



Land and Environment Court  
New South Wales

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Case Name: Thirroul Plaza Pty Ltd v Wollongong City Council

Medium Neutral Citation: [2022] NSWLEC 1569

Hearing Date(s): 25 - 28 July 2022

Date of Orders: 19 October 2022

Decision Date: 19 October 2022

Jurisdiction: Class 1

Before: Dickson C

Decision: The Court orders that:  
(1) The appeal is dismissed.  
(2) Development application number 2020/363 which seeks consent for Lot consolidation, demolition of existing structures, removal of 32 trees and construction of a 3 storey mixed use development containing 77 residential units across 4 building forms, wellness centre and swimming pool, commercial premises (14 shops, 2 kiosks and 1 supermarket) and 2 basement levels containing 299 carparking spaces (206 retail parking spaces, 77 residential visitor spaces), 51 bicycle parking spaces and 13 motorcycle parking spaces and associated road upgrade works at 282-298 and 302-304 Lawrence Hargraves Drive, Thirroul is determined by way of refusal.  
(3) The exhibits are to be returned except for Exhibits A, E, and 1.

Catchwords: DEVELOPMENT APPLICATION: demolition and construction of a proposed three storey mixed use development with basement car park – supermarket, shops, 77 residential apartments – whether the development has an adverse impact on built form and character of the village – acceptability of pedestrian

circulation and public domain -whether the development will result in unacceptable impacts on the adjacent heritage items – whether the residential component of the development will have appropriate amenity – whether the development will have an appropriate level of acoustic amenity given proximity to rail and commercial uses – consideration of public submissions and concerns – appeal dismissed, application refused.

Legislation Cited:

Civil Procedure Act 2005 s 56  
Environmental Planning and Assessment Act 1979 ss 3.42, 3.43, 4.15, 8.7  
Environmental Planning and Assessment Regulation 2000 cl 55  
Land and Environment Court Act 1979 s 34  
State Environmental Planning Policy (Transport and Infrastructure) 2021 cl 2.100  
State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development ss 4, 28  
State Environmental Planning Policy Resilience and Hazards cl 4.6  
Wollongong Local Environmental Plan 2009 ss 2.2, 2.7, 4.3, 4.4, 4.6, 5.10, 7.13

Cases Cited:

Concrete Pty Ltd v South Sydney City Council [2001] NSWLEC 227  
Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd (1996) 90 LGERA 68  
Stockland Development Pty Ltd v Manly City Council [2004] NSWLEC 355  
Universal Property Group Pty Ltd v Blacktown City Council [2020] NSWCA 106

Texts Cited:

NSW Department of Planning, Apartment Design Guideline (2015)  
Wollongong Development Control Plan 2009

Category:

Principal judgment

Parties:

Thirroul Plaza Pty Ltd (Applicant)  
Wollongong City Council (Respondent)

Representation:

Counsel:  
A Galasso, SC (Applicant)  
M Staunton (Applicant)  
A Seton, (Solicitor) (Respondent)

Solicitors:

Wilshire Webb Staunton Beattie (Applicant)

Marsdens Law Group (Respondent)

File Number(s): 2021/177626

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** These proceedings are an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) by the Applicant, Thirroul Plaza Pty Ltd, against the deemed refusal by Wollongong City Council of their development application DA/2020/363. The development application seeks consent for lot consolidation, demolition, tree removal and construction of a 3-storey mixed use development containing residential units across 4 building forms, a wellness centre and swimming pool, commercial premises and basement level carparking spaces and associated road upgrade works. The development is proposed at 282-298 and 302-304 Lawrence Hargrave Drive (LHD), known as “Thirroul Plaza” (Lot 103, DP 706867, Lot 2 DP 534253, Lot 1 DP 240526).
- 2 On 5 August 2021 the Court granted leave with the consent of the Respondent for the amendment of the development application pursuant to the provisions of the then cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation). The appeal was subject to conciliation on 1 November 2021, pursuant to s 34 of the *Land and Environment Court Act 1979* (LEC Act). The development application was further amended with consent of the Respondent on 22 March 2022. Despite the conciliation conference and the amendments to the development application, agreement was not able to be reached between the parties and the matter was listed for hearing.
- 3 The development for which consent is now sought by the Applicant in the proceedings is as follows:

‘Lot consolidation, demolition of existing structures, removal of 32 trees and construction of a 3 storey mixed use development containing 77 residential units across 4 building forms, wellness centre and swimming pool, commercial premises (14 shops, 2 kiosks and 1 supermarket) and 2 basement levels

containing 299 carparking spaces (206 retail parking spaces, 77 residential visitor spaces), 51 bicycle parking spaces and 13 motorcycle parking spaces and associated road upgrade works'

(Exhibit K)

4 The Respondent maintains that the development warrants refusal on the following grounds:

- (1) The built form and number of storeys proposed is excessive and does not comply with the requirements of Wollongong Development Control Plan 2009 (DCP 2009) and secondly, the development will result in adverse impacts on the character of the Thirroul Village Centre and upon views to the Illawarra escarpment.
- (2) That the approval of the development will result in unacceptable impacts on the context and the setting of the adjacent heritage items, precincts and landscapes and is inconsistent with the provisions of cl 5.10 of Wollongong Local Environmental Plan 2009 (LEP 2009).
- (3) The development will not provide an acceptable level of acoustic amenity to future residents and will result in land use conflict with commercial uses in the vicinity of the subject site.
- (4) The development application contains residential development on the ground floor which is prohibited by cl 7.13 of the LEP 2009. The development application requires the Court to be satisfied of the requirements of cl 4.6 of LEP 2009 prior to the grant of consent in order for the development standard to be varied.
- (5) That the proposed development fails to provide acceptable access, entry and wayfinding. Further, the design of the development does not facilitate natural surveillance or provide well defined entrances.
- (6) That a number of the proposed units will not provide acceptable levels of amenity for future residents. Further, the proposed communal open space is of poor design.
- (7) The site design does not provide adequate deep soil zones, the impacts to existing trees are not accurately documented and the proposed landscape design is not viable or sustainable.
- (8) The external traffic impact, the public domain works and the resultant loss of on-street parking provision, changes to loading facilities and relocation of the public bus stop will have a significant detrimental impact on the Thirroul Village Centre.
- (9) That it has not been properly demonstrated that there is a supermarket undersupply in the local community and the impact of the proposed development on existing local businesses has not been properly considered.
- (10) The proposed development is not in the public interest having regard to the proceeding issues, the concerns raised in the public submissions and the significant public opposition to the proposed development.

## Outcome of the Appeal

- 5 Having appreciated the site and its context at the view, listened to and considered the submissions of the residents, reviewed the expert evidence, the submissions of the parties and undertaken an assessment of the application I am satisfied consent should be refused. My reasoning is contained in full later in the judgment, however in brief I find:
- (1) That the built form of the development is incompatible with the desired future character of Thirroul Village Centre as detailed in Chapter D12 of DCP 2009. Further, that on merit, a variation to the building height development controls at cl 13.2 (a) and 18 of chapter D12 of DCP 2009 is not warranted as the objectives of the control are not achieved: s 4.15 (3A) (b) of the EPA Act.
  - (2) I am satisfied that the proposed development application will have a detrimental impact on the heritage significance of the Illawarra Escarpment Heritage Conservation Area (Escarpment HCA).
  - (3) Further, I find that the development should be refused because: firstly, the acoustic assessment fails to provide sufficient information to evaluate the likely impacts of the operation of Anita's Theatre on the proposed residential development; secondly, the development application does not sufficiently demonstrate how it proposed to accommodate or mitigate the existing acoustic impacts from the Beaches Hotel; and thirdly on the preceding basis I find that it is uncertain that the proposed development will provide an acceptable level of acoustic amenity for future residents.
- 6 I am satisfied that each of the preceding likely impacts of the development are sufficient to warrant the refusal of the application: s 4.15(1)(b) of the EPA Act. They are not relied on collectively to establish an unacceptable impact sufficient to warrant the refusal of the development application.
- 7 I note that both the public submissions and the evidence in the proceedings canvassed additional issues and matters. These included matters in relation to the external traffic impacts, loss of on street parking as a result of the proposed public domain works, and the acceptability of the amenity of the proposed apartments. Consistent with the obligation at s 56 of the *Civil Procedure Act 2005*, namely, to facilitate the just, cheap and quick resolution of the real issues in the proceedings, I have not made findings in relation to these matters as I am satisfied the aforementioned detrimental impacts of the development are sufficient for me to conclude the development application should be refused.

- 8 As a result of these findings, the outcome of the proceedings is that the appeal is dismissed, and the development application is refused.

### **Site**

- 9 The site is legally defined as Lot 103 DP 706867, Lot 2 DP 534253, Lot 1 DP 240526, known as “Thirroul Plaza”, with a street address of 282-298 and 302 - 304 LHD, Thirroul. The site contains a number of trees including four trees along the frontage to LHD which are proposed to be transplanted. Works are also proposed in the public domain (a portion of LHD, King Street, McCauley Street and Raymond Street) and in the rail corridor (tree removal).
- 10 The site is located within the B2 Local Centre zone pursuant to the provisions of Wollongong Local Environmental Plan 2009 (LEP 2009).
- 11 The site has a total area of 9,094.8sqm and a cross fall of some 5 metres from the south to the southwest. Lot 103 currently contains the Thirroul Plaza Shopping Centre with at grade parking, whilst Lots 1 and 2 are currently vacant. Lot 103 is accessed off King Street, whereas Lots 1 and 2 are accessed from LHD.
- 12 Lot 103 is identified as potentially contaminated due to previous uses. The site as a whole is identified in LEP 2009 as containing Class 5 acid sulfate soils. (Exhibit 1)
- 13 The site is identified as being flood affected, being located within an uncharacterised flood risk precinct.
- 14 Existing improvements on the site are proposed to be demolished.

### **Locality**

- 15 The site is located in the northern section of the Thirroul Village Centre (the Village) area which is separated from the southern section by a road bridge over the Main Southern Railway Line. Immediately to the northeast of the site is the Beaches Hotel. Anita’s Theatre, a heritage item under LEP 2009, is directly opposite the site across King Street. LHD adjoins the site to the east and is characterised by a mix of different small-scale retail and commercial uses. Finally, to the west of the site is the Main Southern Railway Line and W F Jackson Park adjoins the southern boundary of the subject site.



Figure 1: Aerial photo of the northern section of the Thirroul Village, subject site indicatively outlined in red.

source: <https://maps.six.nsw.gov.au/>

- 16 DCP 2009 provides site specific controls for the Thirroul Village Centre. At section 3.14 chapter D12 of DCP 2009 the existing character of the Village is described as follows:

Thirroul is the focal retail, business and cultural point for residents of the northern suburbs. Thirroul is situated between the Bulli Pass Scenic Reserve to the west and the Pacific Ocean to the east. It has a distinctive cultural identity that is supported by the retail amenity and the convenient clustering of community and educational facilities in or near the village centre.

Thirroul's village centre is separated into two distinct areas by the South Coast Railway line. The northern side of the village is the core focal point for retail and community services within the suburb and contains St Michael's Catholic Church and primary school. The southern side comprises of a small mix of retail and community services with a more village, compact character, highlighted by its close proximity to the Thirroul Railway Station. It contains a Montessori preschool and Thirroul Public School. The two sides of the village centre are unique and offer a variety of services and facilities that promote and improve the quality of life of all residents.

The north and south sides of the village centre are linked via a railway bridge over Lawrence Hargrave Drive and a footbridge at the Thirroul Railway Station providing vehicular and pedestrian access.

Thirroul residential area is characterised by a mix of single storey to two storey dwelling-houses including a number of circa 1920's and 1930's weatherboard and corrugated iron roofed bungalows. The coastal strip of Thirroul including along Lawrence Hargrave Drive contains a mix of single storey weatherboard and fibro dwellings and new contemporary dwellings and some medium density townhouses and walk up residential flat buildings.

New hinterland subdivisions on the foothill slopes of the escarpment contain new contemporary split – level and two storey dwelling styles with weatherboard or rendered brick wall construction and pitched, sloping flat or curved roofline forms. Thirroul also contains a number heritage items, including Thirroul railway station, Former Kings Theatre, Thirroul Baths (inter-war) precinct, old railway barracks, Thirroul public school, several federation and inter-war dwellings which also add to the distinct character of the village.

(Exhibit 3, vol 2)

- 17 In this judgment I have utilised the term 'escarpment' to encompass a more general reference to the range of mountains situated to the west of the Village and 'Escarpment HCA' when referencing the specific area covered by the local heritage listing.

### **Public Submissions**

- 18 In determining the development application, the Court is to take into consideration any submissions made. The submissions received by Wollongong City Council since the lodgement of the development application were tendered in the proceedings as part of the Respondent's evidence. I have read and considered those submissions.
- 19 The development application, in its original form was notified in accordance with the provisions of DCP 2009 from 8 to 27 May 2020. The notification period resulted in 515 submissions.
- 20 On 5 August 2020 the Applicant was granted leave by the Court to amend their development application. These amended plans were notified from 10 to 30 September 2020. This period of notification resulted in 1051 submissions, including 16 submissions of support.
- 21 The development application was further modified and renotified by the Respondent in August 2021 and March 2022. A total of 1060, and 1200 submissions were received in response to the respective renotifications. These submissions are included in the evidence before the Court.



