Land and Environment Court

New South Wales

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| Case Name: | Surewin Parkview Pty Ltd v Wollongong City Council |
| Medium Neutral Citation: | [2024] NSWLEC 1578 |
| Hearing Date(s): | 15-19 July and 22-26 July 2024 |
| Date of Orders: | 19 September 2024 |
| Decision Date: | 19 September 2024 |
| Jurisdiction: | Class 1 |
| Before: | Walsh C and Coetzee AC |
| Decision: | The Court orders that:<br>(1) The appeal is dismissed.<br>(2) Development Application DA-2022/469 for multi dwelling housing at Lot 90 DP 1086429, known as 14 Cosgrove Avenue Keiraville, is determined by refusal of consent to the application.<br>(3) The exhibits are returned, except Exhibits 1, D and Q which are retained. |
| Catchwords: | APPEAL – development application – multi dwelling housing – bushfire risk – determination of appropriate vegetation formation for asset protection zone calculations – steep site gradients and accessibility of urban fire appliances – visual impacts – aboriginal cultural heritage impacts – scale of excavation and earthworks – construction stage impacts on local residential amenity |
| Legislation Cited: | Environmental Planning and Assessment Act 1979 ss 4.14, 8.7<br>Fire and Rescue NSW Act 1989<br><br>Wollongong Local Environmental Plan 2009 cl 7.14 |

| | |
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| Texts Cited: | Fire Safety Guideline – Access for fire brigade vehicles and firefighters<br>National Construction Code<br>Ocean Shores to Desert Dunes: The Native Vegetation of New South Wales and the ACT, NSW Department of Environment and Conservation<br>Planning for Bush Fire Protection 2019<br>Wollongong Development Control Plan |
| Category: | Principal judgment |
| Parties: | Surewin Parkview Pty Ltd (Applicant)<br>Wollongong City Council (Respondent) |
| Representation: | Counsel:<br>A Pickles SC (Applicant)<br>M Staunton (Respondent)<br><br>Solicitors:<br>Piper Alderman (Applicant)<br>Wollongong City Council (Respondent) |
| File Number(s): | 2023/143024 |
| Publication Restriction: | Nil |

## JUDGMENT

1 **COMMISSIONERS**: These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by Wollongong City Council (Council) of Development Application DA-2022/469 (DA), which seeks development consent for a multi dwelling housing at Lot 90 DP 1086429, known as 14 Cosgrove Avenue, Keiraville.

**Proposal**

2 We rely on Council's amended statement of facts and contentions filed on 3 May 2024 (Ex 1) for much of the descriptive material which follows in this and the following section.

3 The DA, as amended, seeks consent for multi-dwelling housing containing a total of 24 dwellings and 54 car parking spaces, a utility and waste management building, significant earthworks (and in particular site excavation),

tree removal, biodiversity management works, driveway and pedestrian pathway construction, landscaping, provision of asset protection zones, stormwater drainage, an electrical substation, certain defined fencing along with strata subdivision.

**Site and setting**

4 The site is an irregular shaped parcel with a total area of some 41,934m2. It slopes steeply from east to west and is wider to the west with access via a narrow “handle” to Cosgrove Avenue to the east. The frontage to Cosgrove Avenue is 18.62m. An airphoto of the site and its immediate context is presented at Figure 1.


Figure 1 - Airphoto of site (outlined in red) and its environs (source Ex 1 p 4)

5 As might be gleaned from Figure 1, the site occupies land at the peri-urban fringe. It sits at the foothills of the Illawarra Escarpment and is quite proximate to Mt Keira an important landmark within the escarpment. The site is partly cleared and partly vegetated and comprises part of one of the ridges dropping

from the escarpment to the eastern lower lands, sitting between two watercourses mostly located on adjoining land.

6 Low density residential development adjoins the site to the east and takes up most of the land further eastwards towards the north-south movement corridors and the coastal fringe. Wollongong University and Wollongong Botanic Gardens are both nearby.

7 The site is zoned partly R2 - Low Density Residential and partly C2 - Environmental Conservation under Wollongong Local Environmental Plan 2009 (WLEP). Figure 2 shows the current zoning pattern in the site vicinity with the site boundaries delineated in red. A portion of the site zoned C2 is located in the south-western corner, with the rest of the site zoned R2.


Figure 2 – Current zoning pattern under Wollongong Local Environmental Plan 2009 (source: Ex 1 p 10)

8 Multi dwelling housing is a permissible use within the R2 zone and the works associated with the proposed multi dwelling housing would be entirely located on the R2 zoned land. The proposal does not provide for any development on the C2 portion of the site, except for environmental protection works, a permissible development in that zone.

**Key issues**

9 The key issues in dispute in these proceedings can be best understood by illustrating them within their relational setting.

10 The first key issue is concerned with whether the proposal provides for unacceptable risks from bushfire. This issue needs to be understood in the context of the proposal's response to natural ecology considerations, in particular the assignment of "vegetation formation" for specified spatial areas relevant to asset protection zone requirements for bushfire purposes.

11 The second key issue is concerned with *urban* fire management, and in particular the accessibility of urban firefighting appliances (ie fire trucks and the like). This issue is centred on the design response in the face steep site gradients. It will become apparent that landscaping is proposed as an avenue to respond to visual impact concerns, but there are fire-risk related constraints on the proposed landscape response.

12 The third key issue concerns visual impact. There is a direct relationship between this issue and the implications for the proposal in relation to Aboriginal cultural heritage.

13 The fourth key issue is that of neighbourhood amenity impacts. Primary here is the extent of excavation which is required for the development. The extent of excavation, and its removal, raises concerns in regard to impacts to immediate neighbours, but also requires heavy vehicle movement at an unusual scale along defined haulage routes, including through relatively quiet residential streets.

14 While there were other contentions raised by Council, we see the issues nominated above as capturing the central and determinative factors in this appeal.

15 The experts providing evidence with respect to these issues included the persons nominated in Table 1. In this table we also take the opportunity to refer to relevant expert support exhibit references, as tendered. It can be seen that in a number of instances more than one expert report was tendered.

Table 1 – Expert evidence particulars

| Expertise | Appointed by Applicant | Appointed by Respondent | Expert report exhibit identification |
|---|---|---|---|
| Bushfire | A Hawkins | S Jarvis | Ex 3<br>Ex 4 (supplementary) |
| Ecology | M Sheather-Reid | M Henderson | Ex 7<br>Ex 8 (supplementary) |
| Access for urban fire fighting appliances | D Levy | S Jarvis | Ex 16 |
| Traffic & access | V Doan<br>D Harrison | D Fonken<br>P Tobin | Ex 12<br>Ex 13<br>Ex 14 |
| Construction management | G Nelson<br>D Harrison<br>V Doan | A Heaven<br>D Fonken | Ex 6 (contentions 7 and 9)<br>Ex 5 (contention 8) |
| Visual impact | J Aspinall | K Castellanos | Ex 17 |
| Urban design | S Kennedy | K Castellanos | Ex 15 |

| | | | |
|---|---|---|---|
| Aboriginal heritage | M Smith | J Thompson | Ex 9 |
| Town planning | H Deegan | S Fortu | Ex 11, 28 |
| Fire safety engineering | D Levy<br>H Liu | A Harriman | Ex 23 |

**Bushfire risk**

*Setting the scene*

16 The site occupied by the proposal is identified as bushfire prone land on Council's bushfire prone land map (Ex 3 p 2). This brings into play the policy document entitled Planning for Bush Fire Protection 2019 (PBP) (reference s 4.14 EPA Act). The applicant's evidence (and submissions) argue that the proposal would comply with the performance based solutions of PBP. Council disagrees. The point of particular dispute is that relating to the extent of required asset protection zones (APZs).

17 There appears to be no dispute as to the following particulars associated with PBP. A particular outcome, or "performance criterion", sought for development of the kind associated with the proposal under PBP, is that new buildings are exposed to a maximum radiant heat level of 29kW/m2 (PBP pp 26 and 43). PBP establishes a set of pre-requisites to establish "acceptable solutions" to the achievement of this performance criterion. The determination of APZs are an important factor here. APZs are designed for, and are managed to, a set fuel loading at different topographical gradients or slope. What PBP refers to as "vegetation formation" (within 140m of the "development site or asset") is a central consideration in relation to fuel loading (PBP A1.2).

