted and before that consent as originally granted was modified. Or put another way, the consent authority must form the positive opinion of satisfaction that the modified development is substantially the same development as the originally approved development (*Arrage* at [32]). Nothing can replace the words of s 4.55(2) of the EPA Act which is an observation I also made in the matter of *193 Liverpool Road Pty Ltd ACN 163231810 v Inner West Council* [2022] NSWLEC 1197 (*193 Liverpool*) at [21] – [25].
- 34 The Applicant bears the onus of persuading the Court to form this positive opinion of satisfaction that the modified development is substantially the same development as the originally approved development.

Identifying the originally approved development

- 35 Development Application DA-503/2013 ('the Consent') was approved by the Joint Regional Planning Panel (Sydney East Region) on 10 July 2014. This consent approved a 9-storey building containing two ground retail tenancies, 397 dwellings (95 studios; 161 x 1-bedroom units; 136 x 2-bedroom units; 5 x 3-bedroom units), with 432 parking spaces. It is relevant that the two

developments involve 4 buildings referred to buildings A, B, C and D in the Building Key Plan of the Consent drawings, or as buildings 1, 2, 3 and 4 in the Building Key Plan of the Proposed Modification drawings. I will come back to the unit mix description at [48].

- 36 The consent plans are before the Court at Tab 13 of the Applicant's Bundle of Documents (Ex E-A).
- 37 The ASOFAC goes on to provide some factual history regarding the development in that on 28 June 2017, consent was granted to modify DA-503/2013 under the former s 96 of the EPA Act 1979 (referenced as DA-503/2013/A) following consideration of the modification application at a Sydney South Planning Panel meeting on 14 June 2017. DA-5013/2013/A approved an amendment to provide a nine-storey building containing two ground floor retail tenancies and 439 dwellings and changes to the layout and design of the development, including adjustments to the internal and external layout on all floors of all buildings and adjustments in size and shape to Council dedicated land at the Canterbury Road and Close Street intersection.
- 38 The Applicant submits that it is the overall approval which is to be the subject of the comparison task, not merely individual aspects of the development to be compared. (Applicant Written submissions at par 4) Similarly, the Respondent, in closing submissions, says that understanding how the development looks as a whole is instructive (Transcript, 2 March 2023, page 58) and that although there is no direct comparison in a 3D sense of what is there, what we do have is a clear ability to understand this building compared with the approved building in the elevations (Transcript, 2 March 2023, page 63). The Court is assisted by the comparison architectural plans at Ex C-A, Tab 3 and the Applicant submits that this 'demonstrates a qualitative satisfaction of the test' (Applicant Written Submissions at par 4). I come back to the elevations, within Ex C-A Tab 3, at [60] below.
- 39 There is a difference in approach taken by the experts, namely whether to approach the comparison of the two developments by way of a micro or a macro comparison in attempting to undertake the assessment and form an

expert opinion as to whether the Proposed Modification is substantially the same as the consent as originally granted and before any modifications.

- 40 Quantitatively, the Applicant relies on the “comparison of the empirical aspects of the two developments” at Ex A, Tab 7, to demonstrate “satisfaction of the test”. The Applicant also relies on the Addendum Statement of Environmental Effects (Addendum SEE) dated 11 November 2022 which addresses the test on a merit basis (Ex B, tab 1 pages 17 to 22) and is more applicable to the merit assessment pursuant to s 4.55(3) of the EPA Act, which I deal with below in the context of the merit contention.
- 41 I will now consider the evidence before the Court as to the quantitative and qualitative comparison to assist in ultimately undertaking a comparison of the two developments to form the finely balanced positive opinion of satisfaction that the modified development is substantially the same development as the originally approved development.

Quantitative assessment of the Proposed Modification

- 42 I have considered the ASOFAC which particularises a quantitative assessment of the Proposed Modification, the Applicant’s summary table at Tab 7 of Ex A together with the Addendum SEE and I note that the detailed quantitative assessment by Mr Mead in JER Planning, Ex 3 at Table 1 is no longer accurate after the Proposed Modification was amended at the commencement of the hearing. In addition to Mr Mead’s opinions on merit, the Addendum SEE undertakes a comparison of the elevations, now updated at Ex C-A at Tab 3 and reproduced below at Fig 5 and Fig 6, which is consistent with the macro or qualitative comparison approach.
- 43 The Respondent submits that “whether taken as a whole or separately, the principal changes represent alterations to *critical elements* of the approved development which the Respondent identifies as follows:
- (1) "Height and number of levels;
 - (2) Additional floor space, being 9.8% or 2,368m²;
 - (3) A reconfiguration of units, which although the overall number of units has ultimately increased by 10, the bed arrangement [or unit mix] is significantly different"

- 44 I come back to the reference to critical elements at [63].
- 45 The Applicant submits that it is the overall development approval, which is the subject of the comparison task, not merely individual aspects of elements of the developments to be compared and says “that’s why we say that when you’re looking at it in a broad sense, the answers remain as substantially the same”. (Transcript, 2 March 2023, page 40 (5)). This approach is consistent with *Feldenkirchen*.
- 46 In relation to height, the Applicant submits that buildings 1 and 4 remain at the same height as approved, formerly referred to as buildings A and B, whereas buildings 2 and 3 have the additional height. The HOB development standard provided in the CLEP is 27m and building 1 remains at the approved 27.5m and building 4 remains at the 27.25m. Building 2 is proposed to increase to 29.8m and building 3 is proposed to be increased to 27.1. (Transcript, 2 March 2023, page 39).
- 47 In relation to floor space, the Applicant submits that the number of 2,368m² in and of itself is a large number however, that is not the test. The Applicant refers to the FSR comparison of 3.08:1 as opposed to the proposed 3.38:1 (Transcript, 2 March 2023, page 38).
- 48 The proposed Modification unit mix comparison with the originally approved development is provided by the Respondent in the ASOFAC which I reproduce below with additional notes in accordance with the evidence before the Court:

Unit Type	Originally approved DA-503/2013 10 July 2014	Modification	Change +/-
Studio	95	88	-7
1- bedroom	161 or 199 (see note at [49])	196	
2-	136 or 98 (see note at	85	

bedroom	[49])		
3- bedroom	3	38	+35
Total Units	397	407	+10

49 The first note in relation to the unit mix table from the ASOFAC is that 38 units in the Consent were classed by the Applicant as one bedroom plus study whereas the Respondent classed these 38 units as 2 bedroom units (Transcript 1 March 2023 page 2 and page 6). However, the total originally approved units remains at 397 and the total units sought by the Proposed Modification is an additional 10 units, or 2.5% increase, totalling 407 units.