22 All the submissions received by the Respondent throughout these notification periods traverse consistent areas of concern with the proposed development. These issues raised in the public objections can be summarised as follows:

- Concern about the effect of the proposed development on traffic volumes on LHD and the experience of traffic congestion in Thirroul town centres and surrounding streets. Many residents indicate in their submissions that the existing congestion is significant during peak hour and on weekends.
- Impact of the development, and the proposed traffic and transport changes, on pedestrian access and paths of travel through the town centre. That any reduction in accessibility will be of greater impact due to the ageing population of Thirroul.
- That parking in the village is 'at a premium' during the day under the existing circumstances, with many forced to use private parking at the rear of the existing IGA or Thirroul Plaza to access the shops on LHD. The proposed development will increase parking demand and make parking less accessible due to it being located in a basement.
- The removal of on street parking on LHD to facilitate the development will impact access and viability of the shopping strip. Further, the removal of the parking lane as a buffer to through traffic will reduce the amenity of the footpath dining for existing retail on the east of LHD.
- There is no commitment that new parking provided as part of the redevelopment will be available at no charge as is currently the case.
- Thirroul has a single access road in and out, placing residents at risk in the case of the need to evacuate in times of natural disaster. Additional residential development will exacerbate this risk.
- The traffic survey, which forms the basis of the traffic impact assessment, is not representative of the actual traffic demand as it was only done over a small period of time.
- That the design of the development is not compatible with the existing character of the village. Views of the escarpment are part of the character of the village and will be obstructed by the proposed buildings.
- The design of the development, its height and bulk, will obscure views to the Escarpment HCA and Anita's Theatre which are both listed heritage items.
- That there has been no community consultation about the plans for the redevelopment of Thirroul Plaza.
- The proposed redevelopment does not comply with the character of development envisaged by the controls in DCP 2009. The development will be overbearing and dominant. The development exceeds the two storey planning controls for the site.

- The village character of Thirroul, and its retail precinct, nestled under the heritage listed Escarpment HCA, is at risk of being lost with this example of overdevelopment.
- The development does not comply with the two-storey height limit and will impede views to the escarpment from King Street and LHD. The maintenance of views to the escarpment was a key driver for the development of the controls in DCP 2009.
- The proposed development exceeds the storey height limit and will increase overshadowing of LHD and the village itself.
- The development does not consider the impact of the loss of parking on LHD as a result of the traffic lights and the implementation of the bus lane. The removal of parking will affect business viability and create a potentially hazardous pedestrian environment in the village,
- There is no clarity that the proposed underground parking will be available 24 hours a day or free of charge both of which are necessary to support the ongoing viability of the centre.
- The proposed residential apartments will impact the operation and viability of Anita's Theatre and the Beaches Hotel by locating residential closer to these establishments which both operate late and have live music. Further, the acoustic assessment accompanying the development application fails to address this issue.
- The size of the development does not fit with the village feel of Thirroul.
- The Beaches Hotel has limited street frontage. Any future redevelopment of the Beaches Hotel site will rely on vehicular access and egress from King Street. The location of the vehicular access and egress for the proposed development is located in very close proximity to the existing vehicular cross over for the Beaches Hotel. Given its proximity and size there is concern that it has the potential to limit the Beaches Hotel site's options for vehicular and pedestrian access for any redevelopment.
- That the proposed development may have the impact of curtailing the ability for the Beaches Hotel to operate to the full extent of its license, and Anita's Theatre to operate in its current unlicensed form, due to the proximity of the proposed residential apartments.
- Indigenous heritage has been poorly addressed by the application.
- There has been no assessment of the potential impacts on the village during construction of the development. It is likely to significantly impact traffic, parking, noise and the overall amenity of the village for a significant period.
- There is no indication how the existing public toilets immediately adjacent to the existing building are to be incorporated into the development, or how they will be impacted by the construction. Access to them must be maintained for the public. The development application should include the upgrade and/ or replacement of the public toilets.

- The risk of flooding to the ground floor shops and basement carpark has not been addressed by the development application. The development application should be refused as the consent authority could not be satisfied that the matters listed in cl 7.3(3) of LEP 2009 can be met.
- The flood modelling completed in support of the development application is deficient.
- The development application relies too heavily on public transport, which is not a regular service nor supported by an integrated bus network.
- The development application should incorporate continuous weather shelter to provide cover for pedestrians across the frontage to LHD.
- It is inappropriate for the development to have a zero setback to LHD given the design of the project and the busy traffic environment.
- The proposed relocation of the taxi rank into King Street and the removal of on street parking in LHD will detrimentally impact the older demographic of Thirroul residents reducing the ease of their access to local shops and services.
- The development should be redesigned to provide vehicular access at the existing traffic lights at Raymond Road/ LHD which would have less impact on on-street parking, traffic congestion and place the new parking more central to the existing village shops.
- The proposed residential development relies on skylights for ventilation because the design of the development is too dense to provide appropriate cross ventilation.
- Given the size of the development some commitment to the provision of affordable housing should be made by the Applicant.
- The proposed communal space should be open to the public and create a pedestrian link from WF Jackson Park to King Street.
- The provision of additional supermarket, or further retail space, is unnecessary and not supported by an unmet demand.
- Local schools, and services generally, do not have capacity to absorb additional residents from this development.
- Approval of the development will lead to other developments for high density development within Thirroul Village and set an undesirable precedent for the future character of the locality.
- The proposed development does not reflect the form, type or architectural style of development that is supported by the community.
- The development application does not show how the supermarket will address waste management or the compaction of cardboard.
- The excavation works on the subject site to achieve the basement have the potential to cause undermining of the railway embankment which has a history

of instability.  
(Exhibit 4)

23 During the hearing provision was made for a number of objectors to address the Court directly and give evidence of their concerns in relation to the proposed development. These objections emphasised many of the submissions summarised in the proceeding. In addition, the following objections were made:

- (1) That the potential future access to a redevelopment of the Beaches Hotel will be prejudiced by the approval of the development application,
- (2) That the inclusion of residential apartments on the subject will bring the nearest residential receiver of any noise generated by the Beaches Hotel closer and will therefore impact the ability of the Beaches Hotel to trade and have live music.
- (3) That any residential units in the proposed development should be insulated/double glazed to ensure that any acoustic levels within them are acceptable, despite the proximate live music venues.
- (4) That the development will impact on the provision of parking to support live music events by reducing parking on LHD and there is lack of certainty of public access to the basement parking within the proposed development.
- (5) That the impact of the development on the iconic escarpment is underplayed by the Applicant but is a significant issue for the community. The impact is exacerbated by the proposed height and scale of the development.
- (6) The development seeks to privatise views to the escarpment at the expense of views from the public domain.
- (7) The size and scale of the development is out of character with the Village and will change it forever. The design of the development is not responsive to the modulation of the existing shopfronts or the provision of awnings over footpaths which is a characteristic of the Village.
- (8) The removal of at-grade open air parking and level pedestrian access to businesses in King Street will impact on ease of access for customers. This is particularly the case for elderly or mobility impaired customers.
- (9) The approach to the site design as a 'big box' retail does not integrate with the street shopping style of the village. Further, the contained mall style retail is unlikely to encourage shoppers to also visit the existing street shops. As a result, the development will draw viability from the existing retail to the new development to the detriment of the existing shops.
- (10) The loss of on street parking for shops fronting LHD will be significantly detrimental to retail viability for these shops and will reduce convenience of access for customers.

- (11) These on street parking spaces are high turnover spaces, supporting large numbers of customers on a daily basis. The removal of these spaces may result in the business who rely on volume trade being closed.
- (12) The loss of on street parking will also remove a buffer between customers utilising footpath dining and the traffic on LHD. The key concern is that the replacement of on street parking with through traffic will reduce the amenity of the footpath generally and the attractiveness of any seating due to traffic noise and the proximity of moving vehicles.
- (13) The increase in road width by the removal of parking on LHD will increase traffic speed, reducing pedestrian safety and the amenity of pedestrians on the footpaths.
- (14) The proposed relocation of the bus stop will reduce the ability of businesses in the vicinity of the new location to trade on the footpath.
- (15) Given the scale of the proposed development, the construction period is likely to be extensive. The increased noise, dust and reduced parking availability during this period may be sufficient to change retail habits of customers.
- (16) The design of the redevelopment of the subject site is a missed opportunity for a well-considered addition to the northern section of the Thirroul Village.  
(Exhibit 4)

24 During the assessment of the development application correspondence was also received from Transport for NSW (TfNSW) in response to a referral of the application by the Respondent. Correspondence dated 27 July 2022 states:

...

**Section 2.112 referral – Traffic generating development**

TfNSW does not object to the proposed development as amended on 21 July 2022, subject to:

- The deletion of condition 1 of Council's proposed draft without prejudice conditions of consent dated 18 July (for reasons set out further below); and
- The insertion of TfNSW's recommended conditions attached to this letter.

**Concurrence under section 138 of the Roads Act 1993**

TfNSW declines to provide its concurrence under section 138(2) of the Roads Act at this time. Any grant of section 138 consent would be premature at this time, and may cause significant unacceptable impacts to the safety and network efficiency of the state road network.

Instead, as set out in TfNSW's recommended conditions attached, TfNSW requires the Applicant to enter into a works authorisation deed (WAD) with TfNSW. Upon the WAD being entered into, TfNSW will exercise its powers

under section 64(1), section 72(1)(b) and section 87 of the Roads Act to give the necessary consents under the Roads Act for the proposed road works, including under section 138 of the Roads Act.

For additional clarity, I note that, despite the use of the phrase 'general terms of approval' in proposed condition 1 of the Council's draft without prejudice condition, the proposed development is not 'integrated development' for the purposes of division 4.8 of the *Environmental Planning and Assessment Act 1979* (the EPA Act): see section 4.46(3) of the EPA Act. Accordingly, sections 4.47 and 4.50 of the EPA Act do not apply to the grant of any section 138 consent in the future with respect to the proposed roads works.

For completeness, I also note that, despite the broad powers granted by section 39 of the *Land and Environment Court Act 1979* (LEC Act), the Court does not have jurisdiction to grant consent under section 138(1) of the Roads Act in the absence of TfNSW's concurrence under section 138(2): *Captive Vision Pty Ltd v Ku ring gai Council (No 3)* [2019] NSWLEC 1472.

...

(Exhibit 19)

- 25 On the Applicant's submission the effect of the correspondence from TfNSW is that TfNSW has indicated acceptance of the proposal, subject to the imposition of specific conditions which are accepted by the Applicant. In the alternative the Respondent submits that TfNSW is not a consent authority for these works and has not considered the environmental impacts of the proposed development. Further, Mr Seton notes that in the second paragraph of the letter TfNSW specifically disavows any consideration of the removal of on street parking.

### **Expert Evidence**

- 26 The Court was assisted by a broad range of experts, as detailed below:
- Town planning and urban design: Jessica Saunders and Dr Alexandra McRobert for the Respondent and Steven Layman and Brian McDonald for the Applicant. Their joint reports were tendered as Exhibit 14 and 15 in the proceedings. In addition to their joint reports the experts were called for cross examination.
  - Acoustics: Graham Atkins for the Respondent and Victor Fattoretto for the Applicant. Their joint reports were tendered as Exhibit 12 and 17 in the proceedings. In addition to their joint reports the experts were called for cross examination.
  - Traffic: Craig McLaren for the Respondent and Tim Rogers for the Applicant. Their joint reports were tendered as Exhibit 13 and 16 in the proceedings. In addition to their joint reports the experts were called for cross examination.

- Economic: Michael Cullen for the Respondent and Peter Leyshon for the Applicant. Their joint report was tendered as Exhibit 10 in the proceedings. In addition to their joint report the experts were called for cross examination.
- Heritage: Joel Thompson for the Respondent and Graham Brooks for the Applicant. Their joint report was tendered as Exhibit 11 in the proceedings. In addition to their joint report the experts were called for cross examination.
- Landscaping: Greg Tesoriero for the Respondent and Charlie Robinson for the Applicant. Their joint report was tendered as Exhibit 9 in the proceedings. In addition to their joint report the experts were called for cross examination.
- Contamination: Suri Mora for the Respondent and Matt Lemcke for the Applicant. Their joint report was tendered as Exhibit 8 in the proceedings. The report concludes that the previous contentions in the proceedings are in their opinion resolved by the imposition of conditions which are agreed by the Applicant. Further, the experts agree that in their opinion the consideration at cl 4.6 of State Environmental Planning Policy Resilience and Hazards (SEPP RH) is satisfied. On the basis of their agreements in the joint report the experts were excused from oral evidence.
- Flooding: Andrew Heaven for the Respondent and Anthony Barthelmess for the Applicant. Their joint report was tendered as Exhibit 7 in the proceedings. The report concludes that the previous contentions in the proceedings are in their opinion resolved by the imposition of conditions which are agreed by the Applicant. On the basis of their agreements in the joint report the experts were excused from oral evidence.