18 At the centre of this disputed issue is the question of what fuel loadings should be adopted for the purposes of the calculation of APZs to achieve the target performance criterion. Briefly here, the applicant argues that it is appropriate to adopt a vegetation formation of "rainforest" which brings a lesser fuel loading than does, relevantly, a "forest" vegetation formation under PBP (consistent

with much of the evidence, for convenience we will use the term “forest” here noting that while wet and dry sclerophyll forests are different vegetation formations under PBP, they have the same APZs under Table A1.12.2).

19 In turn, a rainforest vegetation formation would result in a lesser APZ minimum distance requirement (for different effective slope categories) when compared to forest vegetation formation (PBP Table A1.12.2). We understood it to be agreed by the bushfire experts that a rainforest vegetation formation has been relied upon for the purposes of calculating the relevant APZ distances in the subject application and that the proposal would not comply with the acceptable solution in regard to APZ minimum distance were a forest vegetation formation deemed to be applicable. An important provision of PBP, still relating to the acceptable solutions approach here, is that of adoption of the greater hazard formation in instances where mixed vegetation formations are located together (PBP A1.2):

> “Where mixes of vegetation formations are located together, the vegetation formation providing the greater hazard shall be used for the purpose of assessment. The combination of vegetation and slope that yields the worst case scenario shall be used.”

20 Other agreed provisions within PBP are that:

- PBP establishes a performance based regime, and calculated APZ widths are one acceptable solution under that regime.
- There is a requirement that all developments satisfy the aims and objectives of PBP (s 1.1). PBP objectives of note arising in the evidence include:

> “…afford buildings and their occupants protection from exposure to a bush fire;
>
> provide for a defendable space to be located around buildings;
>
> provide appropriate separation between a hazard and buildings which, in combination with other measures, prevent the likely fire spread to buildings;
>
> ....”

21 There are two particular spatial areas of interest to the dispute between the parties here. The first area is within the site and located to the south of the proposed development. We will refer to this area as the “C2 zoned land”. The bounds of the C2 zoned land correspond with the C2 Environmental Conservation zone under WLEP, discernible in the south-west corner of the

site in Figure 2. The second area comprises land on neighbouring property to the north-east. We will refer to this as the Standen land. For both of these areas, the applicant submits (based on the evidence of Mr Jervis) that it is appropriate to adopt a vegetation formation of “rainforest”. The APZs adopted in the proposal rely on this submission. That is to say, the vegetation formation factor adopted to determine the APZs in the proposed scheme do assume a vegetation formation of rainforest.

*Ecological expert evidence and related factors concerning vegetation formation classification*

**Wider vegetation setting**

22 Figure 16 of the Biodiversity Development Assessment Report (BDAR) (identified as behind Tab 3 in Ex G) identified vegetation communities within 500m of the site. It is reproduced below.


Figure 3 – vegetation communities within 500m buffer of the site (BDAR Fig 16)

23 The site is located at the centre of the figure and is outlined in red. The C2 zoned land is at the south-west corner of the site. Its vegetation communities are better gleaned from Figure 4, below. The Standen land is to the north-east

of the site. Figure 3 provides the best representation of its vegetation communities. However, a blow up of this area is provided when the Standen land is discussed below.

**C2 zoned land**

24 The proposed Biodiversity Management Plan (BMP) (identified as behind Tab 4 in Ex G) establishes management zones in the vicinity of the C2 zoned land. Figure 4 shows these management zones overlain on the information about identified vegetation communities. The triangular-shaped C2 zoned land is designated as management zone 1 or MZ1 under the BMP.

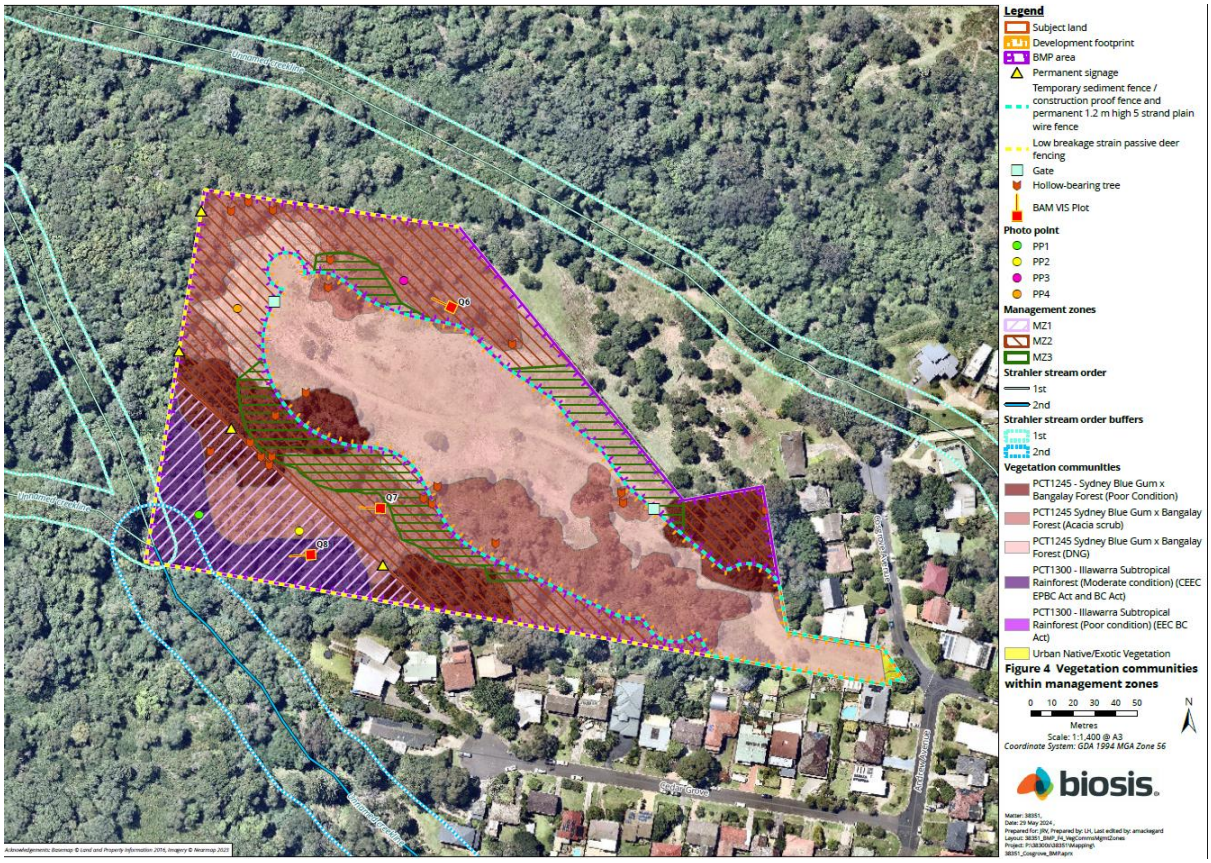


Figure 4 – Vegetation communities within management zones (source: BMP Fig 4).

25 The BDAR mapping and BMP findings identify the MZ1 land as encompassing a mixture of vegetation types and conditions as follows (BMP Table 3 p 20):

> "PCT 1245 - Sydney Blue Gum x Bangalay Forest (Poor Condition) - 0.11 ha.
> PCT 1245 Acacia scrub – 0.16 ha.

> PCT 1300 - Illawarra Subtropical Rainforest (Moderate condition (CEEC) – 0.32 ha."

26 The following are among the works to be undertaken within the MZ1 zone (BMP Table 3 p 20):

> "Works within MZ1 are to include the slow and strategic removal of all exotic species, with scope to maintain the integrity of the slope and promote natural regeneration.
>
> …
>
> Supplementary revegetation to promote a structurally and floristically diverse vegetation community."