50 The second note goes to the crux of the state of satisfaction I need to achieve in order to satisfy the jurisdictional precondition of s 4.55(2) of the EPA Act. That is, for a development of this size (over 400 units over 4 buildings and 2 retail tenancies) the level of detail required to be considered to undertake the comparison exercise. Mr Smith expresses an opinion that “there’s not one wall in the same location when you compare what it [is] now to the original application and there’s only a few walls in the same location between now and the s 96 I understand as well.” (Transcript, 2 March 2023, page 23 (39)) At [3.10] of the JER Planning Mr Smith expands his opinion as follows:

“3.10 A comparison between the original consent, the consent as modified and the current proposal indicates that the building design has undertaken a radical change in plan. This proposal is not simply a modification of the existing approval with additional floor – but also contains a complete redesign of the floor plate.

3.11. This includes the redesign of almost all of the apartments...”

51 In the context of the “redesign of almost all of the apartments”, Mr Betros expresses his opinion that “As I understand it, the approach put was seeking to improve the amenity and, in my view, and with respect to the design at the time, in my opinion, it was extremely lacking and provided for poor amenity and if the aim is to rationalise the apartment layouts and try and overcome some of those issues, that it should have been done via a new DA, not as a

modification, particularly, in the circumstanced where you have two extra storeys and, etc etc.” (Transcript, 1 March 2023, page 39 (32)).

- 52 I have carefully considered the evidence of the experts. Mr Mead, for the Applicant, provides his opinion in the JER Planning (Ex 3) as follows:

“1.5 The proposed development will maintain several key quantitative elements of the development. Specifically, the proposed modifications will continue to provide four buildings (including their arrangement, location and siting), the provision of retail premises at ground level, two levels of basement parking and a mix of apartment types. Whilst these key quantitative elements will be modified in part, it will not result in a development which is dissimilar or inconsistent with that originally approved.

1.6 It is in my opinion that the increase in overall height will not result in a development which is vastly dissimilar from that originally approved. The two additional storeys proposed are limited to 2 of the 4 buildings. Whilst there is an increase in building height, it is limited to 50% of the overall development and is specifically situated so that the overall bulk, scale and character will not be substantially different from that originally approved. Ultimately and when considering the development as a whole, there will be no severe transformation in the overall built form which would warrant a new application. That is, the part of the building which has the most bearing on streetscape character is unchanged. As I have discussed under Contention 2, the proposed modifications will not significantly change the overall contribution of the development to the transitioning character of the Canterbury Town Centre.

1.7. In terms of FSR, this represents an increase of 9.7% over the approved development. Although increased, this is appropriately dispersed throughout the development, so as to not materially change the character of the development as a whole. The increase in FSR is also supported by a reduction in the building envelope at certain parts of the development, particularly at the ground plane, which will improve circulation and movement from Canterbury Road to Cooks River, however in a manner that will not change the essence of the development.

1.8. These quantitative modifications will not result in a radical transformation to the overall development. That is, the essence of the approved multi-storey mixed-use development will be preserved and the increase in floor area and overall height will not result in a development which is uncharacteristic or unrecognizable from that originally approved. Whilst the modifications as viewed in solitary can be considered greater, when focusing on the development as a whole, the modifications will not be so large to change the fundamental nature of the development.”

- 53 Mr Betros disagrees with Mr Mead and states that it is his opinion that “the modification includes substantial amendments which radically transform the visual impact, design and impacts, when compared with that was originally approved.” (JER Planning, 21 February 2023, at par 1.14) Mr Betros goes on to explain at par 1.15 as follows:

“1.15 I understand that the applicant’s planner and urban design intent is to improve the amenity, design and function of the approved development, however, I consider that the extent and impact of the amendments are too extreme to be submitted under the provisions of Section 4.55 of the EP & A Act 1979.

1.16. In my opinion, such an application should have been submitted as a development application for alterations and additions to an approved mixed-use development. Such an application would allow for the broad extent of changes that would be required to improve the amenity and overall quality of the development.”

54 Mr Betros goes on at par [1.24] to say that “The removal of parking from the entry-level may be considered to be a positive outcome from safety, design and amenity perspectives, however, such modification has resulted in this ground floor portion of the site bearing no resemblance to the approved scheme.”

55 Mr Betros relies on the particulars of the contention in the ASOFAC which include a detailed outline of why the modified development as sought is not substantially the same from a quantitative and qualitative perspective (JER Planning, 21 February 2023, at par 1.22). The Respondent submits that the particulars “merely demonstrates the extent of the changes are collectively substantial” (Respondent Written Submission, at par 28). Mr Mead addresses these particulars at par [1.13] of the JER Planning and I reproduce below as follows:

“1.13 Dealing with the particulars specifically:

a)(i) The amended proposal increases the gross floor area by 2,360m². This represents a 9.7% increase over the approved development which is not substantive and does result in a built form or envelope vastly different from that approved. The overall essence and character of the development will be maintained.

a)(ii) Table 1 provides a comparison between the approved and proposed apartment mix.

a)(i) As I have discussed in further detail below, the subject site is capable of accommodating an increase in density. Regardless, an increase in density is not a relevant test for s4.55(2) modification applications. The provision of 42 additional apartments and a revised mix will not result in a development which is materially different from that approved. That is, the proposal (as modified) will continue to provide a high-density mixed-use development consistent with the desired character of the locality and one that incorporates a mix of unit types. I note that the consent authority previously permitted an increase in residential apartments (to 439 dwellings) under a separate s4.55(2) application for the subject site.

a)(ii) Table 1 has considered the apartment mix of the originally approved and proposed development. The proposal will increase the number of units by 11% over the approved development and will not create a density of development not suitable for the site. I have addressed the increase in density in further detail under Contention 2.

a)(iii) Table 1 has considered the maximum height of the development, including lift overruns and the like. I have discussed the increase in height above and under Contention 2 below.