### **The building height provisions of LEP 2009 and DCP 2009 are not inconsistent**

- 27 In his closing submissions, Mr Galasso argues that it is open to for the Court to conclude that the provisions of DCP 2009, which seek to limit development on the subject site to two storeys (such as chapter D12 clauses 13.2(a) and 18.1), are inconsistent with the maximum height standard at cl 4.3 of LEP 2009. He argues that applying the provisions of s3.43(5) of the EPA Act the provisions of DCP 2009 should be read down.

#### *Relevant Planning Controls*

- 28 Pursuant to cl 4.3: Height of Buildings, and the height of building map which forms part of LEP 2009, the subject site has a maximum building height control of 12m. Building height is defined in LEP 2009 as follows:

***building height*** (or ***height of building***) means—

(a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or

(b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

29 Chapter D12: Thirroul Village Centre in DCP 2009 applies to the subject site as it is within the study area mapped in Figure 1 of clause 1.1.

30 The provisions of this chapter prevail over the more general provisions of DCP 2009, as explained by clause 2.2 of Chapter D12. The relevant provisions are clauses 13.2(a) and 18.1 which are reproduced below.

31 Clause 13 of Chapter D12 states:

13.1 General:

Building heights contribute to enhancing view corridors, emphasising the identity and legibility to significant structures, as well as framing important views and vistas. Coordinating the scale of buildings can also assist in the development of street character. In this regard, Thirroul Village Centre is best served by a uniform building height and scale that relates well to each other and provides appropriate definition to the street.

13.2 Development controls

Building Height

a) Building height is limited to two storeys except where specific in Figure 10'.

...

Floor to Floor Heights

a) The ground floor of a retail development must have a floor-to-floor height of no more than 4.5 metres (minimum height of 4.2 metres floor to ceiling).

b) The maximum floor-to-floor height of levels above the ground floor is 3 metres (minimum floor to ceiling height of 2.7m).

Roof Height

a) The maximum height from the upmost level to the top of the roof is 1.5 metres (Part 5).

32 It is accepted by the parties that Figure 10 shows the subject site nominated as limited to two storeys in height.

33 Clause 18 of Chapter D12 states

18.1 General

1. This part of the Precinct Plan sets out building envelope controls for the Northern and Southern sectors of the Thirroul Village Centre. The



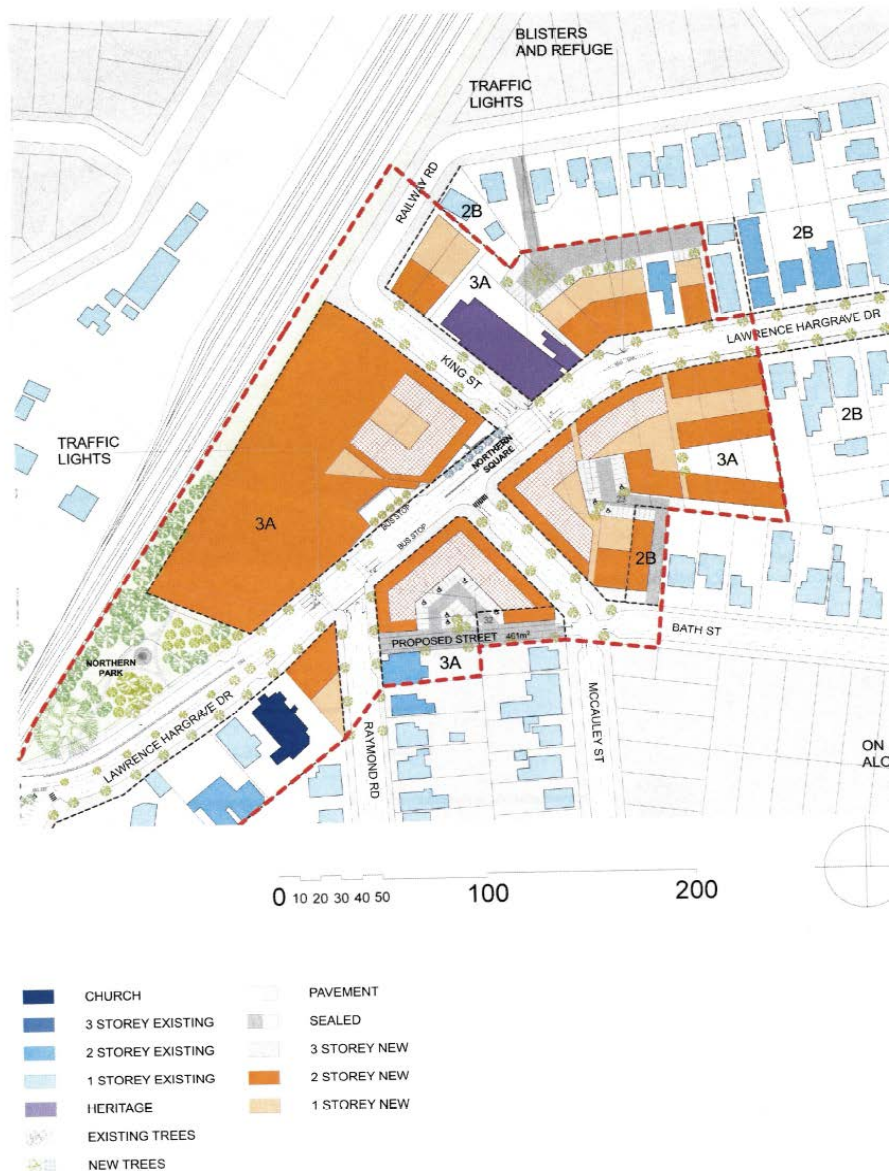
controls address heights, setbacks, build-to-lines, building depth and site coverage.

2. The aim of the design controls are to ensure that all development proposals are of an appropriate bulk and scale and maintain the desirable aspects of the local character, as well as taking into account environmental considerations.

...

5. The specified building envelopes are critical in achieving the desired future character of Thirroul. Any deviation from these diagrams or controls must be sufficiently justified and must be consistent with the vision and strategies contained in this plan.

- 34 The block diagram for the subject site is Figure 18: Indicative Building Envelope – North, which is extracted below:



- 35 Within Chapter D12 of DCP 2009, height measured in storeys is defined as:

‘The number of storeys is the maximum number of storeys which may be intersected by the same vertical line, not being a line which passes through a any wall of the building.

...’

36 The Applicant submits that the controls in LEP 2009 and DCP 2009 are inconsistent and in conflict. Mr Galasso relies on s 34.3(5) of the EPA Act to argue that the DCP provisions are of no effect to the extent that they are inconsistent and incompatible with cl 4.3: Height of Buildings in LEP 2009.

37 The relevant provisions of the EPA Act in relation to this question are:

**3.42 Purpose and status of development control plans** (cf previous s 74BA)

(1) The principal purpose of a development control plan is to provide guidance on the following matters to the persons proposing to carry out development to which this Part applies and to the consent authority for any such development—

(a) giving effect to the aims of any environmental planning instrument that applies to the development,

(b) facilitating development that is permissible under any such instrument,

(c) achieving the objectives of land zones under any such instrument.

The provisions of a development control plan made for that purpose are not statutory requirements.

(2) The other purpose of a development control plan is to make provisions of the kind referred to in section 3.43(1)(b)–(e).

(3) Subsection (1) does not affect any requirement under Division 4.5 in relation to complying development.

**3.43 Preparation of development control plans** (cf previous s 74C)

(1) The relevant planning authority may prepare a development control plan (or cause such a plan to be prepared) if it considers it necessary or desirable—

(a) to provide the guidance referred to in section 3.42(1), or

....

(5) A provision of a development control plan (whenever made) has no effect to the extent that—

(a) it is the same or substantially the same as a provision of an environmental planning instrument applying to the same land, or

(b) it is inconsistent or incompatible with a provision of any such instrument.

### *Summary of relevant expert evidence*

38 The question of whether the building height provisions in LEP 2009 and DCP 2009 were inconsistent was the subject of town planning evidence.

39 Ms Saunders evidence can be summarised as follows:

- (1) That cl 4.3 and the building height map in LEP 2009 ‘... provides a maximum height that would be permitted at the site. It does not entitle the entire development to build to that maximum’. (Exhibit 14)
- (2) That chapter D12 of DCP 2009 provides additional guidance on the development of the site and its relationship with the Thirroul Village Centre and surrounding context.
- (3) That the purpose of a development control plan is to provide guidance on the aims of LEP 2009 as it applies to the development, facilitate development that is permissible and achieve the objects of the land use zones. In her view DCP 2009 achieves these purposes. Applying those principles to the specific provisions Ms Saunders argues:

‘In the case of Chapter D12 of WDCP 2009, the Chapter does not provide guidance as to how the 12m maximum building height should be applied. In various parts of the Chapter, there is emphasis on the built form needing to give consideration to the maintenance of escarpment views, extracts from the chapter include the requirement to maintain views to the escarpment and sightlines that preserve connections to the escarpment, requirement to maintain views to the escarpment ...(etc)

It may be appropriate for an alternative site design which gave due consideration to these controls, and which gave due consideration to these controls and which was designed around the retention of key views to vary the two storey maximum. The proposal presented however, seeks consent for a built form that is inconsistent with the existing and desired future character of the Thirroul village centre, as sought to be achieved by the clauses in Chapter D12 of WDCP 2009, and the submitted Visual Impact Assessment demonstrates that the proposal will have adverse impacts on views from the Thirroul village centre. In my opinion, the poor site design and impacts of the development on key view lines from the Village Centre to the escarpment do not provide sufficient justification for the variation sought’.

- (4) That the primary concern of the building height controls in chapter D12 of DCP 2009 is maintenance of views to the escarpment. (Exhibit 14)

40 In cross examination Ms Saunders accepted that a 12m height standard is generally synonymous with a three-storey built form (3m floor to ceiling heights). In contrast Mr Galasso argued that applying the provisions of DCP 2009 requiring a two-storey development, would essentially replicate the

existing built form given the elevated nature of the existing ground floor.

Further, Mr Galasso submits that the proposed third storey is representative of the addition of a second storey to the existing Plaza development. This scenario arises from the specific characteristics of the existing benching of the subject site and the fact that the proposed development lowers the existing ground level of development at the boundary with LHD.

- 41 In the alternative Mr Layman notes that the amended development application is fully compliant with the maximum height control of 12m at cl 4.3 in LEP 2009. He accepts that Figure 10 in Chapter D12 of DCP 2009 indicates that the subject site has a proposed two storey height limit. However, he notes that the adjoining Beaches Hotel site, and properties on the eastern side of LHD, are subject to a height of two storeys at the street edge with a third storey setback from the street boundary some 3-6m. Mr Layman concludes that '(t)he principle of a two-storey street edge with a setback is established in the DCP for the northern sector of the Thirroul (Village) Centre'. He argues that the proposed development adopts this principle (of a recessed three-storey) 'as a way of reconciling the apparent conflict of a LEP 12m height limit (suggesting at least three storeys, possibly plus attic) and a DCP control for 2 storeys.' (Exhibit 14)
- 42 Mr Layman concludes that the design of the proposal is an appropriate response to the apparent conflict in the provisions of cl 13.2 of Chapter D12 of DCP 2009 and those at cl 4.3 of LEP 2009. (Exhibit 14)
- 43 Mr Seton submits that the height controls in LEP 2009 and DCP 2009 are not inconsistent on the following basis:
- The height development standard at cl 4.3 of LEP 2009 is a *maximum* permissible height.
  - Consistent with the reasoning in *Stockland Development Pty Ltd v Manly Council* [2004] NSWLEC at [87], DCP 2009 operates to confine the intensity of development otherwise permitted the local environmental plan.
  - As a development is capable of complying with the height controls in both DCP 2009 and LEP 2009, the controls are capable of existing in harmony and operating together.