27 In contrast, the MZ2 land to the north-east (BMP Table 3 p 20):

> "… forms a managed vegetated buffer from the proposed development footprint to create a strategic fuel reduced landscape to the equivalent of a 'Rainforest threat' in accordance with Planning for Bushfire Protection 2019."

28 So, as we understand it, while the MZ2 land was to be managed to directly respond to the requirements of a rainforest threat equivalent, under PBP, there was no such intention with respect to the C2 zoned land. This was clear from the direct evidence of the BMP ("promote natural regeneration") but also from the oral evidence of the ecological experts.

29 Here we observe that it is clear from the BDAR mapping and BMP that the C2 zoned land is not wholly rainforest and that instead (based on areas at [25]) about 45% of the C2 zoned land is identified as "Sydney Blue Gum x Bangalay Forest" and "Acacia scrub", together designated as Plant Community Type (PCT) 1245. While the Sydney Blue Gum x Bangalay Forest area is designated as "poor condition", the intention of the BMP seems to be to remove weeds and rubbish and "promote natural regeneration".

30 One of the factors here was Table 15 to the BMP which nominated recommended planting species. Table 15 was headed "Recommended species planting list for Illawarra Subtropical Rainforest (MZ1)". Mr Sheather-Reid indicated an inclination towards rainforest species in the C2 zoned land as a consequence of Table 15 planting. However, this was not as a means of meeting bushfire objectives. Mr Sheather-Reid suggested the rationale for Table 15 planting was related to a higher ecological benefit overall, associated with rainforest conservation (Tcpt 17 July 2024 166(5)). However, Dr Henderson disagreed. She acknowledged "Commonwealth Conservation

Advice" in support of rainforest buffer planting, but that PCT 1245 planting could serve the buffer purpose. Her view was that the Table 15 species include species which are naturally occurring within PCT1245 (Tcpt 17 July 2024 161 (19)).

**Standen land**

31 The Standen land is located adjacent to the site to the north-east, and not within the bounds of control of the applicant. We understood there to remain a dispute as to whether the Standen land should be classified as rainforest or forest formation under PBP terms. But we also note that the applicant's case included reliance on what PBP references as a "short fire run" approach (PBP s A1.11.2). we will come to this later point when considering the bushfire evidence and turn now to ecological evidence relating to vegetation formation on the Standen land.

32 Figure 3, as reproduced above, is a little out of scale for this interpretation, but it was clear from the evidence during the hearing (using the zoom function of a pdf version of Figure 3) that the land immediately adjacent to the site and within the Standen land is occupied by PCT1245 vegetation (ie Sydney Blue Gum x Bangalay Forest) (acacia scrub). To the immediate north-east again (and reflecting the mapping colour codes) are corridors, or bands, of differentiated plant community types, as follows: PCT 1300 (ie Illawarra Subtropical Rainforest community) the first band noted as in poor condition, then the second band in moderate condition, then a further band of PCT1245 (acacia scrub), followed by a larger area of PCT1245 Sydney Blue Gum x Bangalay Forest in poor condition.

33 No management regime was proposed via the BMP or otherwise for the Standen land, and in that sense there is no suggestion that the required active management over current PCT1245 land would be undertaken to bring it to a rainforest vegetation formation under PBP (Tcpt 17 July 2024 130 (29-39)). However, Council submitted that there was currently a planning proposal before it, at a very advanced stage (in terms of imminence and certainty) in relation to the Standen land (but not the subject site, given certain undertakings given by Council in that respect (Ex 2 Tab 20c)). The planning proposal would

bring about the rezoning of the major portion of the Standen land to C2 Environmental Conservation zone, with a smaller portion, closer to the existing residential precinct, to C3 Environmental Management . We understood Council to be arguing in support of the prospects of this land to not at some point in the future be available for management actions resulting in a rainforest vegetation formation under PBP.

*Bushfire expert evidence*

34 In their joint expert report (Ex 3 and Ex 4), the bushfire experts indicated their significant, although not necessarily absolute, reliance on the ecological experts to assist them in drawing conclusions on vegetation formation under PBP. The following commentary is noted with respect to the C2 zoned land and the Standen land (Ex 4 pars 20-21):

> "20. Based on discussions with the applicants ecology expert and the interpretation of the revised (BMP) and revised BDAR, (Mr Hawkins) has formed the opinion that vegetation classification, across all bushfire assessment aspects, is 'Rainforest'.
>
> 21. Based on discussions with the respondents ecology expert and the interpretation of the revised (BMP) and revised BDAR, (Mr Jarvis) has formed the opinion that there is 'mixed vegetation' (being a mixture of 'Rainforest' and 'Forest' vegetation) across some bushfire assessment aspects, and as such considers 'Forest' is the vegetation classification."

35 Mr Hawkins in particular identified that he understood a distinction between how an ecologist and bushfire expert looks at vegetation classification, with bushfire experts concerned more with the resultant intensity of fire (Tcpt 17 July 2024 145(25-28)):

> "So, as you say, they may be mapped as different classifications, but, for us, it comes down more to the fuel loading."

**C2 zoned land**

36 Mr Hawkins essentially maintained a position that a rainforest fuel load would apply in the C2 zoned land. While in Ex 4 he referred to evidence from Mr Sheather-Reid to support his position, in his oral evidence Mr Hawkins repeatedly referred to his reliance on Dr Henderson's oral evidence, which in his view inferred a rainforest loading for the C2 zoned land. But Mr Hawkins also relied on his four site inspections and expert assessment on fuel loadings. Significantly, in our view, Mr Hawkins relied on the supplemental planting in the C2 zoned land (ie the "Table 15" planting) to bring about a rainforest loading

here. In respect of the C2 zoned land he indicated (Tcpt 17 July 2024 151(24-27)):

> "My assessment was that it's currently in poor condition, as stated in the BDAR. And with the replanting schedule in mind, and rehabilitation schedule, well objectives, that it will end up more like a rainforest community than a forest community."

37 Mr Jarvis held the view, essentially based on his own interpretation of the expert evidence in particular PCT findings, that the C2 zoned land was of mixed vegetation formation (forest and rainforest formation).

**Standen land**

38 There was a similar difference between the bushfire experts in regard to the Standen land. With Mr Hawkins adopting a rainforest vegetation formation and Mr Jarvis preferring a mixed vegetation formation (rainforest and forest), in accordance with PCT findings, and mindful of the planning proposal to zone much of this land C2. A further notable point in regard to the Standen land included the provision of a "a radiant heat barrier", in the form of a 1.8m steel fence, for a 92m length along the north-eastern angled shared boundary with the site, "which will affect the radiant heat impact" of the north-east fire run (Ex G Tab 1 p 9).

*Consideration of bushfire risk contention*

**C2 zoned land vegetation formation and consequential fuel loadings**

39 It seems to us on the evidence that the Table 15 planting schedule (under the BMP) should not be seen as providing a substantive shift to the ecological outcome over the C2 zoned land. It seemed that existing floristic characteristics, soil and seedbank were at the centre of rehabilitation plans. The evidence of both Dr Henderson and Mr Sheather-Reid assists here. First in relation to Dr Henderson's evidence (Tcpt 17 July 2024 163 (26-41):

> "STAUNTON: And would that not be changing - if what Mr Sheather-Reid said is the potential outcome of using species from table 15. If it had the effect that Mr Sheather-Reid is suggesting, would that not result in a changing of the floristics of that vegetation community?
>
> WITNESS HENDERSON: Yes. So, if you - if the result was to supress emergent canopy species, such as those that are in the mertasy(?), such as turpentines, the bangalay, and white - white box eucalyptus quadrangulata. It would change the floristics, because you'd be supressing those species that are characteristic of PCT 1245.

> STAUNTON: Right. And would that be consistent with the objectives of the C2 zone?
>
> WITNESS HENDERSON: No, because you would be not enhancing that particular plant community type, you'd be altering it."