a)(iv) The increase in building height is limited to 50% of the originally approved development, or 2 of 4 buildings. Whilst increasing the building height, this will not change the overall nature of the approved development as the primary bulk and scale of the buildings, as they front Canterbury Road and Close Street, will be unchanged. That is, the part of the building which has the most bearing on streetscape is unchanged and the additional height does not span across all buildings.

a)(v) The increase in building height, floor space and apartments will not result in a radical transformation when compared to the approved development. That is, the multi-storey, mixed-use character of the development will not be altered despite the proposed modifications as the overall essence of the development will be maintained. Specifically, the predominant bulk, scale and character as it presents to the public domain is unchanged and the proposal will preserve the siting, location and design of the 4 buildings across the site. In my opinion, the provision of two additional storeys and increase in apartments will not result in a development which is not substantially the same as that approved.

a)(vi) The proposal will result in a minor increase in overshadowing to the open space. However, the majority of shadow cast by the proposal will be onto the waterway. Given the proposal will significantly increase the quantum of open space and will also improve the design and function of this area, this will offset the minor impacts created by the modifications.

a)(vii) Whilst the increase in building height will be perceivable, as detailed above, this will not result in wholesale changes to the character of the approved development.

a)(viii) As above.”

56 Mr Dickson also gives a summary of the modification sought in the context of DFC (JER Planning at [2.52] and [2.53]) which is relevant to the merit assessment required by s 4.55(3) of the EPA Act.

57 After considering the various opinions, I find that there are a number of quantitative differences between the two developments which on face value alone and without any further consideration may otherwise lead to a conclusion that the two developments are not substantially the same. However, this is not

the test and is not of itself conclusive for the purpose of s 4.55(2) of the EPA Act.

- 58 I now consider the evidence regarding the qualitative comparison of the two developments.

Qualitative assessment of the Proposed Modification

- 59 The Applicant relies on the architectural comparison drawings, at Tab 3 of Ex C-A, for a qualitative comparison and submits primarily that the exercise required by s 4.55(2)(a) of the EPA Act does not involve a floor by floor plate comparison but rather that the Court “would be entitled to simply go to a picture in three dimension of the development. That is, you notionally picture the development as built and as originally approved and then you notionally picture the development as built that’s before the Court. As you’re driving around or walking around, doing what we did on Tuesday, you’re asking yourself, in the hypothetical sense, is the second one substantially the same as the first one?” (Transcript, 2 March 2023, page 40 (45)).
- 60 The Court has before it a number of elevations and sections at Tab 3, Ex C-A starting at Drawing 11.119.S4.55.200 (DA Check).A through to Drawing 11.119.S4.55.302 (DA Check).A. I reproduce below at Fig 5 an extract of the Canterbury Road Elevation, Cooks River Elevation, and at Fig 6 an extract of the Park Elevation and Close Street Elevation. I consider these elevations to provide some assistance in undertaking a qualitative assessment between the two developments.

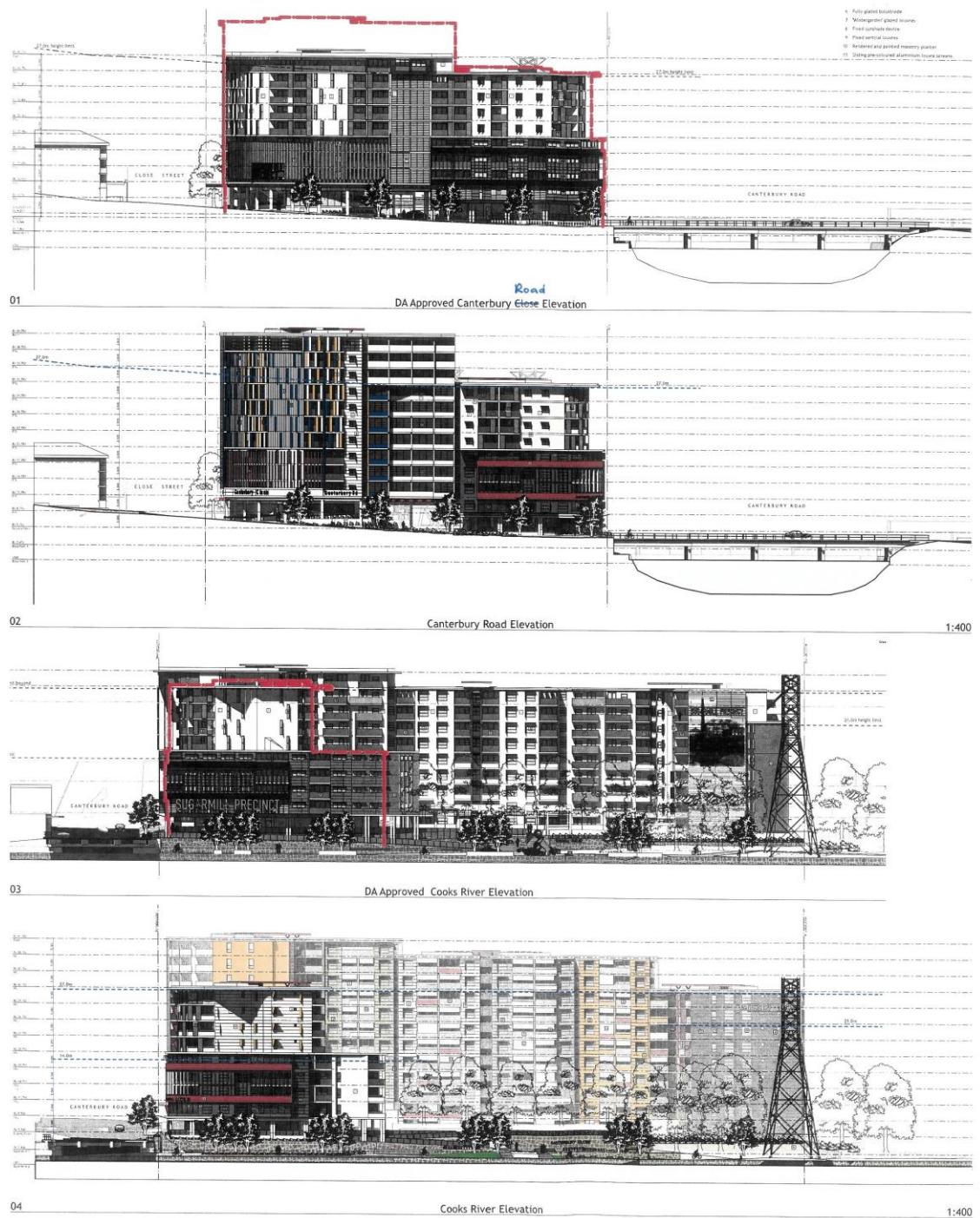


Fig 5: Canterbury Road Elevation, Cooks River Elevation Drawing 11.119.S4.55.200 (DA Check).A (Ex C-A, Tab 3).