## *Findings*

- 44 I am not satisfied that the provisions at clauses 13.2 and 18.1 of Chapter D12 of DCP 2009 are of no effect on either of the grounds available at s 3.43(5) of the EPA Act. Namely that either the nominated controls in DCP 2009 are the same or substantially the same as in LEP 2009, or that the nominated controls are inconsistent or incompatible. My reasoning follows.
- 45 Pursuant to s 3.43(5)(a) of the EPA Act, I am not satisfied that the provisions in DCP 2009 are the same or substantially the same as those in LEP 2009. Applying the common meaning of the words in cl 4.3 of LEP 2009 the nominated 12m height limit is a maximum. In contrast, in my view, DCP 2009 plainly seeks to control the number of storeys (not the overall height) of the development. Consistent with this analysis, I accept and prefer the evidence of Ms Saunders in this regard. I adopt her conclusion that the building height standard in LEP 2009 of 12m is a maximum height standard, not an entitlement or a standard that must be achieved across the subject site. Further, I am satisfied that the applicable DCP standard is directed to storeys within the proposed development (as defined by DCP 2009), rather than the meterage height of the maximum point of the building above existing ground level which includes elements such as roof features, lift overruns, parapets etc. I find that the exception at s 3.43(5)(a) of the EPA Act that would nullify the provision of DCP 2009 does not apply.
- 46 The second exception at s 3.43(5)(b) is that provisions of the DCP 2009 are to be of no effect if the DCP 2009 provisions are inconsistent or incompatible with the provisions of the environmental planning instrument, in this case LEP 2009. Giving 'inconsistent' and 'incompatible' their ordinary meaning results in the two provisions either: firstly, being self-contradictory; or secondly, needing to be incapable of existing together in harmony or being discordant. Plainly, in this case a building is capable of being within a maximum building height of 12 m whilst also being of a two-storey height. The provisions are not contradictory, are able to exist in harmony and are not discordant. I accept and adopt Mr Seton's submissions in this regard. I find that there is no unreconcilable tension between the height development standards for the site in LEP 2009 and the DCP controls relating to building height. In my view they can plainly operate

together: *Universal Property Group Pty Ltd v Blacktown City Council* [2020] NSWCA 106 at [13]. The exception at s 3.43(5)(b) of the EPA Act does not apply.

47 Therefore, I am not satisfied that the provision at cl 13.2 nor 18.1 of Chapter D12 of DCP 2009 is inconsistent or incompatible with the maximum height provision in LEP 2009 and of no effect.

48 I address the question of whether the provision at cl 13.2 and 18.1 of Chapter D12, amongst other controls in DCP 2009, should be varied utilising the flexibility provided at s 4.15(3A) of the EPA Act later in the judgment.

**The development has an adverse impact on built form and character of the village and on views to the escarpment.**

49 The Respondent argues that the development application should be refused because the built form and number of storeys proposed are excessive. Further, that the development application does not comply with the development controls in chapter D12 of DCP 2009 and will result in an adverse impact on the character of the Village and upon views to the escarpment.

*Relevant Planning Controls*

50 In addition to the maximum height standard at cl 4.3 of 12m, LEP 2009 contains the following relevant provisions:

**2.2: Zoning of land to which Plan applies**

The site is zoned B2 Local Centre. The proposed use is permissible with consent in the zone. The objectives of the zone are as follows:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To allow for residential accommodation and other uses while maintaining active retail, business or other non-residential uses at the street level.

**2.7: Demolition requires development consent**

The development includes demolition which is permissible with consent.

**4.4: Floor space ratio**

Floor space ratio (FSR), which provides for a maximum FSR of 1.5:1 for the site.

### **7.13: Certain land within business zones**

Certain land within business zones which requires that the ground floor for a building is not to be used for residential purposes.

- 51 Applicable development controls are also included in Chapter B3: Mixed use development in DCP 2009. The relevant controls are as follows:

#### **4.3 Building Height**

##### **4.3.1 Objectives**

- (a) To encourage buildings which integrate within the existing streetscape or the desired future character in an area which is undergoing transition.
- (b) To minimise the potential impacts of overshadowing and overlooking on adjacent dwellings and open space areas.

##### **4.3.2 Development Controls**

1. The maximum permissible building height for a mixed use development upon a particular parcel of land is shown on the relevant Heights Map applying to the subject site as contained in the relevant LEP.

#### **4.4 Front Setbacks**

##### **4.4.1 Objectives**

- (a) To reinforce the existing character of the street by acknowledging building setbacks.
- (b) To provide a continuous façade along main commercial streets.
- (c) To define the spatial proportions of the street and define the street edge.
- (d) To provide a transition between the public and private domain.

##### **4.4.2 Development Controls Within the B2 Local Centre zone:**

1. The building should be located on the front property boundary, where a continuous façade along main commercial streets is desired.

#### **4.6 Built Form**

##### **4.6.1 Objectives**

- (a) To support the integration of appropriate retail and commercial uses with housing.
- (b) To provide an identifiable and desirable street address to each building and dwelling.

(c) To create safe and more active lively streets and urban areas, which encourage pedestrian movement, and services to meet the needs of residents.

(d) To ensure that the design of mixed-use developments maintains residential amenity and preserves compatibility between uses.

(e) To allow for outlook and surveillance towards the street and the public domain.

(f) To encourage mixed used development that achieves the principles of ecologically sustainable development.

#### 4.6.2 Development Controls

...

6. Within the B1 Neighbourhood Centre and B2 Local Centre zones, commercial office / retail development is required at the ground floor level, as a minimum, within a mixed use or shop top housing building. However, any such use must be designed to minimise any potential adverse noise or amenity impacts upon the upper level residential apartments in the building.

...

8. In B2 Local Centre, B1 Neighbourhood Centre and B4 Mixed Use zones, the ground floor and first floor levels of a building must provide for minimum 3.3 metre floor to ceiling height clearances, to maximise the flexibility of in the future use of the buildings.

...

10. The following elements must be incorporated into the building design to define the commercial and retail components of the development: (a) Servicing of retail and commercial uses must be separated from the servicing of the residential component. Commercial and residential uses. (b) Residential entrances must directly address the street. The main pedestrian entrance or a foyer must provide for continuous and safe access for all people, including people with a disability.

52 As noted at [16] DCP 2009 includes Chapter D12: Thirroul Village Centre which provides specific controls for the subject site. In addition to the development controls extracted at [29-34], the following provisions are relevant:

(1) Clause 3.2: Objectives:

1. The key objectives of the Thirroul Village Centre Precinct Plan are:

a) To support retail frontage along Lawrence Hargrave Drive wherever possible;

b) To encourage retail activities along Lawrence Hargrave Drive;



- c) To encourage a viable village through a variety of uses and activities;
- d) To create and consolidate open spaces for the local community;
- e) To create a place that recognises cultural identity;
- f) To maintain efficient traffic flows whilst enhancing pedestrian amenity along Lawrence Hargrave Drive;
- g) To provide adequate parking to maintain viable retail activity;
- h) To maintain a village character with a safe pedestrian environment;
- i) To create a built form that compliments the existing urban fabric;
- j) To reinforce links to surrounding areas, in particular Thirroul Beach; and
- k) To retain key views to the escarpment.

(2) Clause 4.2 includes the following statement of desired future character:

1. The significance of the Thirroul Village Centre as a commercial and retail precinct with cultural linkages to the community of Thirroul as well as Thirroul's history can be strengthened through the expansion of existing commercial/retail operations, the encouragement of mixed-use development designed to foster a lively main street Village Centre, and improvements to community facility provisions.
2. The linkages between the Village Centre, the history of Thirroul and the community will be accommodated through the adoption of appropriate built forms and land uses that respond to the social and cultural aspirations of the community. The Village Centre will retain its identity as a low-rise township and a social / cultural hub.
3. Thirroul's historic 'gateway' role to the Northern Suburbs will be maintained through the provision of retail and parking areas servicing Lawrence Hargrave Drive.
4. Promoting economic growth within the Village Centre particularly in retail and small businesses will provide local employment and support the needs of the community. A strong local economy will enable people to shop, work and relax near their home and enjoy the benefits of high accessibility to services in regional centres.
5. Development of the Village Centre should appropriately respond to the natural environment in Thirroul, which includes but is not limited to the conservation and protection of natural resources, the coastal climate, the Illawarra Escarpment and the Pacific Ocean.

(3) Clause 4.2.2 provides the following statement of desired future character for the northern part of the Village:

1. The northern sector of the Village Centre will retain core retail village components, including supermarkets, the Beaches Hotel and the Thirroul Plaza. Additional residential activity will be provided; residences will retain the architectural character of the proximity and views to the ocean will be maintained.

2. The ocean views and view to Kennedy Hill from Lawrence Hargrave Drive at the crossing of the railway bridge will be maintained. The northern sector will be the focal point for retail. It will be characterised by a two-storey street wall that maintains the village scale. Three storey buildings are located in the vicinity of the Thirroul Plaza and the Beaches Hotel. The street character will be enhanced and improved by providing increased setbacks to the public domain.

3. Access, appearance and views throughout the Northern Village will be maintained.

(4) Clause 5.1: Views:

1. Existing views from the Village Centre to the escarpment and water are important visual components which should be maintained as a backdrop to the Village Centre.

2. Future built forms need to maintain views to the escarpment and sightlines that preserve connections to the escarpment and water. In this regard, building separation, building height limits and roofline controls need to maintain a built form rhythm that does not obstruct views from the Village Centre.

(5) Clause 11: Parking for vehicles and bicycles

11.1: General

The location, quantity and form of parking areas are a critical component of achieving an accessible and sustainable Village Centre. Parking will be provided in the form of designated car park areas and on-street parking. Car park areas allow for the clustering of a large number of spaces while on-street parking provides high levels of access to activities and creates a buffer between passing vehicles and pedestrians on the footpath.

(Refer to Figure 6)

11.2: Development Controls

a) Maintain parallel parking along Lawrence Hargrave Drive.

b) Provide on-street parking as indicated in Figure 6.

...

k) Provide surface parking for retail / commercial uses in accordance with the Car Parking requirements contained in Part E of the DCP.

l) Residential parking standards must be in accordance with the Car Parking requirements in Part E of the DCP.

...

n) Parking for residential uses can be underground.

o) No additional access to Lawrence Hargrave Drive will be provided unless exceptional circumstances apply.

...

- t) Promote underground car parking within the major retail portions of the Village Centre. Underground car parking is recommended for all new two or three storey developments.
- u) Vehicles must enter and exit sites in a forward direction.
- v) Provide the following minimum rates of bicycle parking for retail use;
  - i) 1 space per 300 square metres of GFA for employees;
  - ii) 1 space per 200 square metres of GFA for shoppers.

...

## (6) Clause 12: Built form

### 12.1 General

1. In order to create an identifiable and memorable environment the built form will be developed with the principle that shops must front important streets and public spaces wherever possible.
2. To retain views to the escarpment and the Pacific Ocean, three storey developments will be permitted only within the core retail area (north precinct)

### 12.2 Strategies

- a) Enhance the definition of public spaces in the Village Centre by maintaining a zero front setback and consistent built edges.
- ...
- c) Design and articulate buildings with strong vertical proportions, reflective of the existing buildings in the Village Centre.
  - d) Promote a two storey built form within the southern part of the Village Centre.
  - e) Promote a three storey built form with a two storey street wall within the core retail area in the northern part of the Village Centre to maintain a village scale.
  - f) Enhance and improve street character through providing increased setbacks in the Thirroul Plaza and Beaches Hotel vicinity so that access and visual appearance throughout the northern section of the Village Centre is maintained.
  - g) Accommodate retail and commercial uses by allowing deeper building footprints for the retail component within buildings, but maintain the town centre's character by avoiding 'big box' built form typology.
  - h) Limit building depth above ground floor to 18 metres to enable both residential and commercial uses to achieve cross ventilation and solar access. Refer to Figures 12, 13, 18 and 19.

## (7) Clause 19: Architectural character

### 19.1 General

A high level of urban design quality is greatly dependent on the design and appearance of buildings. Well-designed buildings not only improve

the character and appearance of the streetscape but also contribute to the coherence of the Village Centre.

## 19.2 Objectives

- a) To promote high quality architectural design;
- b) To ensure building designs reinforce the character of the street; and
- c) To ensure building designs reflect the cultural distinctness of the local culture.

## 19.3 Development Controls

- a) Express vertical elements within the façade rather than floor levels.
- b) Use windows with vertical proportions.
- c) Provide predominately glazed shop fronts to all ground floor retail areas and minimise blank walls at street level.
- d) Limit opaque or blank walls for ground floor uses to 20% of the street frontage.
- e) Highly reflective finishes and curtain wall glazing are not permitted above the ground floor.
- f) All buildings must express internal functions in their facade.
- g) Adopt vertical emphasis above awnings and avoid horizontal emphasis, particularly broad opaque, blank walls, and horizontal windows above the awning level.
- h) Articulate and fragment building walls addressing the street to add visual interest.
- i) Emphasise built form corners that are significant in the urban form of the Village Centre without adding additional height or obstructing existing views to the escarpment.

...

### 19.3.2 North Village

- a) Development must not be more than 3 storeys in height, with the upper storey set back a minimum of 6 metres from the street.
- b) Maintain the architectural character of the Northern part of Thirroul Village by responding to its proximity to Thirroul Beach and also to its surrounding residential areas.
- c) Implement a continuous two storey street wall along Lawrence Hargrave Drive; and
- d) Three storeys in the area confined to the vicinity of McCauley Street and King Street to increase the vibrancy of Thirroul's core retail identity. Refer to Figure 21.

### *Summary of relevant expert evidence*

- 53 In relation to this contention the planning and urban design experts gave evidence primarily on the following issues:

- Whether the proposed development is consistent with the existing and desired future character of the Village,
- Whether the consent authority should apply the flexibility available pursuant to s 4.15(3A)(b) of the EPA Act and vary the controls at clauses 13.2(a) and 18 of chapter D12 of DCP 2009, and
- Whether the impact of the proposed development on views to the escarpment from the Village are acceptable.