40 We do note that Mr Sheather-Reid indicated that the Table 15 plantings would have an impact of some kind, further evidence was as follows (Tcpt 17 July 2024 164 (8-39)):

> "STAUNTON: And Mr Sheather-Reid, just in relation to those management works. We went through it earlier. Using the species from table 15 was no more than supplemental. It wasn't the purpose to effectively remove the vegetation that currently exists, was it?
>
> WITNESS SHEATHER-REID: No. That's correct.
>
> STAUNTON: And if a tree dies, or a number of trees die, that doesn't necessarily mean they'll be replaced by trees from table 15. It may well be that they are replaced by natural regeneration?
>
> WITNESS SHEATHER-REID: Yep. That's possible.
>
> STAUNTON: And presently, within the C2 land, that could be presently occurring and continuing to occur?
>
> WITNESS SHEATHER-REID: Yes, it could be.
>
> STAUNTON: And then the only way you could guarantee - if the outcome is to provide a rainforest - I'm sorry if I asked you this question before - the only way to guarantee a rainforest fuel load would be to have an active management regime in that C2 area, wouldn't it?
>
> WITNESS SHEATHER-REID: It would have to replace the existing canopy to an actual rainforest canopy. And to a certain extent, you would need to have some degree of fuel management. They'll be a mismatch.
>
> STAUNTON: So, you'd have to effectively remove the canopy of the bangalay which we're seeking to preserve and enhance, and in addition have some fuel management?
>
> WITNESS SHEATHER-REID: Yep."

41 We believe it reasonable to take the view on all of the evidence from the ecologists that the C2 zoned land would generally regenerate to include significant proportions of both PCT 1245 and PCT 1300 vegetation communities, coarsely here defined as forest and rainforest formations, respectively.

42 The bushfire experts indicated that PBP's reference to the vegetation formations (eg "forest" and "rainforest") was not necessarily directly related to the ecological labels, as put for example in the BMP and BDAR. However, there was no other documentary evidence put to establish alternative

interpretations of vegetation formations under PBP (mindful of its reference to Keith, D.A. (2004). Ocean Shores to Desert Dunes: The Native Vegetation of New South Wales and the ACT, NSW Department of Environment and Conservation).

43 From a bushfire perspective, we accept that Mr Hawkins held the genuine view, including under considerable cross-examination, and based on his expert experience in such work, that a proper bushfire fuel load assessment would find the C2 zoned land as appropriately adjudged as rainforest under PBP (Figure A1.2). However, for us, this indication of a professional opinion based on “experience”, albeit accepted as one basis for the establishment of a performance-based solution under PBP, was insufficient to overcome the alternative evidence. This alternative evidence involved: (1) the assessment of Mr Jervis, another experienced bushfire expert who was consistent in his opinion of a mixed vegetation formation, also under rigorous cross-examination, and (2) what we find to be a reasonably agreed position on the part of the ecological experts that the C2 zoned land would, with the works proposed with the BMP, regenerate to substantial consistency with the BDARs PCT mapping (ie involving both rainforest and forest communities under PBP). That is not to say that the Table 15 planting, would have no influence, but in our interpretation of the evidence, it would not have a significant effect on ensuring a PCT 1245 outcome as a consequence of the BMP, as a whole, in areas currently designated as such in the BDAR.

44 We are aware that Mr Jarvis did not claim that the C2 zoned land should be designated as a forest vegetation formation. His view was that the land would lie somewhere in between (forest and rainforest formation). Consistent with the evidence of Mr Jervis, it is our finding that the C2 zoned land would be appropriately characterised as a mixture of rainforest and forest vegetation formation under PBP. Under PBP’s acceptable solutions approach (PBP A1.2), it is necessary for the greater hazard vegetation formation to be adopted, when one turns to the APZ requirements. The bushfire experts made clear that the Supplementary Bushfire Assessment (Ex G Tab 1) had relied upon a rainforest formation to assign APZs for the proposal and the required APZ under a forest

vegetation formation would not be achieved with the proposal (Ex 4 Annexure 1).

45 We understood that Mr Hawkins continued to claim that the proposal satisfied a performance-based approach to bushfire risk management under PBP. Mr Hawkins relied on site inspections, his "expert judgement" (Tcpt 17 July 2024 181(12)) and his own interpretation of the ecological evidence to make this claim. The performance based claim, that the proposed APZs are justified, ultimately turned on the point of interpretation of the fuel loads in the C2 zoned land (Tcpt 17 July 2024 181(12)). Given our findings with respect to expected fuel loadings in the C2 zoned land, we do not accept Mr Hawkins' claim that the proposal provides adequate APZs under a performance-based approach. Further we note the provisions in PBP (at s 1.4.5 and Appendix 2) with respect to the adoption of performance based solutions. While there is some discretion involved here, we are not satisfied that these processes have been followed in the circumstances of this case.

**Standen land**

46 The bushfire experts acknowledged that there was no capacity for management of the Standen land, which currently included both rainforest and forest vegetation formations. The applicant sought to use an alternative approach under A1.11 of PBP entitled "Assessing remnant bushland and narrow vegetation corridors". The introductory commentary is as follows:

> "The size and shape of small areas of vegetation influences the behaviour of bush fires and the associated risk to the built environment. Small or narrow parcels of vegetation have less opportunity to support fully developed bush fires because of their limited size.
>
> There are two recognized pathways for assessing remnant bushland or narrow vegetated corridors. An assessment can either follow the simplified approach or the short fire run approach. The two approaches should not normally be used simultaneously to assess a patch of vegetation."

47 It was put by the applicant to Mr Jervis that the PCT1245 community on the Standen land could be considered as a narrow standalone vegetated corridor, relevant to section A1.11.1 of PBP and "the simplified approach":

> "The simplified approach provides an acceptable method for assessing remnant vegetation. Remnant vegetation is a parcel of vegetation with a size of less than 1 Ha or a shape that provides a potential fire run that could threaten buildings not exceeding 50m. These remnants are considered a low

> hazard and APZ setbacks and building construction standards for these may be the same as for rainforests."

48 We thought Mr Jervis was convincing in his rejection of this argument (Tcpt 17 July 2024 167(41-44)):

> "How does it stand alone? It doesn't stand alone. It's beside - the rainforest is still a bushfire threat. The forest vegetation to the North of the rainforest is still a bushfire threat. It's not isolated from that vegetation."

49 Mr Hawkins referred to the short fire run (SFR) approach (A1.11.2) to suggest a satisfactory relationship, with respect to APZ. This fire run was from the north-east and subject to lesser fuel loadings overall and potentially subject to moist north-easterly coastal winds. We were unconvinced by this approach. First, we note Mr Hawkins calculations in support of the proposal adopted a rainforest vegetation formation when there is no evidence to suggest management to achieve this formation. Second, we accept the opinion of Mr Jervis, essentially rejecting the applicability of A1.11 of PBP, as the Standen forest vegetation formation is not the type of vegetation setting to which A1.11 might be thought to open its doors. While it might be thought small in size of itself, it can be seen from Figure 3 that it is connected to "vast areas of vegetation" (as put by Mr Jervis), including forest vegetation, albeit separated by reasonably narrow corridors of rainforest vegetation. Third, and while accepting that Mr Hawkins was simply following a procedure established under PBP and involving the identification and adoption of the steepest adjacent land among other factors, the north-east or coastal direction (ie whether transect E or F in Ex J) is not "the most risky fire run" or the run of "greatest fire danger to the site" according to the experts (Tcpt 17 July 2024 185(36-40)). Mr Hawkins indicated this to be from the north west towards the south east, something which makes common sense at least when viewing Figure 3. On this point, while we accept the view that this fire run from the north west would present a flank rather than fire head to the site (where the greatest radiant heat is found), as put by Mr Jervis there, is a not irrelevant risk that wind change could direct such a fire to the site (Tcpt 17 July 2024 185(50)).

**Proposed soft landscape elements of the development**

50 Council also raised concerns that the proposal failed APZ requirements under PBP due to landscape elements on roofs and adjacent to buildings. We

understood there to be a general agreement from the applicant that some further reduction in planting around the buildings and under windows would be necessary to meet requirements.