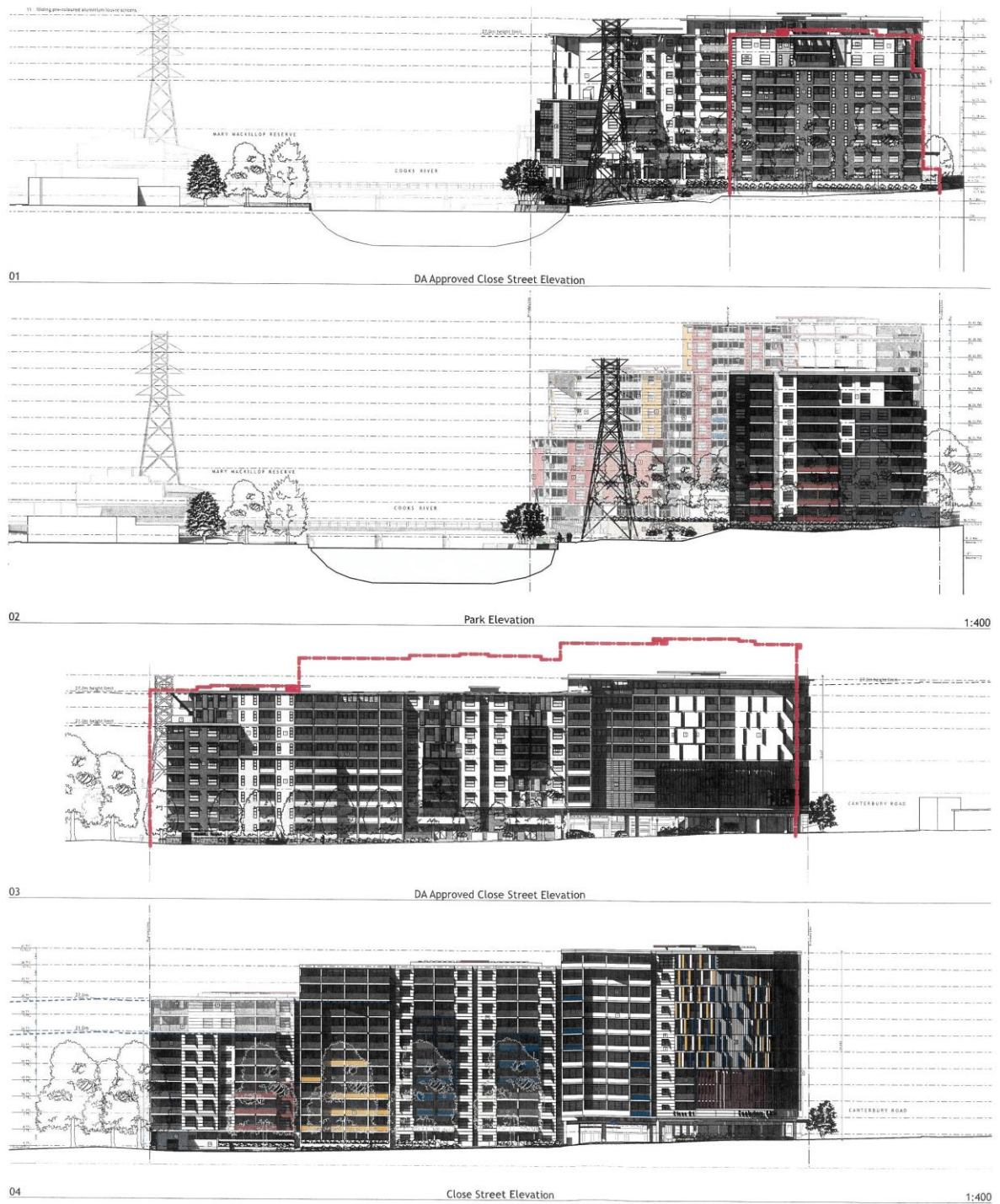


Fig 6: Park Elevation and Close Street Elevation Drawing 11.119.S4.55.201 (DA Check).A (Ex C-A, Tab 3).

- 61 Mr Mead's opinion is that in qualitative terms the proposal is substantially the same and relies on the Addendum SEE (JER Planning, 21 February 2023, at par [1.9]). His expert evidence is as follows:

"1.10 The ground plane modifications, envelope changes, provision of two additional levels and subsequent increase in apartment count is not considered to result in a radical transformation which will alter the essence of the overall development. That is, whilst the development will alter the building envelope and to a certain degree, the appearance, the development will remain as a multi-storey, mixed-use development with ground floor commercial uses and communal open spaces and residential floor area above. Importantly, the overall architectural character of the development will not be adversely modified and the proposed changes will maintain the approved design language. The improvements to the open spaces, building envelopes and additional built form does not materially change the fundamental nature of the development as viewed from the public domain.

1.11. Ultimately, the modifications will not adversely alter the use, operation and function of the site. The comparison between the originally approved and proposed plans shows that whilst there will be modifications, it does not present as a different development.

1.12. In addition to the above, it is also noted that whether or not there will be increased environmental or neighbourhood amenity impacts under the proposed modification development is not a consideration as to whether or not a modification proposal is substantially the same under Section 4.55 of the EP&A Act. Notwithstanding, the proposed modifications will not result in any significant adverse amenity impacts to the surrounding land, and in particular will have no impact on any surrounding residential properties."