54 To the extent that their joint reports or oral evidence canvassed other issues relevant to built form, character or views to the escarpment I have read and considered that evidence but refrain from summarising it in this judgement. I have also reviewed and given consideration to the Visual Impact Assessment (VIA) provided by the Applicant as part of the development application.

55 Ms Saunders argues the development has an unacceptable adverse impact on the built form and character of the village and on views to the escarpment. Whilst concluding that the proposed development is inconsistent with the existing and desired future character, her reasoning is not separately detailed in the joint report but appears founded on her conclusions on the proposed variations to the controls and the view impacts.

56 Ms Saunders argues that a variation to the development controls in DCP 2009 should not be supported by the Court, her reasoning can be summarised as:

- The height of building map in LEP 2009 provides a maximum height permitted on the site of 12m. However, that provision does not 'entitle' the whole of a development to be built to that height.
- That a variation to the two storey height controls in DCP is not warranted, as firstly, the objectives of the standard is not met (the test at s 4.15(3A)(b) of the EPA Act) and secondly, the variation to the storey controls has a direct adverse impact on views to the escarpment from within the Village.
- DCP 2009, and in particular chapter D12, provide guidance on the form of development expected in the Village. The Applicant seeks to vary the block diagram control at clause 18.1(5) in DCP 2009. However, a variation to the expected built form by the proposed development is inconsistent with the vision and strategies of DCP 2009. In particular (2) and (5) which state respectively:

“...

2. The aim of the design controls are to ensure that all development proposals are of an appropriate bulk and scale and maintain the desirable aspects of the local character, as well as taking into account environmental considerations.

...

5. The specified building envelopes are critical in achieving the desired future character of Thirroul. Any deviation from these diagrams or controls must be sufficiently justified and must be consistent with the visions and strategies contained in this plan”

- Further, reviewing the VIA Ms Saunders concludes that the proposed development does not meet the objectives of chapter D12 of DCP 2009, in particular objective (k) which seeks to retain key views to the escarpment.
- Ms Saunders notes her primary concern with the variation to the block diagram controls proposed by the development application is the impact the variation has on views to the escarpment.

57 In summary, Ms Saunders concludes that the proposed development ‘seeks consent for a built form that is inconsistent with the existing and desired future character of the Thirroul Village’ and that the development will have adverse impacts on key views from the village to the escarpment. Further, she argues that the Applicant provides insufficient justification for the variation sought to the block diagram controls at clauses 18.1 of DCP 2009.

58 Relevant to the analysis of the impact of the proposed development on views to the escarpment from the Village, Ms Saunders and Dr McRobert provide the following analysis of the VIA:

‘ AM and JS note that the line of the escarpment is broken by the third storey in Camera View 02 (Block D), Camera View 15 (Block E), and Camera Views 17 and 19 (Blocks D and E). If the third storey of these two blocks were to be removed, the line of the escarpment would be maintained when looking toward the development from [the] north and south. It is considered from this visual analysis that the third storey to the rear of the site (along the railway) does not have a significant impact on the view to the escarpment and generally maintains the existing line of the escarpment.

Camera Views 09 and 14 demonstrate that despite the ‘gap’ between Blocks D and E there will be no view maintained to the escarpment from either side of LHD in front of the development. Views 10 and 12 demonstrate that the ‘gap’ does not read as a clean break in the built form due to the angle of the interface with the surrounding road network, however View 10 does demonstrate that a limited view of the lower portions of the escarpment would be retained over Block C. View 9 demonstrates that this limited view is further restricted to the point of not being able to be read by a pedestrian as they travelled closer to the Village Centre and Lawrence Hargrave Drive. If the residential units were differently oriented (for example perpendicular to the street, or if the break in the built form was aligned with key views to the escarpment) the permeability of the built form would likely provide further opportunities for substantial views to the escarpment, even while situated in front of the development.

(Exhibit 14)

- 59 To give further context to her evidence Ms Saunders clarifies that it is not her opinion that every view of the escarpment from LHD should be retained, but that the Applicant has not undertaken sufficient site analysis or consideration to identify and then seek to retain key public views.
- 60 In the alternative Mr Layman argues that: firstly, the proposed development is compatible with the character of the Village as detailed in DCP 2009, secondly, has an impact on views to the escarpment which is consistent with that which is expected by the planning controls, and finally, that the variation to the built form controls is warranted.
- The proposal achieves the desired future character by providing retail and activation of the LHD frontage of the site.
  - The proposal compliments the Village character by dividing the LHD frontage of the subject site into two blocks, with modulation, with a corridor through the site to allow views to the escarpment.
  - The proposed development complies with the principal development standard for height in LEP 2009, namely a maximum height of 12m.
  - Relevantly, at Part 12 of Chapter D12 DCP 2009 states: 'To retain views to the escarpment and the Pacific Ocean, three storey developments will be permitted only within the core retail area (north precinct).'
  - The proposal retains views of the escarpment by setting back the proposed third storey from the street edge (LHD). It is Mr Layman's view that this design process reduces the visual impact of the third storey when viewed from key viewing points in the Thirroul town centre.
  - The proposed development is a better outcome than a proposed development that complied with the LEP height control of 12m, and the DCP two storey height limit by proposing two storeys each of 6m height.
  - The variation to the block diagram control is justified. Firstly, because it retains the two-storey street edge consistent with the existing character. Secondly, the development achieves the setback third storey which is implicit in the LEP controls. Thirdly, the development provides retail frontage and activity to LHD and King Street. Finally, the built form is modulated and separated along the LHD frontage to provide a scale response to the existing character and provide views through the development to the escarpment.
  - The proposed development will add to the vibrancy and viability of the Village by the addition of retail and population to the Village.
- 61 Mr McDonald also provides evidence in relation to the VIA and draws the following conclusions from reviewing the 13 vantage points detailed in the VIA:

- That the 12m height standard in LEP 2009 means that it is not realistic to expect locations along LHD in close proximity to the development to retain views of the escarpment.
- At viewpoint 9 (located on the footpath on the eastern side of LHD) a two-storey building would prevent views of the escarpment.
- Viewpoints 14, 15, 17 and 19 (views from the footpath on the eastern side of LHD moving south) 'show that the proposed building will block all but the skyline of the escarpment, notwithstanding compliance with the 12m height of buildings standard.' (Exhibit 14)
- At viewpoint 10 (footpath proximate to 5 Raymond Road) the break provided between proposed buildings D & E and C & F allow a view through the subject site to the escarpment.
- That following completion of the development, the photomontages demonstrate that views of the escarpment will be retained to the north of the site on the eastern footpath of LHD (view point 01) within McCauley Street and Raymond Road.  
(Exhibit 14)

62 Along with the 50mm standard, in accordance with the Land and Environment Court Policy, the VIA provides each of the photomontage images at a 24mm focal length. Mr McDonald also argues that: "(t)he 24mm images more accurately represent the human field of vision, showing that the escarpment can be seen behind and to the sides from vantage points 1 and 2. The wider angle from vantage points 4, 5, 6, 10, 12, 17, 19 and 23 show that the escarpment will continue to be the dominant background behind and to the sides of the development". (Exhibit 14)

63 Finally, Mr McDonald makes two points about the context in which the VIA should be considered:

- Firstly, that the VIA does not represent how a pedestrian would experience views of the escarpment because they are taken as a stationary framed view, rather he argues a pedestrian moving through the village would see the escarpment as a serial experience of views.
- Secondly, that the impact on views to the escarpment are an expected by the planning controls and "not unexpected in [a] town centre situation where buildings are aligned to street frontages from the streetscape, such as in Bulli Town Centre where two storey buildings with high parapets prevent views to the escarpment". (Exhibit 14)

64 In his oral evidence Mr McDonald concluded that the impact on views from the proposed development to the escarpment is not significant. He argues that the impact on views to the escarpment arising from the proposed development is



similar to that currently experienced in the Village now and that the key views are maintained by the proposed development.

- 65 In recognising that the proposed development represents a variation to the two-storey height control at cl 13.2 of chapter D12 of DCP 2009 Mr Layman argues that such a variation should be supported by the Court on the following grounds:

‘The proposal is a better outcome than for example two storeys each nominally 6m in height. This would be compliant with the maximum building height control and literally consistent with the DCP “Building Form Control -North’. However, it would probably be less consistent with the achievement of the Built Form objective of retaining views of the escarpment’

(Exhibit 14)

- 66 Further, Mr Layman argues that the Court should apply flexibility and vary the control at cl 13.2 of Chapter D12 of DCP 2009 which seeks two storey developments on the grounds the objectives are met. His reasoning is:

‘The justification for the ‘variation’ from ‘specified building envelopes’ is that a 2 storey street edge is retained consistent with the existing streetscape, with a set back third level which achieves the desired future character implicit in the LEP maximum building height control and also achieves the third level setback principle established in the WDCP for the desired future character for a significant part of the northern sector of the Thirroul Local Centre’

(Exhibit 14)

### *Findings*

- 67 As noted at [5] I find that the built form of the proposed development is incompatible with the character of the Thirroul Village. The reasoning supporting this finding is as follows:

- Clause 4.1 and 4.2 of DCP 2009 contain statements of existing and desired future character of the Village respectively, refer to [46]. At cl 5.2.3 North Village North Village the statement of existing and desired character is supported by three relevant development controls:

‘(a) Limit development to three storeys, as indicated in Figure 10.

(b) The third storey of a development must be setback a minimum distance of 6 metres from the front boundary;

(c) Any new development may be required to lodge a photomontage to Council, demonstrating the proposed development does not detract from views of the escarpment.

...’

- Whilst not determinative, it is relevant that the development application represents a variation to the control at c; 5.2.3 at sub cl (a) and, in my assessment, to sub cl (c).
- Further, DCP 2009 contains specific controls for Thirroul, devoting chapter D12 to detailing development controls that will apply within the bounds of the Village. This chapter, and its specific controls, when read in the context of all of the controls in DCP 2009, are the focal point of the assessment of whether or not the proposed development is compatible with the desired future character of the Village. It is appropriate in my view to give weight to these controls given their specificity and the public consultation which underpinned their development: *Stockland Development Pty Ltd v Manly City Council* [2004] NSWLEC 355 at [87].
- I accept and adopt the conclusion of Ms Saunders, as summarised at [55]-[57] that the proposed development is incompatible with the existing and desired character of the Village. In addition to that evidence, in my view, the inconsistency of the proposed development with the existing and desired future character arises from:
  - Firstly, the length of the proposed development as perceived in the streetscape of LHD and demonstrated by viewpoints 10, 12 and 15 of the VIA. The length of the proposed development (approximately 35m for Block E and 37m for Block D) is in contrast firstly with the rhythm of the existing shopfronts on the eastern side of LHD and secondly the scale which is sought to be retained by DCP 2009 For example: cl 4.2(7) which emphasises a rhythm of vertical articulation and the controls at clauses 19.1, 12.2 (c) and (f), extracted at [52]). On this basis I disagree with the evidence of Mr Layman that the built form of the proposed development is modulated and separated along the frontage of LHD.
  - Secondly, I am satisfied that the pedestrian experience of the proposed development in proximity to LHD, and within the Village itself, is contrary to the intent of maintaining the identity of the Village as a low-rise township, codified in control 5.3.2 in chapter D12 of DCP 2019. In my view the VIA demonstrates that the proposed setback to the third storey is not sufficient to maintain the primacy of the two-storey scale that is an essential element of the existing and desired character of the Village.
  - Thirdly, I accept the evidence to Mr Thompson, summarised at [101], and his conclusion that the proposed development lacks vertical expression and provides insufficient breaks in its built form to ensure it does not read as a contiguous building mass. In my assessment both of these factors result in the proposed development being discordant with the existing and desired future character of the Village.

68 For the preceding reasons I conclude that the proposed development will have an adverse impact on the character of the Village as defined in DCP 2009.