51 We will consider the proposed green roofs and green walls when considering the urban fire fighting contention, below.

*Conclusion on bushfire risk*

52 On the above reasoning, it is necessary to adopt a forest rather than rainforest vegetation formation, and associated fuel loadings, for both the C2 zoned land and the Standen land. In turn, the proposal's APZs do not meet PBP requirements. On all of the evidence, we are not satisfied that the objectives of PBP are met with the proposal in this respect. The performance-based solutions proffered on behalf of the applicant are not made out and we are not satisfied that relevant performance criteria are met. It has not been demonstrated that the proposal would provide buildings or their occupants with adequate protection from exposure to bushfire. The DA would be refused on these grounds alone.

**Urban firefighting appliances and associated matters**

*Setting the scene*

53 Council also contended that the applicant had not given adequate consideration to the need for urban firefighting appliances and the relevant requirements of Wollongong Development Control Plan (WDCP) and the Fire and Rescue NSW publication: "Fire Safety Guideline – Access for fire brigade vehicles and firefighters – Version 05.01, November 2020" (henceforth FSG), tendered into evidence at Ex 2 Tab 7. Of particular concern was the issue of firefighting appliance access, having regard to site gradients and associated constraints. In this topic there were also certain overlaps with access provisions under PBP (Ex 23 par 2). The applicant submitted a Fire Risk Assessment Report in response (Ex G Tab 7 (FRAR)).

54 There was no dispute that, apart from being located upon bush fire prone land, the site is also located within a "Fire District" pursuant to the *Fire and Rescue NSW Act 1989* and that the initial response to emergencies within the subject

site (e.g. structure fires, car fires, garbage fires, at least) is most likely to be by Fire + Rescue NSW, in an urban firefighting appliance (Ex 16 pars 1 and 2).

55 The relevant document for prescriptive firefighting appliance access provisions, for development intended to meet the National Construction Code (NCC) and BCA 2022, was agreed to be FSG. It is important to note that FSG also provides for a performance-based approach to firefighting appliance access in line with C1P9 of BCA 2022 (Ex 23 pars 1-4).

*Fire appliance accessibility constraints associated with site gradients*

56 In regard to the prescriptive standards for fire firefighting appliances under FSG and, as relevant, PBP, the proposal had numerous points of non-compliance. Mr Levy and Dr Liu acknowledged, in their evidence that the proposal "poses geometrical limitations for certain fire appliances due to steep grades and insufficient turning radius" but that general firefighting appliances could attend "to perform firefighting tasks (and handle) rescue and hazardous material" (Ex 23 par 23).

57 The particulars of the carriageway gradient requirements seemed to be more or less agreed. The prescriptive provisions are as follows:

> **"7.6 Grades and ramps**
>
> 7.6.1 The grade of a *carriageway* or ramp is to be no steeper than 1 :6 (16.6%).
>
> **Note:** A grade of 1:8 (12.5%) or less is preferred for easier access. AS *2890.2:2018* prescribes a maximum roadway/ramp grade of 1:6.5 (15.4% ).
>
> 7.6.2 If the *carriageway* or ramp follows a curved or circular path, the maximum grade is to be no greater than 1:8 (12.5%) as measured along the centre line. **Note:** The vehicle's chassis and body will twist and flex when negotiating a circular path, increasing with vehicles that have a longer *wheelbase.*
>
> *…"*

58 Mr Levy and Mr Jarvis agreed that while the average gradients over the total of some 750m of carriageway within the proposal were about 18%, there were large sections of road shown with grades ranging from 20% to 25% (Ex 16 par 23). The fire engineering experts' evidence (Messrs Levy, Liu and Harriman) inferred a 20% maximum gradient (Ex 23 par 5). Our review of the engineering

drawings would suggest that there is a significant length of road at 25% gradient (Ex B Drawing C05 chainage 585 to 650).

59 Messrs Levy and Liu argued that (Ex 23 par 9):

> The access-related non-compliances will be addressed as part of a performance solution (PS) and be submitted to Fire and Rescue NSW (FRNSW) at a later Construction Certificate (CC) stage. This contention cannot be addressed via PS prior to the CC stage.

60 Mr Harriman was of the opinion that the proposal could not meet the performance requirements of C1P9 (Ex 23 par 14):

> a. The gradients are too steep for regular pumpers as outlined in the FRNSW FSG 2020;
>
> b. The hardstands proposed do not meet the criteria of the FRNSW FSG 2020 and therefore do not meet the standards expected of the FRNSW.
>
> c. There is no alternative escape (egress) pathway for both occupants of the building (whether escaping on foot, or by motor vehicle) or by fire brigade personnel as there is a single driveway and walkway beside it.

61 Mr Harriman, who provided clear opinions and coherent reasoning in support, was critical of the level of assessment and conclusions of the FRAR. An extended citation of his evidence is warranted (Ex 23 pars 15-19):

> 15. Paragraph 2 on page 4 of the (FRAR) states that 'general fire appliances' have been assessed to be able to attend the site, however no details are provided. The gradient and hardstands are not suitable for general fire appliances as outlined above. I therefore disagree with this statement within the (FRAR).
>
> 16. In paragraph 3 of page 4 of the (FRAR) it states specialist appliances can attend the site to the utility building. The subject development is a complex development and is over 9m in effective height (which are discussed below) and therefore the FRNSW require access for an aerial appliance as outlined in the FRNSW FSG 2020. The (FRAR) agrees that access for aerial appliances is not available.
>
> 17. I disagree with conclusion 2 of part 1.3 of the (FRAR) which states general fire appliances can attend the site and are capable to perform firefighting tasks, rescue and hazardous materials, as the gradients of the driveway are too steep for general appliances and the hardstands are not suitable for use by fire brigade vehicles.
>
> 18. I disagree with conclusion 3 of part 1.3 of the (FRAR) as it states the potential risks in the proposed building can be adequately addressed by a general fire appliance and that a specialist fire appliance is not required to access the site. My reasons for disagreement are as follows:
>
> a. The (FRAR) does not assess the risks of the site;

> b. The only analysis in the (FRAR) is effective height of less than 9m but for the reasons set out below in contention 2(h) each building is drawn as 10.1m in effective height;
>
> c. The (FRAR) is not a holistic report that addresses the combination of bushfire and risk of structural fire at the same time and the firefighting capabilities required. For example, the building proposes a green roof which may catch alight in a bush fire and would be best extinguished by an aerial appliance.
>
> d. It does not reflect that the gradients and hardstands are not suitable for use by general fire appliances and provides no analysis as to why the site conditions are suitable for use by fire brigade appliances.
>
> 19 The FRNSW FSG 2020 is a document specifically written by the FRNSW to address the performance requirements of C1P9 of the BCA and the (FRAR) acknowledges that the subject proposal does not comply with this document. The (FRAR) also does not propose any alternative access arrangements, requirements or reasoning for compliance with C1P9 as an alternative to the Guideline.

62 The points raised here by Mr Harriman are persuasive in regard to overall inadequacies of the proposal with respect to firefighting appliance access. While here we do not find necessarily that the proposal would require an aerial appliance, we do generally agree with the conclusions of Mr Harriman and Mr Jarvis that the proposal is complex development with respect to PSG, essentially as articulated by Mr Jarvis (Ex 16 par 54):

> This is due to the development comprising more than one building, which contain structures of 'higher than normal risk'. This increased level of risk can be attributed to a number of characteristics including the podium design, basement carparking, increased residential density (i.e. numerous units, occupants and motor vehicles) and the isolated location on the ridge line with the single access point to the public road system below.