- 62 I accept and adopt Mr Mead's qualitative conclusion, articulated in the Addendum SEE at page 21, at pars (a) to (d) that

"the proposal as modified:

- (a) Will not change the nature or the intensity of the use;
- (b) Whilst improving the relationship to the public domain at ground level, this is similar with the intent established in the original approval;
- (c) Will not change the relationship to surrounding developments as the modifications will maintain the character of the original approval;
- (d) Where an increase in floor space and height is proposed on the upper levels, the development is consistent with the original approval as a whole, and the bulk and scale which establishes the streetscape character (from ground levels to levels 7/8) is unchanged per the original approval;"

Mr Mead continues at paras (e) to (f) on page 21 of the Addendum SEE with merit based opinions which are not relevant at this stage of jurisdictional enquiry.

63 The Respondent makes submissions that this matter can be considered similar to the considerations undertaken by Talbot J in the decision of *The Satellite Group (Ultimo) Pty Ltd v Sydney City Council* [1998] NSWLEC 244 which may be illustrative because Talbot J dealt with a shop top housing development where the original development approved nine shops on the ground floor and the modification then ended up with one shop on the ground floor and His Honour dealt with the question of whether the two developments were substantially the same and at par [29] said:

“[29] It is not appropriate, in my opinion, to attempt to confine the consideration of the extent of changes to the context of the whole building, notwithstanding that the consent authority is required to consider the totality of the development as proposed for modification and to take into consideration such of the matters referred to in s79C (formerly s90) as are of relevance to that development. The focus may be on a critical element of a building which is to be the subject of change in order to determine whether the entire development is substantially the same development.”

64 An example of this approach could be where I considered that the proposed removal of a north facing communal space in a boarding house was the removal or deletion of a *critical element* sufficient to render the proposed modification in *193 Liverpool* to not be substantially the same development as the development for which consent was originally granted. In this case, the Respondent points to how retail tenancy A is presented to the street (Transcript, 2 March 2023 at page 65). I have compared the Consent drawing 11.199.DA.102.D dated 15 May 2014 (Ex E-A, Tab 13) with the Proposed Modification drawing LEC V2.102.B (Ex A, Tab 2) and observe that both developments have a Tenancy A and a Tenancy B where Tenancy A is in the same location whereas Tenancy B is now located adjacent to Tenancy A. Tenancy A remains larger than Tenancy B and the entry to each tenancy remains separate. There is also no change proposed to the categorisation of the development as both tenancies remain within the B2 Local Centre Zone where shop top housing is permissible with consent (Fig 2). Therefore, I am not satisfied that any *critical element*, such as Tenancy A, is being deleted from or even modified so significantly that would render the two developments not substantially the same.

65 The Applicant invites the Court to imagine the viewpoint of a person retuning in their Tardis the day after leaving the building constructed in accordance with

the Consent and returning back to the building constructed in accordance with the Proposed Modification and determining whether it was the same building. The Respondent submits that that person would think it a wholly different building looking at the ground level. As I said above, I accept that there are differences, and some of those differences, in isolation, may appear to be significant, but on the whole and on balance, I prefer the evidence of Mr Mead because the approach is consistent with the test of s 4.55(2) of the EPA Act.

- 66 For these reasons I find that the quantitative and qualitative changes identified above cause me to form the finely balanced positive opinion that the modified development is substantially the same development as the originally approved development.

Merit contentions:

- 67 In addition, and separate to the jurisdictional prerequisite of s 4.55(2) of the EPA Act, the Respondent makes four merit contentions for the Court's determination pursuant to s 4.55(3) of the EPA Act. The four merit contentions relate to DFC, FSR, amenity and design quality. The parties combine HOB and FSR with the DFC and they then consider amenity and design. I will deal with these merit contentions in that order below.
- 68 I accept the Applicant's submission, with which the Respondent agrees (Transcript, 2 March 2023, page 59 at par 17), that once satisfied about the threshold question of substantially the same, the Court is left with these four substantive contentions which are "not similarly limited to a comparison only with the original consent." The Court is "entitled to take into account what the council has done since the original consent by the s 96 process", that is, I am entitled to look at and assess what it is that is before the Court as an application compared to the consent as it previously exists. The Applicant relies on the comparison exercise depicted in Ex C-A at Tab 3 and Tab 4 in terms of the built form. I note that Tab 3 is a side by side comparison of the Consent with the Proposed Modification whereas at Tab 4 appears a side by side triptych comparison of the Consent plans as , the plans as modified pursuant to s 96 of the EPA Act and the Proposed Modification as at 26 October 2022 when these documents were filed with the Court.

Is the Proposed modification consistent with the DFC? (Contention 2 and 3)

69 The first merit contention goes to character, specifically that the Proposed Modification is not consistent with the DFC. The Respondent says that the Proposed Modification does not achieve one of the aims of the CLEP (Transcript, 28 February 2023, page 27 (10)). The CLEP sets out at cl 1.2(2)(c) as follows:

(c) to ensure that development is of a design and type that supports the amenity and character of an area and enhances the quality of life of the community,

70 The Respondent also relies on references to character in the objectives of the cl 4.3 HOB development standard and in the objectives of the cl 4.4 FSR development standard of the CLEP. Clause 4.3 of the CLEP HOB development standard provides the following objectives:

4.3 Height of buildings

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

(a) *to establish and maintain the desirable attributes and character of an area*, [emphasis added]

(b) to minimise overshadowing and ensure there is a desired level of solar access and public open space,

(c) to support building design that contributes positively to the streetscape and visual amenity of an area,

(d) to reinforce important road frontages in specific localities.

71 Clause 4.4 of the CLEP FSR development standard provides the following objectives:

4.4 Floor space ratio

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

(a) to provide effective control over the bulk of future development,

(b) *to protect the environmental amenity and desired future character of an area*, [emphasis added]

(c) to minimise adverse environmental impacts on adjoining properties and the public domain,

(d) to optimise development density within easy walk of the railway stations and commercial centres.