- 69 On the Respondent's case the proposed development is inconsistent with the development control cl 5.3.2(c) in chapter D12 of DCP 2009 which states: 'any new development may be required to lodge a photomontage to Council, demonstrating the proposed development does not detract from views of the escarpment'.
- 70 In my assessment the proposed development also represents a variation to the following controls in Chapter D12 of DCP 2009:
- Clause 13.2 which states: 'Building height is limited to two storeys except where specified in Figure 10'. I note that figure 10 nominates the site as being subject to a two-storey height limit; and
  - Clause 18.1 which at Figure 18 mapped the site as being two-storey development.
- 71 The objectives of the preceding controls each include reference to the need to maintain views to the escarpment. They are extracted below:
- The objectives of the Views section at clause 5.1 General, states:
    - '1. Existing views from the Village centre to the escarpment and water are important visual components which should be maintained as a backdrop to the Village Centre.
    - 2. Future built forms need to maintain views to the escarpment and sightlines that preserve connections to the escarpment and water. In this regard, building separation, building height limits and roofline controls need to maintain a built form rhythm that does not obstruct views from the Village Centre.'
  - The objectives of the built height section at clause 13.1 states:
    - 'Building heights contribute to enhancing view corridors, emphasising the identity and legibility to significant structures, as well as framing important views and vistas. Coordinating the scale of buildings can also assist in the development of street character. In this regard, Thirroul Village Centre is best served by a uniform building height and scale that relates well to each other and provides appropriate definition to the street.'
  - The objectives of the built form section at clause 12.1(2) states:
    - 'To retain views to the escarpment and the Pacific Ocean, three storey developments will be permitted only within the core retail area (north precinct)';
- 72 Pursuant to s 4.15(3A)(b) of the EPA Act, where a development application does not comply with a standard in a DCP, the consent authority is required to be flexible in applying the provisions and allow reasonable alternative solutions that achieve the objects of the standards. In the assessment of the current

application, it is my determination that such flexibility is not warranted. It follows that in my assessment the proposed development has a likely detrimental impact on views to the escarpment. My reasoning is:

- The relevant objectives of each of the development controls sought to be varied seek to retain views of the escarpment from the Village.
- I note that the Applicant has prepared a VIA which includes photomontages from viewpoints throughout the Village. I have reviewed and assessed this VIA as part of the evaluation of the development application.
- Having undertaken this assessment of the VIA, I adopt and prefer the analysis and evidence of Ms Saunders and Dr McRobert as summarised at [58]. A fair analysis of the VIA demonstrates that the portion of the proposed development which seeks to vary the development control (the third storey) impacts views to the escarpment from within the Village. For example, in Viewpoint 2 (approximating the view of a pedestrian on the eastern side of LHD) the third storey (the variation) disrupts the silhouette of the escarpment against the sky and dominates the expansiveness of the escarpment as a backdrop to the Village. A similar adverse impact/obstruction is demonstrated in Viewpoint 10, 12, 15, 17 and 19.
- However, I agree with the limitation advanced by Ms Saunders that the intent of the controls is not that no impact on views to the escarpment from the proposed development is required for acceptability.
- In my view the impacts from this development are unacceptable on three grounds. Firstly, on the basis of the cumulative extent of the obstruction of views to the escarpment from the Village arising from the development. Secondly, the lack of provision, within the design of the proposed development, of an effective view through the development site to the escarpment. And finally, that the obstruction of views to the escarpment arises from a variation to the built form development controls in DCP 2009 by the inclusion of a third storey.

73 For the proceeding reasons I am satisfied that, on merit, a variation to the development standards at clauses 5.3.2(c), 13.2 and 18.1 of chapter D12 of DCP 2009 is not warranted. On my assessment, applying the provisions at s 4.15(3A)(b) of the EPA Act, the objectives of the relevant controls are not achieved by the proposed development through a reasonable alternative solution to the development standards.

74 In evaluating the merits of the development, and the Respondent's contention that the proposed development is inconsistent with the character of the Village and has an adverse impact on escarpment views, I have given weight to the submissions made from the public during the assessment of the application: s

4.15(1)(e) of the EPA Act. Many of those submissions emphasise that firstly, Thirroul is characterised by its village feel and escarpment views along its linear main streetscape; secondly, a concern that the unsympathetic design of the proposed development will have an adverse impact on the essential character of Thirroul Village and finally, that the height of the proposed development will unreasonably compromise views to the escarpment from east side of LHD and Raymond Road.

- 75 I am satisfied that the adverse impacts on the character of the Village, and the detrimental impacts to views to the escarpment are both likely impacts of the development: s 4.15(1)(b) of the EPA Act. These detrimental impacts are in my view sufficient to warrant the refusal of the development application.

**The development has a detrimental impact on heritage significance.**

- 76 The Respondent argues that the development application should be refused because it will result in unacceptable impacts on the context and setting of two proximate heritage items, being: Anita's Theatre; and the Illawarra Escarpment heritage conservation area (the Escarpment HCA).
- 77 In their joint report of the heritage experts agree to the following key viewing points to the two heritage items from within the Village.
- View A: from LHD on the southern approach to the development site, approximately halfway along the frontage of W F Jackson park looking towards the subject site.
  - View B: from LHD on the northern approach to the Village in proximity of the intersection with Arthur Street looking west toward Anita's Theatre.
  - View C: from the pedestrian waiting area on the eastern corner of the intersection of LHD and Raymond Road looking toward the escarpment.
  - View D: from the footpath on the eastern corner of the intersection of LHD and McCauley Street looking west to the escarpment.
- 78 Photographs of these views were incorporated in the joint report. Comparing the above viewpoints to the VIA they do not directly correlate. However, View A roughly equates with View 19 in the VIA, View B & C are not included in the VIA, View D roughly equates with View 2 in the VIA.

- 79 In his oral evidence Mr Thompson confirmed it was not his expectation that development of the subject site would have no impact on the identified key views. Mr Brooks agrees.

*Relevant Planning Controls*

- 80 To the north of the site is Anita's Theatre (formerly known as King's theatre) which is a locally listed heritage item. It is listed in schedule 5 of LEP 2009 as Item 6155 with the following description:

Thirroul      Former Kings Theatre      264-270 Lawrence Hargrave Drive      Lot 101, DP 1126857      Local      6155

- 81 At cl 5.10 Heritage conservation of LEP 2009 it states:

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

- (a) to conserve the environmental heritage of Wollongong,
- (b) to conserve the heritage significance of heritage items and heritage conservation areas, including associated fabric, settings and views,
- (c) to conserve archaeological sites,
- (d) to conserve Aboriginal objects and Aboriginal places of heritage significance.

...

(4) **Effect of proposed development on heritage significance** - The consent authority must, before granting consent under this clause in respect of a heritage item or heritage conservation area, consider the effect of the proposed development on the heritage significance of the item or area concerned. This subclause applies regardless of whether a heritage management document is prepared under subclause (5) or a heritage conservation management plan is submitted under subclause (6).

...

- 82 The statement of significance for Anita's Theatre contained on the NSW Heritage Inventory is extracted below:

The former Kings' Theatre building has significance for the local area for historical, aesthetic, social and reasons for reasons of rarity and representativeness. The building is a purpose designed cinemas built during the 1920's and formed part of the Wollongong Theatres Pty Limited chain. It is the only cinema/ theatre building to remain in Thirroul, where once were several venues where movies were shown. The building provides valuable evidence of the growth and development of Thirroul as a recreational resort during the early twentieth century.

The building's design is representative of the work of the architectural firm Kaberry and Chard, which designed numerous cinemas throughout New South Wales and other states during the 1920's, including the Majestic at Petersham, Montreal at Tumut and the former Athenaeum Theatre in Junee. The fabric is

representative of theatres built in suburban Sydney and smaller country centres during the 1920's, as evidenced by its structural system.

The building is a prominent local landmark that contributes to the visual identity of Thirroul and provides some special associations to older residents of Thirroul who would have attended screenings prior to its closure in 1966. The building is a rare surviving cinema building of the 1920s in Wollongong and its environs that has retained some original fabric.

- 83 The subject site is also in the vicinity of the Escarpment HCA which forms a backdrop to the west of the Village. The description and statement of significance for the Escarpment HCA contained on the NSW Heritage Inventory is extracted below:

### **Description**

Area approximately 3900ha between 3 LGAs at the eastern extremity of the Illawarra Range. It includes the edge of the Woronora Plateau and those upper foothill slopes which possesses attributes whose preservation needs to be assured ie. the natural rock exposures, forests and pasture lands, threatened and protected species.

The adjacent narrow coastal plain exaggerates the vertical scale of the escarpment. In the horizontal plane the escarpment forms a magnificent backdrop to the heavily development industrial and newly emerging residential areas. The escarpment extends for an extraordinary length of relatively unbroken cliff lines. Cliffs of the escarpment are generally sheer and spectacular.

The varying colours of their sandstone exposures contrast with both the mixed heath vegetation and low forest at the plateau edge and the mature eucalypt forest and the mature eucalypt forest and pockets of lush remnant rainforest near the cliff base and on deeper soils on the slopes. Red cedars ('Toona Australis'), once common are becoming rarer. Many other species rapidly disappearing species are still to be seen in this landscape (NT). The cliffs are generally sheer and spectacular, extending in relatively unbroken lines for a remarkable distance.

### **Statement of Significance**

An inspirational cultural landscape of supreme importance. Values encompass scenic, ecological, historic and indigenous cultural, social (including tourist and recreational), visual and natural history.

The combined effect of a narrow coastal plan, rugged uplift sheer walls, rich forest and pasture lands give a most dramatic landscape of considerable grandeur which exceeds any other coastal plain and mountain landscape on the NSW coast. There are many vantage points to experience the extensive views and vistas into and out from the Illawarra Escarpment. Many smaller areas within the escarpment are of specific scientific, historic and scenic importance. The escarpment is located adjacent to one of the most heavily industrialised and confined areas on Australia's eastern coast (NT 1974). It is the single most important landscape feature of the Illawarra

and is [an] integral part of the wider landscape including above the escarpment and the coastal plain.

(Exhibit 11)

- 84 The subject site is not a listed heritage item or within a heritage conservation area.
- 85 There is nothing in the evidence that suggests a likelihood of the presence of indigenous heritage on the subject site. In his oral evidence Mr Thompson confirmed that in his view appropriate examination had been done and that the Respondent was satisfied the development would not have any impact on indigenous heritage. I accept his evidence.
- 86 The relevant heritage provisions are contained in Chapter E11: Heritage Conservation in DCP 2009. Firstly, at clause 14.2 Development Controls which requires specific matters to be taken into account for development in the vicinity of a heritage item or in a heritage conservation area. Those matters are:
- (a) The character, siting, bulk, scale, height and external appearance of the development;
  - (b) The visual relationship between the proposed development and the heritage item or heritage conservation area;
  - (c) The potential for overshadowing of the adjoining heritage item or any building within a heritage conservation area;
  - (d) The colours and textures of materials proposed to be used in the development;
  - (e) The landscaping and fencing of the proposed development;
  - (f) The location of car parking spaces and access ways into the development;
  - (g) The impact of any proposed advertising signs or structures;
  - (h) the maintenance of the existing streetscape, where the particular streetscape has significance to the heritage site;
  - (i) The impact the proposed use would have on the amenity of the heritage site; and
  - (j) The effect the construction phase will have on the well being of a heritage building
- 87 Secondly, at cl 14.2.3 of chapter E11: Heritage Conservation of DCP 2009 that '(d)evelopment in the vicinity of a heritage item should give strong regard to any significant views to and from the heritage item or heritage conservation area and any public domain area.'



- 88 These two provisions of the DCP 2009 were the focus of expert evidence, in particular, clause 14.2(a) through (d) and whether the proposed development had a detrimental impact on the key views to the two heritage items.
- 89 Finally, chapter 11 of DCP 2009 at clause 20.11 Illawarra Escarpment Landscape Heritage Conservation Area reproduces the statement of significance for the Escarpment HCA and requires a development application within the Escarpment HCA to include a heritage impact assessment. This requirement is met by the development application.

### **Summary of relevant expert evidence**

- 90 In their joint report, the heritage experts detailed the heritage management framework and the heritage values that were relevant to the proposed development. I have read and considered this information along with the individual opinions of the experts.
- 91 Mr Thompson and Mr Brooks agreed that there were two key heritage items likely to be impacted by the proposed development, being:
- Item 6155: King's Theatre Building (Anita's Theatre); and
  - Item 6480: Illawarra Escarpment HCA
- 92 The statement of significance for these items is detailed at [82] and [83].
- 93 Mr Brooks broad position is that the development "will have acceptable impacts on the setting of the King's [Anita's] Theatre building and on key views from Thirroul Village to the Illawarra Escarpment [HCA]". (Exhibit 11)
- 94 In the alternative, Mr Thompson concludes that the proposed development "will impact in a significant manner on key views from Thirroul Village to the Illawarra Escarpment, and on the setting of the King's [Anita's] Theatre building". (Exhibit 11)
- 95 The reasoning for the conclusions of both heritage experts is summarised in the following.

### *Anita's Theatre*

96 The experts agree that “(t)he Kings [Anita’s] Theatre Building represents the largest and most visible built form in the township and its prominence is a core aspect of the village character.” (Exhibit 11)

97 Additional survey information tabled at the joint conference allowed the experts to compare the relative levels of the Anita’s Theatre and the overall height of the proposed development. They conclude:

‘That the proposed development, including the rooftop plant, whilst taller than the Theatre ridgeline, is unlikely to be visible above the ridgeline of the King’s Theatre in views along the approach [on LHD] from the north. The Theatre will be retained as the dominant build feature as perceived in this approach to the Village.’ (Exhibit 11)

98 It is Mr Brooks view that the proposed development provides a sensitively designed addition to the built environment of the Village. Further, he concludes that the proposed building will not threaten the prominence of the Anita’s Theatre. His reasoning is as follows:

- That the new building elements will reactivate the central shopping precinct and whilst inevitably it will change the streetscape of the Village, that change will not be detrimental.
- The two-storey street frontage of the development is divided into bays to reflect the rhythm of the existing street fronting shops along LHD. The streetscape rhythm is reinforced by varying parapet heights and colours in the proposed design to break down the mass of the development in relation to the Anita’s Theatre.
- The upper-level residential accommodation of the proposed development is set back from LHD and reinforces the tradition two-storey scale of the village.
- These approaches to the architectural design maintain the prominence of Anita’s Theatre.  
(Exhibit 11)

99 Mr Brooks concludes that the above attributes of the proposed development mean that it will be a suitable and respectful addition to the Village streetscape whilst retaining the prominence of the Anita’s Theatre.