63 There are further concerns raised, by Mr Harriman, in regard to carriageway and PBP requirements. These included the Table 5.3b of PBP requirements for: (1) more than one access in and out of the development (the proposal brings only one), (2) perimeter roads to have a minimum carriageway width of 8m (the lower section of the entry road was scaled by Mr Harriman at 6.5m which was suggested to unsafely restrict the capacity for two vehicles to pass in smoky fire settings) (Ex 23 pars 20 and 21) and that the crossfall that a firefighting appliances would need to negotiate to move into the proposed off-carriageway hardstand areas near Unit 7 (at least) did not meet the 3% requirement (Tcpt 22/7/2024 374 (26)). On the last point Mr Harriman referred to turning path drawings by Traffix which indicated "proposed driveway does

not accommodate general fire appliance" (Ex G Tab 7 TX.23). Mr Harriman believed the concern here was that to access the hardstand the turning firefighting appliance would need to (for a short distance) negotiate the long sectional gradient of about 18%, which presented a risk that a water-laden vehicle would topple. On the former point, the engineering drawings seem to confirm a carriageway width of 6.5m at the site entry (from chainage 0-150m: Ex B Drawing C06 – typical cross section).

64 A further concern raised by Mr Harriman was in regard to the hardstand area proposed within the utility area towards the lower portion of the site (before what was nominated as the "hairpin turns"). While some of his concerns seemed to be adequately responded to by Mr Levy, we accepted Mr Harriman's opinion that if there was a fire in the utility area (something certainly not beyond practical reasoning given it is the garbage storage area), then there was no practical area for the fire appliance to attend to the fire without standing on the driveway, and essentially blocking the driveway (ie through the vehicle itself and its hoses). Blocking the driveway, in a position where it was the only site egress, was itself a significant risk.

*Green wall and green roof strategy*

65 A feature of the proposal was the provision of green walls and roofs. These were intended as one of the means of enabling landscaping and green spaces to "permeate throughout the development" despite bushfire related landscape restrictions (ie 15% tree canopy cover maximum for inner asset protection zones under PBP (Urban Design Report Ex G Tab p 26)). Green roofs would generally cover the whole of the extent of the roofs. They would improve internal amenity, and the roofs in particular would assist with the environmental performance of the buildings. According to the urban design report, together, the green roofs and walls would "improve the appearance of the proposed development from the surrounding context" (Ex G Tab 6 p 46).

66 The fire engineering experts agreed that green walls and roofs involved a non-compliance with deemed to satisfy provisions of the BCA. As we understood it, it was agreed that taller, climbing and hanging plants which had been indicated in certain of the landscaping and urban design plans (eg Ex G Tab 6 p 47)

would not satisfy performance-based requirements, and that it was better to think of each as a green wall system and green roof system, with quite limited vegetation or height (and climb or drop) in the planting and purpose-designed supporting frames. This requirement of the fire engineers had relevance to the visual impact topic.

67 We turn to the proposed green walls and roofs (as modified) from a fire safety point of view. The essence of it related to the fire load from the plants themselves, the growing medium and the supporting frames. In regard to this question, there was evidence provided by Dr Liu to support what seemed to us to be an arguable approach with respect to his refined version of green walls at least. While Mr Harriman again was not supportive on the material before him, particularly given the bushfire prone status of the land, in this instance we are not willing to make a finding that some kind of green wall system may not be able to satisfy a performance-based approach. As indicated above, we believe it would necessitate much more modest landscaping than that indicated in the site's visual presentation material, as indicated in the urban design report (eg Ex G Tab 6 p 47).

*Conclusion on urban firefighting appliances and associated matters*

68 There was persuasive evidence on the inadequacies of the proposal with respect to the PSG standards for firefighting appliance accessibility which were not able to be countered by the applicant. Critical factors included the gradient of the perimeter road (with a considerable portion at 25% gradient), the turning movements into hardstand areas for firefighting appliances and the width of the entry road. While we acknowledge that, as the approval system operates, PSG provides for a series of acceptable solutions (by way of prescriptive standards many of which the application has not been able to achieve), there remains the case that there is opportunity for the applicant to follow a "performance-based" path. But it is reasonable to expect an applicant in an appeal of this kind to present something in the way of a cogent explanation of possibilities for addressing the relevant criteria if the Court is to be convinced that such an important contention, relating to human safety in the face of a fire emergency, might be set aside. Indeed PSG (at section 10.3.3) appears to suggest a need to give consideration to potential major emergencies at the "design phase".

69 Mr Harriman put clearly in his evidence that, given the particulars of this proposal, he did not see any path for approval of the development under a performance-based approach. In regard to the accessibility of general fire appliances, in particular, this was not countered in other satisfactory evidence by the applicant's expert appointees.

70 Through oral argument from Mr Levy, the applicant did attempt to introduce late evidence in relation to a performance-based approach to compliance with PSG. The Court rejected such exploratory questioning by the applicant. We see this finding as consistent with the Court's Practice Note for Class One Development Appeals (Sch E par 13). Under, arrangements for the administration and management of matters in this Court, the proper place for the articulation of a response to Council's concern was via written evidence, to allow due scrutiny. Put this way it would provide fair opportunity for examination and response by the applicant and its expert Mr Harriman. It was unfair to expect Mr Harriman to respond from the box.

71 We accept the evidence of Mr Harriman, generally. The applicant has not been able to make the case that the proposal provides adequately for urban firefighting appliances. Here we note that it would be inappropriate to grant development consent on these grounds alone.

**Visual impact**

72 The site has as its physical and visual backdrop the Illawarra Escarpment and most immediately Mount Keira within that escarpment. These areas have been recognised as follows:

- The reservation of the Illawarra Escarpment State Conservation Area, which is listed as a 'Scenic Landscape of State-wide Significance' on the Register of the National Trust of Australia (NSW) (Ex 1 par 15(a)).
- The designation of the Illawarra Escarpment Landscape Area Heritage Conservation Area (IELA HCA), as a heritage conservation area of "local significance" under Schedule 5 of WLEP.

73 The Statement of Heritage Significance for the IELA HCA indicates (Ex 1 p 59):

> "The escarpment area has a high scenic quality given the combined effect of a narrow coastal plain, rugged escarpment edge, rich forest and contrasting pasture lands. The Illawarra Escarpment is also widely considered to have a

> high scenic environmental quality in comparison to other coastal plain and escarpment landscape areas along the New South Wales coast".

74 Chapter B6 of WDCP is concerned with the escarpment and includes various provisions relating to preserving native vegetation and the scenic environmental quality of the area. However, it seems clear that this chapter does not apply to the evaluation of this proposal. Section 1.3 indicates that Chapter B6 applies to land above the 50m contour level (a contour level which the entirety of the site sits above) but only within the following zones "RU1, RU2, RU4, C1, C2, C3, C4 and SP2 under WLEP", that is to say, not the R2 Low Density zoned land, within which the proposed built form would sit (Ex 2 p 137). That is not to say that visual impact on views to the escarpment and Mount Keira are not considerations on their merits.

75 There was considerable examination of this topic in the course of the site inspection and hearing. The visual experts disagreed entirely in regard to potential visual impacts of the proposal. Mr Aspinal's opinion, in relation to potential impact on the escarpment is in part captured by the following paragraphs in written evidence (Ex 17 pars 1-3):

> "1.…The main visual features [of the escarpment] are at its upper levels, the fold-created cliffs and plateau-eroded outcrop mountain ranges west of the Illawarra coastal plain south of Sydney. These higher-level features are most notable in locations such as Mount Keira, where the rocky outcrops rise above the lower-level slopes. The densely vegetated lower slopes provide a transition between the mountain tops and the residential areas below. There is then a further area of transition to the residential properties themselves, which has typically occurred in a random manner over the years. The current proposal's intent is to provide a more considered approach to how this transition can be more effectively managed, by providing a design that is also densely landscaped and a use of materials that reflects the existing geology and forms. The description of this as having an 'adverse visual impact' is an opinion only and does not acknowledge the depth of thought and design evolution that has occurred to date.
>
> 2. … Both the location and design of the proposal seek to minimise any adverse impact on the natural features and environment of the Illawarra Escarpment, through the careful separation of built forms and the extensive landscape that is strategically positioned to reinforce the visual separation between the built elements. The forms are carefully designed in order to diminish and taper towards the upper levels of the site, providing a carefully designed transition into the Illawarra Escarpment Landscape Heritage Conservation Area.
>
> 3. In reply to Contention 15(a): The proposal and associated landscaping have been carefully designed to minimise its visual impact and to respect the nature of its surroundings. It is on an existing cleared site and all necessary

> requirements for the minimisation of fire land stability, flooding and drainage risks have been met."