72 The ASOFAC particularises the DFC contention as follows:

“a) The LEP height standards and accompanying DCP storey requirements envisage heights of 6-9 storeys on this site. The proposed development now

seeks a height of 11-storeys which is considered to be inconsistent with the desired future character. The greatest height limit on the site is mapped to have an overall height of 27m. The approved height already breaches the 27m height limit. It is noted that the approved and proposed new levels adopt floor to floor heights of 3-metres, which reflects the non-compliant nature of the proposal when assessed against the ADG.

b) The existing approved development breached the number of storeys expressed in the DCP, a maximum of 9-storeys in the northern corner of Close Street and Canterbury Rd. Such height is consistent with the constructed height of the building immediately opposite on the corner of Charles Street and Canterbury Rd. The proposed height will generate a disparity between the height of approved/constructed buildings and those anticipated by the LEP/DCP height limits. Future development along the northern side of Close Street opposite the site has height limits of 21 and 27-metres and FSR of 3:1 and 2.7:1. A height limit of 21m should only achieve a height of 6-storeys when assessed properly against the ADG, having regard to the floor to floor heights of 3.1m and lift overrun, whilst a height limit of 27m should only achieve 8-storeys having regard to the floor to floor heights of 3.1m and lift overrun. The proposed built form will present as 11 storeys and 9-storeys opposite these sites, which will create an inconsistency with the desired future character...”

- 73 The objectives of cl 4.3, CLEP, do not call for compatibility or consistency with or even refer to the phrase “desired future character”, but rather to “establish and maintain the *desirable attributes and character* of an area” [emphasis added]
- 74 The Respondent submits that the Applicant is trying to ‘achieve a height of the building diagonally opposite it as justification for increasing the height significantly over the height for which the controls call.’ (Transcript, 2 March 2023, page 66). I acknowledge this submission, from which the Applicant does not resile (Transcript, 2 March 2023, page 71), and consider that achieving such a relationship may in fact achieve compatibility with the existing and DFC of the area. In that regard I accept that, and both parties agree, from the decision in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 that DFC can evolve and is also informed by the built form. The experts also rely on this decision as set out below when I consider their expert opinions.
- 75 In relation to the HOB, it is not disputed that as this is a modification application utilising the modification power of s 4.55 of the EPA Act, there is no requirement for a request pursuant to cl 4.6 of the CLEP to justify the contravention of the HOB development standard (*North Sydney Council v Michael Standley & Associates Pty Ltd* (1998) 43 NSWLR 468; [1998] NSWSC

163). However, the Court is still required to take into consideration the terms of the relevant development standards as required by s 4.55(3) of the EPA Act.

76 Mr Mead has assisted the Court with an assessment of the Proposed Modification consistent with the terms of cl 4.6 of the CLEP as to satisfaction of the objectives of the cl 4.3 HOB building development standard and the objective of the cl 4.4 FSR development standard (Ex B, Tab 1 at pp 24-32). This is relevant to the DFC Contention 2 and the floor space Contention 3.

77 Messrs Mead and Dickson address the issue of DFC and the compatibility of the development with it in the JER Planning (JER Planning, 21 February 2023, at pars [2.2]-[2.11] (Mead) and [2.22]-[2.60] (Dickson)).

78 Mr Betros is of the opinion that the additional height, bulk and scale and detrimental impacts associated with the modifications sought confirm that the proposal is not consistent with the desired future character (JER Planning, 21 February 2023, at par [2.12]).

79 Mr Smith's opinion is that "The proposed additional height is inconsistent with the character of the area – especially that which is viewed from Canterbury Road to the south of the site, the Cooks River and the public open space." Additionally, he comes back to this in response to contention 5 Design Quality. However, at par [2.24] Mr Smith states as follows (JER Planning, 21 February 2023, at par [2.24]):

"2.24 The proposal is inconsistent with the heights provided in the LEP and the DCP. While the proposal is in close proximity to the Sydney Metro station, to date numerous strategic planning studies to increase densities and heights in this precinct have been rejected for various reasons. It is incongruous to permit additional height on land through a modification of a development application where previous strategic studies for additional height have been rejected."

80 Mr Dickson, urban designer is guided by the following Court decisions to define the desired character of the area:

- (1) *SJD DB2 Pty Ltd v Woollahra Municipal Council* [2020] NSWLEC 1112
- (2) *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 (at [52] and [57])
- (3) *HPG Mosman Projects Pty Ltd v Mosman Municipal Council* [2021] NSWLEC 1243

(4) *Big Property Group Pty Ltd v Randwick City Council* [2021] NSWLEC 1161

- 81 Mr Dickson undertakes an analysis of DFC at pars [2.29] to [2.45] in the JER Planning and then considers the planning principle in *Project Venture Developments v Pittwater Council* (2005) 141 LGERA 80; [2005] NSWLEC 191 and is of the opinion, firstly, that the Proposed Modification does not have the adverse impacts asserted by the Council (JER Planning, 21 February 2023, at par [2.49]) and that the Proposed Modification is in harmony with the other approved development within the visual catchment (JER Planning, 21 February 2023, at par [2.51]).
- 82 Mr Mead does not agree that the Proposed Modification is incompatible with the DFC and relies on the decision of *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 for the proposition that “in determining the desired future character, matters other than the development standard needed to be considered including other approved development even where that contravenes the development standard” (JER Planning, 21 February 2023, at par [2.2]).
- 83 The Applicant submits that “what is clear on the evidence is that the Council’s application of the controls has altered somewhat the character that may be said to be the desired future character as gleaned from the controls. This is especially the case for the two development standards, height and FSR” (Applicant written submissions, par 16). To support this submission, the Applicant refers the Court to the Height and Floor Space Ratio comparables including Surrounding Heights Survey Map, prepared by Lawrence Group (Ex D, Tab 17), Precinct Analysis Plan (Rev C) prepared by Realize Architecture dated 24 February 2023 (Ex E-A, Tab 6) and the JER Planning (Ex 3).
- 84 I accept, and the evidence supports, that in the absence of a definition of the DFC in the CLEP, there has been a relaxation of the FSR and HOB controls in relation to approved developments in the area of the Site.
- 85 I have taken into consideration the Canterbury Development Control Plan 2012 (CDCP) on folio 338 of the Respondent’s Bundle (Ex 7) and the reference to building heights ranging to nine-storeys in the Canterbury Town Centre and

accept the evidence that there are approved buildings in the area of the Site that go to 10-storeys.

- 86 For these reasons, I conclude, that there is a modified DFC as compared with a bare reading of the provisions and controls of the CLEP and CDCP. Accordingly, I conclude that the Proposed Modification will be consistent with the objective of HOB development standard in cl 4.3 of the CLEP.