100 In oral evidence Mr Brooks agreed that the proposed development maintains the dominance of Anita’s Theatre, despite the fact it did obscure characteristic features of the item. In his view, any detrimental impact to the significance of Anita’s Theatre is not significant.

101 In the alternative Mr Thompson concludes that the proposed development will result in an unsatisfactory impact on the heritage setting and significance of Anita's Theatre. His reasoning is summarised below:

- That the design of the proposed development is inconsistent with the desired future character sought for the Village. In particular, he concludes it inconsistent with the requirement at clause 1.2(7) of chapter D12 in DCP 2009 for new buildings to "be designed and articulated through vertical components and roof forms and contribute to the character of the village centre by adding visual interest to the skyline when viewed from street level or surrounding key vantage points". (Exhibit 11)
- That whilst the frontage of the proposed development to LHD has been divided into two blocks in his view the overall site design fails to provide sufficient vertical expression or adequate articulation to mitigate the significant horizontal length of the proposed development fronting LHD.
- The proposed development is comprised of a number of large, bulky forms which are similar in design and materials. In his view, despite the limited articulation in the design, this similarity means that the development will read in the streetscape of LHD, and in the Village, as
- That the proposed built form is of a significantly larger size, scale and mass than that of the Anita's Theatre. He notes that the prominence of the theatre in the Village and as a landmark is noted in the statement of significance as one of the attributes of its importance.
- Mr Thompson concludes that given the preceding characteristics the development will detract from the heritage significance arising from the prominence of the theatre.

102 He concludes that the size and scale of the development when viewed in the streetscape has "the potential to de-escalate the prominence and significance of the Kings [Anita's] Theatre building within the street" which is a detrimental impact to its heritage significance. (Exhibit 11)

103 In his oral evidence Mr Thompson maintained his view that the proposed development will have a detrimental impact on the significance of Anita's Theatre. He reiterated his assessment that the impacts arise in two main ways. Firstly, from the scale of the built form elements within the proposed development which he argues will compete with the landmark quality and prominence of Anita's Theatre in the Village, and secondly, from the horizontal emphasis in the design of the development as demonstrated in the LHD streetscape elevations.

104 In cross examination Mr Thompson acknowledged that a future redevelopment of the Beaches Hotel site to the maximum height limit in LEP 2009 and storey control in DCP 2009 (part three storey) would impact views to Anita's Theatre. However, whilst conceding that it would likely have an impact equivalent to the proposed development, he argued that such potential impact would depend on the design of an actual proposal for the Beaches Hotel site.

#### *Escarpment HCA*

105 In their joint report, the experts agree that the proposed development will not have any direct impact on the heritage values of the Escarpment HCA. Rather they agree that any impacts from the proposed development arises in two ways: firstly, from the potential for the development to disrupt views to the Escarpment HCA from within the Village; and secondly, to impact the prominence of the Escarpment HCA as a backdrop to the Village.

106 Further, the experts noted that the "significance, character and visibility of the Illawarra Escarpment extends throughout the Wollongong Local Government Area and that the Thirroul Village Centre provides one viewing point within that broader plain." (Exhibit 11) I have taken note of this agreement in my considerations.

107 Mr Brooks' evidence emphasises that none of the natural, historic, scenic or cultural aspects of the Escarpment HCA, or its identified significance, will be impacted by the proposed development. Further, he concludes that the development will not impact the role of the Escarpment HCA in defining the character of, and background to, the Village. Mr Brooks supports his conclusions with the following reasoning:

- Thirroul's identity is characterised by a strong sense of enclosure along LHD, generated by tall retail parapets and Anita's Theatre. These historic building forms limit existing views to the Escarpment HCA from the Village.
- The design results in the main frontage of the site to LHD being divided into two blocks, separated by a staircase. This allows a view through the site to the Escarpment HCA maintaining a link to the Village.
- That the proposed development will have a taller streetscape presence than the existing development. However, the following view corridors will provide sufficient visibility for pedestrians along the eastern footpath of LHD to maintain the presence and identity of the Escarpment HCA in the Village, those being:

along King Street, between the subject site and the Beaches Hotel and through the proposed development at the break between Block D and E.

- That 'there can be no doubt that the Escarpment [HCA] and the coastline are deeply embedded in the popular psychology of the Illawarra and all its inhabitants and visitors to [the] region' but in his view that importance is not impacted by the proposed development.
- That an assessment of the acceptability of the proposed development should give weight to the impact that would arise from a development proposal which complied with the building envelope controls in LEP 2009 and DCP 2009 (presumably a planned level of impact). This comparison supports a conclusion that the impact is acceptable.  
(Exhibit 11)

108 In cross examination Mr Brooks was taken to ten of the photomontages within the VIA and was asked to assess the impact on views to the Escarpment HCA arising from the proposed third storey of the development. As a cumulative assessment of these views Mr Brooks agreed that for each of the views he was taken to, the proposed third storey impacted on existing views to the Escarpment HCA from within the Village. However, Mr Brooks qualified this conclusion by arguing that firstly, views to the Escarpment HCA need to be considered in the context of managing change and secondly, that a pedestrian's perception of any impact would be mitigated by the fact that views are experienced in an ambulatory way.

109 In the alternative, Mr Thompson argues that the proposed development will have an unacceptable impact on views from the Village to the Escarpment HCA. Further, he argues that the detrimental impact on views will also affect the character of the Village. Mr Thompson notes that the retention of views from the Village to the Escarpment HCA is a key objective of Chapter D12 of DCP 2009 and further Mr Thompson gives weight to the following two controls at clause 5.1 of D12 DCP 2009:

- '1. Existing views from the Village Centre to the escarpment and water are important visual components which should be maintained as a backdrop to the Village Centre.
2. Future built forms need to maintain views to the escarpment and sightlines that preserve connections to the escarpment and water. In this regard, building separation, building height limits and roofline controls need to maintain a built form rhythm that does not obstruct views from the Village Centre'.

110 Mr Thompson evidence about the perception of the proposed development in the streetscape of the Village, summarised at [101], is also relevant to his conclusions of impact to the Escarpment HCA.

111 In undertaking an assessment of the acceptability of the impacts arising from the proposed development Mr Thompson acknowledges that the Escarpment HCA is vast and is visible along the coastal areas of Wollongong. However, in his view, it is clear that the applicable planning controls put importance on the specific direct visual and physical connection between the Escarpment HCA and the Village and its character. On that basis, he gives the controls substantial weight.

112 Mr Thompson identifies that the development has a significant and unacceptable impact on views to the Escarpment HCA at View C and View D, as described at [77], as well as from the footpath on the western side of LHD. He concludes:

123. The overall impact of the proposed development on viewing opportunities to the west from along Lawrence Hargrave Drive is significant and indicates a design process which has failed to adequately acknowledge and respond to the significance of the Escarpment, to the aspiration set out in the Development Controls to retain these views in future development as a key aspect of the village character.

124. Mr Thompson considers the proposed break within the Lawrence Hargrave Drive wall associated with the central stair is inadequate in responding to the view considerations.

125. Mr Thompson considers that a two-storey building, as imagined with the development controls of Chapter D12, which are detailed within Contention 2, would likely substantially reduce the impact of the development on views to the Escarpment.

126. The design of the built form will result in a significant reduction in opportunities for visitors to the village to perceive their location in the context of the Illawarra escarpment due to view loss resulting from the proposed lengthy sections of two storey street wall fronting Lawrence Hargrave Drive, and the additional elements located behind.

(Exhibit 11)

113 In his oral evidence Mr Thompson argued that the proposed development, and its impact on views to the Escarpment HCA, would have a material impact on the experience of the Village and the unique sense of enclosure that arises from the presence of the escarpment in the public domain. Further, he argues that in the overall assessment appropriate weight should be assigned to the

impact, reflecting the specificity of the planning controls in chapter D12 of DCP 2009. Finally, Mr Thompson asserted that the detrimental impact arising from the proposed development is not limited to the third storey element and that whilst the design incorporates a break in the built form and a view through the site (between Block D & E), in his assessment the proposed break is insufficient to either reduce the scale of the built form in the streetscape, or to allow views through the site to the Escarpment HCA.

## **Findings**

114 In determining the development application cl 5.10(4) of LEP 2009 requires the consent authority to consider the effect of the proposed development on the heritage significance of the items or the conservation area. In these proceedings that assessment is required in relation to two items: firstly, Anita's Theatre and secondly the Illawarra Escarpment HCA. The significance of these items is summarised in the statements of significance extracted at [82] and [83] respectively and the heritage inventory sheets located on the State Heritage Inventory.

### *Anita's Theatre*

115 By reference to the heritage inventory, Anita's Theatre meets the threshold for local heritage significance against the following criteria: each of historical, aesthetic and social significance, rarity and representativeness. The expert evidence focussed on the potential impact of the proposed development on the aesthetic significance of the item which includes its landmark value in the Village. I agree that given the form of the proposed development and the location of the subject site relative to the heritage item this is the relevant impact to be assessed.

116 I accept and agree with the assessment of Mr Thompson that the proposed development will impact on the prominence of Anita's Theatre and its significance arising from its landmark quality in the Village. I adopt his reasoning and his conclusions that the proposed development will read in the streetscape of the Village as a homogenous building mass of considerable scale and that as such it will compete with the landmark quality of the theatre

and its aesthetic significance. I do so on the basis that his assessment and reasoning accords with my assessment of the architectural plans and the VIA.

117 However, this detrimental impact will not be perceived uniformly throughout the Village. For example, when viewed from the position of View A adjacent W F Jackson Park, I accept that the prominence of Anita's Theatre will be detrimentally impacted. However, in my view the theatre will retain this landmark quality from the remaining key viewing points identified by the heritage experts, refer [77], along with many other viewpoints in the Village. Following assessment, I conclude that the proposed development will have a modest impact on the identified aesthetic significance of the item.

118 On this basis I find that the proposed development has an acceptable effect on the heritage significance of Anita's Theatre pursuant to cl 5.10(4) of LEP 2009.

#### *Escarpment HCA*

119 As summarised in the joint report of the heritage consultants the escarpment has been identified in various reports, studies and management documents as having various scenic, ecological, Indigenous Australian and European heritage, social and economic values. It is against this background that the Escarpment HCA was listed in 2009. The relevant heritage values and significance for the current assessment of the proposed development are those listed on the NSW Heritage Inventory and summarised at [82].

120 It is trite to say that the Escarpment HCA is experienced in the Village as a grand and dramatic landscape element, as described in the statement of significance. So much was evident from the onsite view. I note that many of the public submissions address the importance of the Escarpment HCA in contributing to the character and uniqueness of the Village.

121 I accept and agree with the experts that any impacts arising from the development arise in the two ways they describe. Namely by disrupting views to the Escarpment HCA from within the Village and secondly, by impacting the prominence of the Escarpment HCA as a backdrop to the Village.

122 I am not persuaded by Mr Brooks conclusion that the proposed development will not impact the significance of the Illawarra HCA. In my view he gives too



much weight in his analysis of the impacts arising from the development to the provisions of views through the subject site facilitated by the design of the development. For the reasons detailed earlier in this judgment, in my assessment these building breaks are insufficient to deliver the benefits asserted by Mr Brooks and the Applicant. Further, when taken to the VIA in oral evidence, Mr Brooks conceded that in many of the identified locations in the Village views to the Escarpment HCA would be impacted. Relevantly, Mr Brooks also accepted that a proportion of this impact arises from built form that is not envisaged by the planning controls, relevantly the third storey. This concession weakens his reasoning (summarised at [107]-[108]) and his conclusion of the acceptability of the development and its impact on the significance of the Escarpment HCA.

123 I prefer and adopt the evidence, reasoning and conclusions of Mr Thompson (summarised at [109]-[112]) that the proposed development will have an unacceptable detrimental impact on the significance of the Escarpment HCA, specifically the experience of its dramatic landscape form, grandeur and views to it from the Village. These detrimental impacts arise from the form, massing and scale of the development.

124 Giving weight to the provisions of chapter D12 in DCP 2009 (summarised at [85-86]) and the public submissions, I am satisfied that the adverse impacts on the significance of the Escarpment HCA are a likely impact arising from the proposed development: s 4.15(1)(b) of the EPA Act. These detrimental impacts are in my view sufficient to warrant the refusal of the development application.