76 It is fair to understand Mr Aspinall to believe:

- The proposal comprises architecture highly responsive to its setting with extensive sensitively designed landscaping, which fundamentally mitigated any potential adverse visual implications.
- The proposal was not visible for very considerable areas, in any event, due to screening by existing built form and landscaping.
- Given other visual points of attention, the proposal would not be prominent from points from which it (ie the proposal) would be visible.

77 Ms Castellanos summarised her position in Ex 17 as follows:

> "Due to the high topographical elevation of the site and the complexity of the proposed built form, the proposal will be visible and have an adverse visual impact on the Illawarra Escarpment.
>
> The Fire Experts agree that the proposed Landscape Plan has non-compliances with the Fire Protection Requirements; therefore, the Applicant's visualisations do not depict the actual levels of visual impact.
>
> The magnitude of the proposal including its physical scale, built form typology and overall massing when compared to the surrounding built form character, the proposal will be incongruous with the Illawarra Escarpment. The proposed stepping of the form stacked arrangement of dwellings and the overall length of the proposal spanning over 150 m contribute directly to proposal's visual impacts. These aspects cannot be easily mitigated and the proposal is not meritorious."

78 It is reasonable to assess that Ms Castellanos's opinion did not vary in the face of rigorous cross examination.

*Consideration*

79 The site is visually apparent from a number of the viewpoints to which we were taken during the site inspection, both those at some distance from the site and in the more immediate site environs. Here we note that we do concur with Council that there was some uncertainty about the accuracy of the "visual catchment area" imagery accompanying Mr Aspinall's evidence (Ex 17 Appendix D). We do accept that the site is not visible from large areas within its surrounds, but it is visible from many areas and certain popular vantage points. These areas can be characterised as: (1) specific areas in the site's immediate environs (eg immediately neighbouring properties and viewpoints 5, 6 and 7 and 13 (the latter with a local park), as per the visual analysis at Ex G Tab 5. and (2) more distant views including points visited during the site inspection,

such as viewpoint 22 and viewpoints on the pedestrian railway bridge at North Wollongong station and along Bourke Street)).

80 Visibility does not automatically infer impact and we also appreciate the applicant's submission that there are already instances of development reaching into the vegetated areas below the escarpment.

81 While Mt Keira and the vertical elements of the escarpment sections at the upper levels are of highest visual importance the lower, mostly vegetated areas, including the site itself (which is not entirely cleared), also play an important function in visually framing these higher order features, from different vantage points around this area of Wollongong. The escarpment generally and the Mount Keira environs in particular are very important character features of this part of Wollongong. It is fair to think this visual character element as something of value to the Wollongong community, including the Aboriginal community which we will consider further below. It is our view that, to the extent that the hard form of visibly intense urban development reaches up into visible areas of the vegetated lower folds within and underneath the defined escarpment (noting all of the site is above the 50m contour line), there is potential adverse visual impact for those otherwise enjoying the existing visual character setting. In regard to this proposal, and given the understanding of viewing positions outline above, there is potential for this kind of adverse visual impact.

82 It is our finding that as a consequence of its the overall massing and scale, this multi-level residential proposal would present as visually intense urban development within the foothills of the escarpment, including from areas with direct views to Mount Keira.

83 In coming to the above finding, we were not convinced that due to architectural design or landscaping this proposal could provide the sensitivity envisaged by Mr Aspinall. As outlined earlier, we were not convinced that the intention to have landscape and green spaces "permeate throughout the development" (Urban Design Report Ex G Tab p 26), as presented in urban design imagery, would be able to be delivered on the site. There also seemed to be some uncertainty in regard to the architectural materiality of the proposal or, in

particular, its colouring. On one hand, the urban design scheme sought to pick up more intricate features of the escarpment backdrop including lighter hues (Ex G Tab 6 p 54-55). But it seemed, essentially in response to the evidence of Ms Castellanos, there was a later intent to reduce or eliminate lighter hues as a way to reduce visual contrast at this lower mostly vegetated level. Here we lost a sense of the coherence of the design.

84 But, more generally, given the intensity of the residential development, roadway and retaining walls and the significant constraints on landscaping due to design for fire safety, the proposal would present as an undesirable visual intrusion from significant vantage points both in the immediate site environs and the wider area.

**Aboriginal cultural heritage**

85 We note that the development application, in regard to aboriginal cultural heritage, relied on an Aboriginal Cultural Heritage Assessment (ACHA) Report by Biosis and dated 8 February 2022.

86 Further we are aware of the Council report: "Aboriginal Place Nomination – Djeera (Mt Keira) and Five Islands" dated 27 November 2023 (Ex 2 folio 1255-1264), which indicates NSW Heritage's interest in this nomination and Council's support:

> "NSW Heritage has advised that it is considering an Aboriginal Place nomination for Djeera (Mount Keira) and the Five Islands under the *National Parks and Wildlife Act 1974*. Most of the nomination area is land managed by the NSW National Parks and Wildlife Service. The nomination area also includes two reserves owned and managed by Council – the Mount Keira Summit Park and Gooyong Street Reserve, as well as some privately owned land. In its capacity as landowner, Council has received a letter requesting Council support the Aboriginal Place nomination.
>
> It is recommended that Council forward a submission to Heritage NSW advising Council's support as a landowner and outlining some operational matters to be addressed in conjunction with the finalisation of the Aboriginal Place declaration."

87 The aboriginal cultural heritage experts agree that IELA HCA and Mount Keira, in particular, hold a high level of cultural and spiritual significance to the local Aboriginal Community (Ex 9 par 3). There is disagreement as to the extent that development on the site might impact on this significance.

88 Significant objections to the development have been made on aboriginal cultural heritage grounds. The Illawarra Local Aboriginal Land Council's submission to the earlier notified proposal is as follows:

> "Illawarra Local Aboriginal Land Council (ILALC) is writing regarding DA_2022/469 at 14 Cosgrove Avenue, Keiraville. In 2020, ILALC submitted an objection to the original DA (2020/4) for the proposed residential subdivision. This objection was based on the significant adverse impacts of the development on Aboriginal cultural values and the visual amenity of a significant cultural place. The original letter is attached to this email, and our concerns and objections remain the same.
>
> To the local Aboriginal community, Djeera (Mt Keira) holds deep family and kinship connections embodied through the memories and lives of people and community, extending through time to the ancestors that created this part of the Country. Djeera is a deep time connected place that speaks of Country, story and connection to Aboriginal people.
>
> Cultural practices that occur across the Djeera, such as food and medicine gathering, teaching and learning, ceremonies and crafts, instil a great sense of wellbeing and responsibility for the conservation of resources in the extended Aboriginal community and demonstrate a continual and deeply held respect for Djeera.
>
> Djeera is part of a cultural landscape that is integral to dreaming narratives, the mountain is the embodiment of an Ancestral being. The mountain contains ceremonial places, cultural learning and education tracks and pathway. It is an important place for resource gathering and use, occupation, connection to Country, teaching and learning and for peace.
>
> The proposed development will adversely impact cultural values, the visual cultural amenities and Djeera's vista and outlook. It will be visually obvious and intrusive. Additionally, the development will disrupt the linkage between the coast and the mountain, which is an important cultural connection for Aboriginal people.
>
> As it stands, ILALC continues to oppose this development due to the visual impacts that it will have on Djeera (a place of immense significance to the Aboriginal community) its cultural values, visual amenity and the landscape to which she is central."

89 Heritage NSW, in their referral response dated 18 August 2022, also expressed significant concerns in relation to potential impacts on aboriginal cultural heritage values: (Ex 2 Tab 17a folio 1264i):

> "Heritage NSW notes that there are significant Aboriginal cultural heritage values associated with this area and concerns have been raised by the local Aboriginal community about the potential impact of the development.
>
> While there has been some engagement with the cultural values of the space within the Aboriginal Cultural Heritage Assessment (ACHA), the values are not clearly articulated and there has been limited assessment of the impact to these values were the development to proceed. A cultural values assessment or alternative community engagement approach to support the ACHA developed by or in close consultation with the local Aboriginal community may

> help assist Council to make a decision on the appropriateness of the development.
>
> While the measures proposed by the developers commit to engaging with these values, designing with Country should occur prior to the DA being approved to ensure design is appropriate and sympathetic to the landscape and appropriately avoids or mitigates impact to values. To consider approving the development before understanding how the development will impact values limits the ability for Council to influence positive outcomes for Aboriginal communities."