Merit contention: Is the Floor Space excessive? (Contention 3)

- 87 The FSR contention articulated in the ASOFAC is titled “Excessive Floor Space” and consists of particulars (a) to (i) and includes images 20 to 23. There is no agreement between the experts.
- 88 The Proposed Modification results in an increase in floor area, being 9.7% over that originally approved. Mr Mead relies on his evidence in response to contention 2 DFC and argues that the increase in floor area “brings with it benefits that improve consistency with objectives and is otherwise acceptable.” (JER Planning, 21 February 2012, at par [3.4]).
- 89 The FSR development standard objectives, cl 4.4 CLEP, are set out above at [71]. In response to objective (a) to the FSR Development standard cl 4.4, Mr Mead states in the JER Planning at par [3.5] that (JER Planning, 21 February 2012, at par [3.5]):

“3.5 The proposal satisfies this objective in that the predominant bulk and scale of the development is controlled through its distribution throughout the site and in a manner that responds to the site context. That is, the proposal provides for its greatest height at the corner of Canterbury Road and Close Street which is the most logical part of the building for increased height and mass given its location opposite similarly sized buildings, fronting a major road corridor, and to emphasise the corner. The proposal does not increase mass on the part of the site that moves away from that important corner. Furthermore, the increase in FSR is commensurate to the site’s considerable site area, amalgamated nature, several frontages and highly accessible location. The site characteristics will limit the impacts of bulk and scale created by the development.

3.6. The additional floor area is dispersed throughout the site to appropriately address and enhance the public domain, an express objective of the DCP (and Metropolitan Plan). Public domain on and adjoining this site is of critical importance at a local and regional level, as evidenced by its treatment in a range of strategic planning documents including the Metropolitan Strategy. The distribution of the additional floor area into additional height goes to the intent of these documents by freeing up the ground plane and enhancing pedestrian connectivity.”

- 90 Regarding objective (b) of cl 4.4 (FSR), Mr Mead states at par [3.7] (JER Planning, 21 February 2012, at par [3.7]):

“3.7 As I have discussed under Contention 2, the FSR is entirely consistent with the desired future character of the area as informed by the changing characteristics and relevant strategic documents. Further, the increase in floor area will have no adverse impact on the environmental amenity of the locality. That is, whilst the proposal is noncompliant, it will deliver wholesale improvements to the development including rationalised building envelopes and open spaces. The proposal will improve pedestrian access from Canterbury Road through to Cooks River. The floor space is also contained within the extent of the approved envelope to ensure the environmental amenity and desired future character of the locality is maintained.”

- 91 The Applicant relies on a Visual Impact Photomontage and Methodology Report prepared by Virtual Ideas dated 20 January 2023 (Ex A Tab 6) and Mr Dickson discusses this in the JER Planning at pars [3.22] to [3.27] concluding that the visual analysis illustrates how the proposal sits within the surrounding context and refers to his evidence in relation to Contention 2 regarding DFC.

- 92 Regarding objective (c) of cl 4.4 (FSR), Mr Mead states at par [3.8] (JER Planning, 21 February 2012, at par [3.8]):

“3.8 The proposed development will not have any adverse amenity impacts to the adjoining properties or public domain. The proposed non-compliance will not result in any privacy or view loss impact beyond the approved development. In addition, solar impacts to the open space are considered acceptable due to the significant improvements provided to the amount and design of open space.”

- 93 Regarding objective (d) of cl 4.4 (FSR), Mr Mead states at par [3.9] (JER Planning, 21 February 2012, at par [3.9]):

“3.9 The site is zoned B2 Local Centre and R4 High Density Residential, which anticipates a high density form reflective of the site’s location, as set out in the applicable strategic planning documents and planning controls. Whilst the proposal will represent a relatively minor increase in density, this is commensurate to the site area, strategic location and will not result in a built form beyond what is capable of being accommodated on the subject site. As detailed, the site is within the Canterbury Town Centre and is within close proximity to the South-West Metro scheme. This, along with the relevant strategic planning documents, ensures that the modifications will result in an optimisation of the site. The redistribution of floor area (away from the ground floor) will improve the pedestrianised access from Canterbury Road to Cooks River and resultantly benefit connectivity.”

- 94 Mr Betros, disagrees with Mr Mead, relies on the particulars in the ASOFAC and is of the opinion that:

- (1) The additional bulk and height associated with the additional FSR will be prominent and responsible for additional and adverse visual bulk and amenity impacts (JER Planning, 21 February 2023, at par [3.17]).
- (2) The objectives of cl 4.4 FSR Development standard are not satisfied (JER Planning, 21 February 2023, at par [3.19]).
- (3) The development in general has poor amenity (JER Planning, 21 February 2023, at par [3.19]).
- (4) Any development in this precinct is proximate to the town centre and facilities, and this alone does not sufficiently justify supporting such a variation to the FSR Development standard (JER Planning, 21 February 2023, at par [3.20]).

95 Cross examination of the witnesses established that the development, as approved, is already bulky consisting of a with a continuous 120 m building with no breaks whereas the Proposed Modification incorporates further improvements and has more stepping down to East.

96 Mr Smith at par [3.39] to [3.43] stated (JER Planning, 21 February 2012, at pars [3.39] – [3.43]):

“3.22. The additional height and floor space is contrary to the objectives in the DCP. The additional height and floor space have a direct and tangible impact on the amenity of the development and the surrounding area.

3.23. The Shadow Comparison Study demonstrate the substantial additional shadow that is cast across the Cooks River and Saint Mary McKillip Reserve and the Close Street reserve. The proposal fails objective (b) of the clause 4.3 in that it does not minimize overshadowing to public open space. The both the park and the river are used for recreation purposes, and it is unreasonable to accept the additional overshadowing. The shadow St Mary McKillip Reserve is over 1800m² larger than the approved shadow.

3.24. Although equinox solar access diagrams have not been provided. The solar access would also be reduced (given the orientation of the open space) from the period of March through to September – a time where it is desirable for solar access to reach public and communal open space.

3.25. For reasons outlined below the proposal does not contribute positively to the streetscape or the visual amenity of the area. The proposal is highly visible from the river and parkland. The silhouette created by the built form should ideally be varied and fragmented so it reads like a collection buildings that step down to the reserve and the river. Instead the proposal seeks to increase the height consistent with a building (2 Charles St) that will not be in the visual catchment of the river when the development is completed.

3.26. The additional floor space is not a result of the change to the ground floor area. The floor area on the ground floor has actually reduced in area. The removal of the on-grade car parking provides an opportunity for increased retail to active the frontage and increased setback from the riverfront.”

- 97 It is my conclusion on FSR that there is insufficient evidence to support the contention to refuse the Proposed Modification on this basis alone.

Do the proposed modifications provide for a sub-standard level of amenity because of the design quality?

- 98 The Respondent addresses amenity and design together in closing submissions. The reasons given by the Respondent that the amenity will be substandard are particularised in the ASOFAC as follows:

“a) The number of cross-ventilated apartments has been overstated as it is considered that many of the apartments shown to be cross-ventilated would not qualify and that the percentage would be well below 60%.

b) Apartments nominated as cross ventilated do not meet the definition of cross ventilation as defined in the glossary 28.

c) A significant percentage of apartments (in particular living areas) received less than 2-hours of solar access between 9am and 3pm on June 21. It is considered that the impact of surrounding buildings has not been accounted for, whilst the 2D solar diagrams do not show that sunlight will penetrate the living areas due to the depth of the balconies.

d) The number of apartments that receive no sunlight is considered to be substantially greater than stated and more than 15%. A considerable number of the approved apartments face south to the courtyard and will be overshadowed to a greater degree due to the siting of the proposed additional 2-storeys.

e) A significant number of new apartments on the new upper levels are single-oriented and have deep floor plates. The combination of these features is likely to result in units with poor access to sunlight, daylight and cross-ventilation. The proposal is also considered to be overly reliant on skylights to compensate for the lack of sunlight to the living areas of the apartments.”

- 99 I note that these particulars were drafted by the Respondent prior to the amendments to the Proposed Modification which have responded to most, if not all, of these particulars. The Respondent submits that there has been a lot of movement and change in relation to design and amenity over the course of the hearing (Transcript, 2 March 2023, page 65).

- 100 The Applicant submits that in the context of this appeal, strictly speaking, pursuant to State Environmental Planning Policy No 65-Design Quality of Residential Apartment Development (SEPP 65) “neither the Design Quality Principles nor the Apartment Design Guide are required to be taken into account.” (Applicant written submissions, par 26). The reason given by the Applicant, which I accept, is that “whilst those matters are required to be taken into account in the scheme of SEPP 65, it is predominantly with respect to the

consideration of a development application” (Applicant written submissions, par 27).

101 Clause 28 of SEPP 65 relates to determination of development application and requires a consent authority to refer a development application to a design review and panel and to consider the following, pursuant to subcl (2):

- (a) the advice (if any) obtained from the design review panel, and
- (b) the design quality of the development when evaluated in accordance with the design quality principles, and
- (c) the Apartment Design Guide.

102 On the other hand, cl 29 of SEPP 65 deals with determination of applications for development consent modifications and cl 29(1) “applies if a consent authority is required by clause 115(3B) of the *Environmental Planning and Assessment Regulation 2000* to refer an application for the modification of development consent (other than in relation to State significant development) to a relevant design review panel (if any) for advice as to whether the modifications diminish or detract from the design quality, or compromise the design intent, of the development for which the consent was granted.”

103 In this case, the Proposed Modification is supported by the qualified designer who gives a design verification that he also designed, or directed the design of, the development for which consent was granted (EX N – Design Verification Statement, dated 22 March 2023 signed by T Savill, filed 24 March 2023) resulting in no requirement for referral to a design review panel and accordingly cl 29 of SEPP 65 does not apply. Relevantly, Mr Savill states:

“I confirm that I designed and directed the design of the subject development ... including the development for which development consent no. DA 503/2013 was granted; the development for which modification consent no. DA 503/2013/A was granted; and the proposed development sought by the subject modification application no. DA 503/2013/B ...I also verify that the proposed modifications do not diminish or detract from the design quality, or compromise the design intent, of the development for which development consent no. DA 503/2013 was granted.”

104 In response to pars [4.12]-[4.21] of the JER Planning, a number of units have been amalgamated with an adjustment to the glass line to increase cross ventilation and solar access, in response to the recommendations made by Windtech. Some balcony screens have also been reduced.

- 105 The Applicant relies on the evidence of Mr Dickson in the Planning JER at [4.7]–[4.21], and oral evidence on 2 March 2023.
- 106 The Applicant submits, and I accept, that what is currently the subject of approval, the currently approved modified consent, is improved by the Proposed Modification and by the merging of some of the units. There is a degree of agreement that was reached between Mr Smith and Mr Dickson as a result of the exercise that Mr Dickson and Mr Smith went through orally in Court and by reference to the Unit Type Floor Plan Booklet (Issue C)(Ex H) (Annexure D).
- 107 I note that Mr Smith agrees that the corner units which were split in what was already approved and that the Proposed Modification will result in those that are domiciled in that corner part of the development having improved amenity compared to what might have been built. (Transcript, 2 March 2023, page 24 at par 20). Mr Smith also agrees that the apartments will now achieve minimum room size dimension (Transcript, 2 March 2023, page 26).
- 108 In addition, I note that the Draft/Proposed Conditions of Consent filed 29 March 2023 include an additional Condition 1A as follows:

“1A. The approved architectural plans are to be amended in accordance with the marked up “Unit Type Floor Plan Booklet” (Issue C), prepared by Realize Architecture dated 13 February 2023, being Exhibit H in LEC Proceedings 2022/99968.”

Findings and conclusions

- 109 For the reasons given above, I am satisfied that the jurisdictional prerequisite of s 4.55(2) of the EPA Act has been satisfied and find that the Proposed Modification is substantially the same as the consent for the original development.
- 110 In relation to the merit considerations, I have considered all the evidence and am satisfied that the Proposed Modification warrants approval because of the numerous and various improvements to design and amenity as well as being compatible with the DFC.

Orders:

- 111 The Court orders:

- (1) The appeal is upheld.
- (2) Development Consent No DA-503/2013 is modified in the terms in Annexure A.
- (3) Development Consent No DA-503/2013 as modified by the Court is Annexure B.
- (4) All exhibits are retained.

E Espinosa

Commissioner of the Court

Annexure A

Annexure B

Annexure C

Annexure D

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