90 These comments related to an earlier proposal, and it is understood that there is no feedback in regard to a revised proposal from the ILALC. Mr Smith acknowledged in oral evidence that there had not been an update of the ACHA report. The applicant retained the intended approach to commit to further cultural values assessment and engagement with the local Aboriginal community after approval. Procedurally, this is at odds with the correspondence from Heritage NSW sought those steps prior to any DA approval.

91 More generally, Mr Smith made his own findings that the amendments to the proposal adequately addressed impacts on Aboriginal cultural heritage. His arguments here included reductions in dwelling yield and removal of buildings at the highest levels of the site. There was also a reliance on the proposed landscaping and "trellises" (Ex 9 pars 16-22).

92 Given the clear significance of the setting, and mindful of the advice of Heritage NSW, and the hearing evidence, we are not convinced that adequate cultural values assessment or community engagement has occurred with respect to the (updated) proposal's potential Aboriginal cultural heritage impacts or capacities "to influence positive outcomes for Aboriginal communities". This concern is heightened given our own findings in regard to the proposal providing for an undesirable visual intrusion into views towards Mount Keira and escarpment. Consistent with the advice of Heritage NSW, in this case, it would be unreasonable to grant consent on these grounds alone.

**Construction stage amenity impacts in consideration of benefits of the proposal**

93 Council contends that the amenity impacts are disproportionate to proposal's beneficial aspects, in particular in regard to the supply of just 24 new dwellings.

There is an explanatory convenience, for us to consider the positive impacts of the proposal and those amenity impacts together.

*Considering the beneficial aspects of the proposal*

94 Planning evidence in support of the proposal argues that the proposal is in the public interest because it is consistent with the objectives of the R2 zone ("in providing for the housing needs of the community within a low density residential environment") and ensures efficient and sustainable land use, and promotes the orderly and sustainable development of the site (eg Ex 28 par 257). It might also be considered that the proposal would bring about a beneficial outcome in terms of ecological considerations. The BMP outlines various action aimed at reducing problems with pest species and ongoing management actions associated with regenerating native vegetation and habitat, with associated monitoring and review provisions. It is also noted that the proposal involves significant tree removal but also a system for offsetting residual biodiversity impacts via the retirement of ecosystem credits under the BDAR (section 8.3).

*Construction stage amenity impacts*

95 The feature of the proposal that we concentrate on in this section of the judgement is that of construction stage impacts. There is agreement between the construction stage experts on a number of factors (Ex 6 pars 13, 15, and 21, respectively):

- The proposal would involve the excavation of about 50,000 m3 of earth and rock over a 12-month period.
- During bulk excavation the maximum number of trucks to and from the site would be about 100vmpd. It is agreed that this is a maximum and is likely to be less on some days due to the nature of site and surrounding conditions, type of material being excavated etc.
- Parking spaces at intersections will be reduced along the haulage route for limited times. This will only occur when large machinery or equipment is being dropped to or from the site such as machine floats or cranes (using a 20m truck). It is agreed that this should happen outside of site construction hours (such as at night), will only occur a maximum of five times per month and will typically only be for a two hour period.

96 The intended haulage route was mapped in the documentation available to the Court. In particular we note Ex 24 which indicated heavy rigid vehicle haulage

routes, the location of stop/go traffic control personnel and “spotters”. There was also agreement on the employment of community liaison personnel, professional traffic control, all aimed at ensuring good communication of intentions with affected residents and the management of traffic flow and safety. There also seemed to be agreements that “haulage be limited to a reduction of no more than 5 vehicular movements in the morning school peak time (8am – 9.30am) and cease by 2.30pm to avoid conflicts with the afternoon “school peak” (Ex 6 par 25).

97 We take the view that the proposal would employ all available means to manage and minimise potential amenity impacts associated with construction stage. Our concern here relates to the severity of impact associated with such a large quantity of heavy truck movement (including the length of time residents would be exposed to it), despite these mitigative efforts. Generally, we reject the evidence of Ms Harrison and Mr Nelson that “this is only a short temporary impact on the adjoining street network and residents and occurs with any development or construction work” (Ex 6 par 23). Instead we accept the evidence of Mr Heaven as follows (Ex 6 par 25-26):

> “… undertaking haulage on narrow, residential streets that are frequented by the community clashes directly with the proposed construction activities. (Mr Heaven) remains of the view that the type of excavation that is required to facilitate this development is greater than that seen in some of the city centre tower excavations, and some of the excavation seen in larger greenfield subdivisions particularly within the Wollongong LGA. Despite agreement that traffic control, spotters etc will be monitoring the local streets, the reality is that this will become a daily occurrence for at least 12 months (during earthworks), and likely for the following 12 months during the building construction period. …The residents in the vicinity of the site haven’t seen, nor will they again, see excavation and haulage to the degree proposed
>
> … given the extent of supervision / interventions required to get safely to and from the site, allowing 12 months of haulage on residential streets is an unreasonable risk to place on the community and workers.”

98 A particular point of attention during the oral evidence was the arrangements for the 20m truck used for floating large machinery. Such movements were expected up to 5 times per month and during night time. The pinch point was Andrews Avenue where parked cars would need to be removed from the street to allow the 20m truck to pass. We perceive a very high level of (regular) inconvenience associated with this for affected residents.

99 Construction-associated amenity impacts along the haul route, generally, but especially in the quieter residential streets (Andrews Avenue, Cosgrove Avenue and the upper reaches of Murphys Avenue) would occur over an extended time and be quite severe.

100 Of course, the most severe construction stage impacts would associate with the immediate neighbours, especially adjacent to the site entry, where activity would be most intense.

101 Local residents and especially immediate neighbours are inclined to regularly raise concerns about construction stage impacts of projects. This arises particularly when neighbours are faced with much larger scale development next door. The acceptable intensity of annoyance does bear some relationship to the density or intensity of urban development which is affected; but also the otherwise public interest or benefit evident in a proposal.

102 In this instance, the project benefits (outlined above) are out of scale with the adverse amenity impacts forthcoming from the construction stage of the project. These impacts are directly related to the particular design schema adopted for the proposal in its setting. That is, we see the proposal as adopting a particular scheme in order to do as well as might be possible, in this setting of steep landform gradients, in regard to meeting the building height standard and reducing visual massing of the built form while optimising vehicle accessibility, including for service and emergency service vehicles. This scheme brings an unreasonable scale of earthworks and associated heavy vehicle movements in a residential setting, when compared to the overall housing yield and the balance sheet of ecological benefits. This is a further additional failing of the proposal.

**Other matters**

103 We are aware of the fact that the proposal does breach a development standard at cl 7.14 in WLEP relating to minimum site width requirements. The provision is as follows:

> Development consent must not be granted for development for the purposes of multi dwelling housing unless the site area on which the development is to be carried out has a dimension of at least 18 metres.

104 The breach relates to the access handle portion of the site (discernible in Figure 2 and apparently some 16.88m in width) rather than the area intended for built form. While the proposal would be likely to also fail on these jurisdictional grounds, the more substantive failings of the proposal are those indicated above.

**Conclusion**

105 Based on the reasoning above, the proposal does not warrant the grant of consent.

**Orders**

106 The Court orders that:

(1) The appeal is dismissed.

(2) Development Application DA-2022/469 for multi dwelling housing at Lot 90 DP 1086429, known as 14 Cosgrove Avenue Keiraville, is determined by refusal of consent to the application.

(3) The exhibits are returned, except Exhibits 1, D and Q which are retained.

**P Walsh** **L Coetzee**

**Commissioner of the Court** **Acting Commissioner of the Court**

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