**The acoustic impacts of the development are unacceptable.**

125 The Respondent argues that the development application should be refused because: firstly, the proposed development will result in land use conflict with existing commercial uses in the vicinity of the subject site; and secondly, will not provide an acceptable level of acoustic amenity for future residents of the development.

126 Further, as noted in their submissions, a key concern of the representatives of Anita's Theatre and the Beaches Hotel is the potential for future residents of the proposed development to be adversely impacted by the acoustic output

and patron noise of these two live entertainment venues. Following a review of the public submissions received on the original development application, and the subsequent amended development, I note that many residents also raised concern that the inclusion of residential dwellings on the subject site has the potential to impact the operation, viability and retention of live music in these two venues. I have given consideration to these submissions in determining the development application: s 4.15(1)(d) of the EPA Act.

### *Relevant Planning Controls*

127 Clause 2.100 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TI) applies to the development application as the subject site is adjacent the railway corridor and is, in part, for the purpose of residential accommodation. Sub clause (3) is a precondition to consent and states:

(3) If the development is for the purposes of residential accommodation, the consent authority must not grant consent to the development unless it is satisfied that appropriate measures will be taken to ensure that the following LAeq levels are not exceeded—

(a) in any bedroom in the residential accommodation—35 dB(A) at any time between 10.00 pm and 7.00 am,

(b) anywhere else in the residential accommodation (other than a garage, kitchen, bathroom or hallway)—40 dB(A) at any time.

128 State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) applies to the development application: s4 SEPP 65.

129 Pursuant to s 28 of SEPP 65 in determining a development application the consent authority is to consider, firstly the advice of any design review panel, secondly the design quality of the development when evaluated against the design principles and finally the provisions of the Apartment Design Guideline (ADG).

130 Relevant to acoustic privacy the ADG provides as follows:

Objective 4H-1: Noise transfer is minimised through the siting of buildings and building layout

Design Guidance:

Adequate building separation is provided within the development and from neighbouring buildings/adjacent uses (see also section 2F Building separation and section 3F Visual privacy)

Window and door openings are generally orientated away from noise sources

Noisy areas within buildings including building entries and corridors should be located next to or above each other and quieter areas next to or above quieter areas

Storage, circulation areas and non-habitable rooms should be located to buffer noise from external sources

The number of party walls (walls shared with other apartments) are limited and are appropriately insulated

Noise sources such as garage doors, driveways, service areas, plant rooms, building services, mechanical equipment, active communal open spaces and circulation areas should be located at least 3m away from bedrooms

131 Relevant to assessment of residential development in noisy environments (detailed as near major roads, rail lines and beneath flight paths) the ADG provides as follows:

Objective 4J-1: In noisy or hostile environments the impacts of external noise and pollution are minimised through the careful siting and layout of buildings

Design Guidance:

To minimise impacts the following design solutions may be used:

- physical separation between buildings and the noise or pollution source
- residential uses are located perpendicular to the noise source and where possible buffered by other uses
- non-residential buildings are sited to be parallel with the noise source to provide a continuous building that shields residential uses and communal open spaces
- non-residential uses are located at lower levels vertically separating the residential component from the noise or pollution source. Setbacks to the underside of residential floor levels should increase relative to traffic volumes and other noise sources
- buildings should respond to both solar access and noise. Where solar access is away from the noise source, nonhabitable rooms can provide a buffer
- where solar access is in the same direction as the noise source, dual aspect apartments with shallow building depths are preferable (see figure 4J.4)
- landscape design reduces the perception of noise and acts as a filter for air pollution generated by traffic and industry

Achieving the design criteria in this Apartment Design Guide may not be possible in some situations due to noise and pollution. Where developments are unable to achieve the design criteria, alternatives may be considered in the following areas:

- solar and daylight access
- private open space and balconies
- natural cross ventilation

Objective 4J-2: Appropriate noise shielding or attenuation techniques for the building design, construction and choice of materials are used to mitigate noise transmission

#### Design Guidance

Design solutions to mitigate noise include:

- limiting the number and size of openings facing noise sources
- providing seals to prevent noise transfer through gaps.
- using double or acoustic glazing, acoustic louvres or enclosed balconies (wintergardens)
- using materials with mass and/or sound insulation or absorption properties e.g. solid balcony balustrades, external screens and soffits

#### *Summary of relevant expert evidence*

132 In addition to the joint report of the experts the Applicant has prepared and filed two noise impact assessments, the most recent dated 31 March 2022 (the Acoustic Assessment). During the proceedings a supplementary joint report was prepared to allow further analysis of the ventilated skylights in the proposed residential apartments.

#### *Skylights*

133 The experts prepared a supplementary joint report to address potential acoustic impacts arising from the introduction of ventilated pop-up skylights being incorporated into a number of the proposed residential units. The Applicant confirms that the purpose of the skylights is to provide cross ventilation to the apartments. The experts undertook their assessment against their identified 'worst case scenario' unit, that being unit C206. Taking into account the proposed ventilated skylight, the acoustic assessment undertaken by the Applicant concludes that this unit will achieve the required noise levels in SEPP TI with the glazing closed. (Exhibit 17)

- 134 The experts agree that, despite the introduction of the skylights, ‘it is possible and practical to comply with the SEPP [TI] noise requirements for railway noise’. A similar conclusion was drawn in relation to the requirement to meet the requirements for traffic noise for the most affected unit. (Exhibit 17)
- 135 I accept the agreed evidence of the acoustic experts and I find that on the basis of the experts’ conclusions the precondition at cl 2.100(3) of SEPP TI is satisfied.
- 136 In regard to the impact of hotel noise on the residential apartments and how that may be affected by the introduction of ventilated skylights the most impacted unit identified by the experts is Unit 304 given its proximity and the fact that the proposed skylight is only partially screened by a parapet. Examining this unit Mr Favoretto concludes that additional treatment is required to the skylights to ‘prevent any audible increase in noise, compared to noise through the façade’. Mr Favoretto identifies the required acoustic mitigation/treatment in an annexure to the supplementary joint report. The acoustic treatment to the skylights includes utilising specific materials to the external faces of the skylight ranging from 6.38mm laminated glass, 10.38mm laminated glass, or solid walling depending on proximity to the noise source. The skylight for Unit 304 is indicated as having 10.838mm laminated glass on two sides with the remainder being a louvered window and a ceiling of two sheets of 13mm plasterboard. (Exhibit 17) As I understand the evidence, this additional mitigation seeks to improve the acoustic performance of the skylight material to reduce noise penetration to Unit 304.
- 137 The supplementary joint report also considered the potential acoustic impact of the inclusion of the ventilated skylights given the proposed roof top air-conditioning units and the condenser unit. The analysis indicated that ‘an unscreened ventilation opening in a roof light within 7m of the plant exposure is likely to exceed the [acoustic] criteria’. In response to this, in a manner similar to that described at [136] the annexure to the supplementary joint report indicates the required screening of the proposed skylights to mitigate the noise impact from the air-conditioning units and ensure compliance with the acoustic criteria. (Exhibit 17)

138 On the basis of the preceding analysis the acoustic experts reached the following agreed conclusions:

43. The experts have reviewed potential noise impacts associated with the proposed roof lights including:

- a) noise intrusion from the railway, road traffic and the Hotel.
- b) noise intrusion for mechanical plant on the roof.
- c) Acoustic separation between the sole occupancy units through open louvres,

44. Treatment indicated to address these noise impacts is summarised in Attachment B.

45. The experts agree that the proposed treatment with windows, closed/ doors/ skylights will achieve compliance with the SEPP daytime criteria for railway and traffic noise, and control an increase in Hotel noise intrusion when compared to noise through the façade.

46. The experts agree that the preliminary assessment indicates that noise from mechanical plant through the skylights can be adequately addressed, however a detailed assessment is required to be undertaken based on the proposed plant and equipment layouts at CC.

47. The experts agree that the isolation of vibration and associated regenerated structural noise from the roof plant/equipment should be incorporated and addressed in detail at CC.

48. The experts agree that the separation between operable louvres is not less than 3m [as recommended by the Apartment Design Guide] with the proposed treatment.

(Exhibit 17)

139 Appropriate conditions of consent have been incorporated to give effect to the agreement of the experts.

140 I am satisfied on the agreed evidence of the acoustic experts that any noise intrusion through the proposed ventilated skylights from the identified noise sources can be mitigated so that the noise environment of the effected units will be equivalent to the noise environment of those units that do not have ventilated skylights.

#### *Anita's Theatre*

141 The Acoustic Assessment makes the following conclusions about the potential for noise intrusion to the proposed residential development from Anita's Theatre:

This venue operates as a theatre with various productions. All noise producing activities are located indoors.

There are existing residential receivers in Redman Avenue [that] are a similar distance from Anita's as the proposed residences. Noise emissions from Anita's to these existing residences would be similar to that of the proposed residences. Existing compliance at these properties will likely result in compliance at the subject development.

Also, the proposed façade treatments to control railway and traffic noise impacts (and noise from the Beaches Hotel) will further mitigate noise from Anita's,

On the above basis, it is concluded that the occupants of the proposed residential development would not be adversely impacted by Anita's Theatre operation, nor would it impose additional noise obligations on Anita's operation.

(Exhibit 12)

142 This extract summarises the reasoning Mr Favoretto has applied to the assessment of any potential acoustic impact for the proposed residential development arising from Anita's Theatre.

143 The acoustic experts were called for cross examination. In his evidence Mr Favoretto confirmed, as agreed in the joint report, that no noise measurements or logging have been undertaken of the noise emissions from Anita's Theatre operations. In other words, the assessment of acoustic impact does not arise from measurements of actual noise levels during, for example, a live music event or the like at Anita's Theatre. Further, I note the joint report confirms that '(t)he unattended noise monitoring conducted in 2019 did not show evidence of any significant noise from Anita's'. (Exhibit 12)

144 In oral evidence Mr Favoretto was questioned by Mr Seton about the foundation supporting his conclusion that the proposed development 'should not' impose any additional limitation on the operation of Anita's Theatre. The relevant section of the joint report to which Mr Seton referred is extracted below:

153. VF has confirmed King's (Anita's) Theatre noise emissions would impact existing residences located to the north and east [of the] theatre more than the proposed residences. These residences are closer to and expected to be more exposed to noise from the Theatre than the subject site.

...

157. VF has confirmed with respect to noise exposure that the proposed development should not impose an additional limitation on the operation of the Theatre.

...

(Exhibit 12)

- 145 In response to Mr Seton, Mr Favoretto agreed that any impact from Anita's Theatre on the existing residences identified has not been measured or assessed the Applicant and there is no acoustic data on the noise levels actually experienced by these existing residences.
- 146 In essence, Mr Favoretto's oral evidence was that his conclusions (extracted above) assume that the current noise impacts to the existing residences located to the north and east of Anita's Theatre are acceptable. Relying on this assumption Mr Favoretto reasons that the residential apartments in the proposed development will be an improvement (or experience less noise impact) than the existing residences in proximity to the theatre as they will include higher standards of construction resulting in improved noise mitigation.
- 147 In the alternative, Mr Atkin's argues, consistent with the Respondent's contentions, that the development application lacks noise measurement and assessment on which to determine any potential impacts on the proposed residential development from noise emissions arising from Anita's Theatre. Further, that in the absence of such analysis it is not possible to determine whether, on a merit basis, such impacts are acceptable. He concludes that inadequate information has been provided to undertake a proper assessment of the likely impacts arising from the proposed development.

*Beaches Hotel*

- 148 In their first joint report the experts note their agreement in regard to the following:
- The noise source from the hotel that is likely to have a noise impact on the proposed residential development is noise from patrons, music, mechanical plant and waste management.
  - That most of the proposed apartment facades are either partially or fully screened from hotel noise sources. The most impacted units would be in Block A (adjacent the common boundary with the Hotel) and the northern most units in Block D.
  - That the highest noise levels predicted are as follows:
    - Block A: 57 dB(A)
    - Block D: 63 dB(A)



- That the acoustic assessment nominates firstly, a range of acoustic glazing incorporating heavy laminated glass and double glazing with large air gaps for the apartments, depending as their levels of exposure; and secondly, supplementary ventilation through ventilated skylights for the affected apartments. (Exhibit 12)

149 At the conclusion of the supplementary joint report the experts discussed the Beaches Hotel licensing conditions. Specifically, the license requirement that:

‘The LA10 noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Centre (31.5Hz – 8kHz inclusive) by more than 5db between 07:00 am and 12:00 midnight **at the boundary of any affected residence**. The LA10 noise level emitted from the licensed premises shall not exceed the background noise level in any Octave Band Centre (31.5Hz – 8kHz inclusive) by more than 5db between 12: 00 midnight and 07:00am **at the boundary of any affected residence**. Notwithstanding compliance with the above, the noise from the licensed premises shall not be audible within any habitable room in any residential premises between the hours of 12:00 midnight and 07:00am.’

...

(Exhibit 17)

150 In the supplementary joint report Mr Favoretto adopts the existing residential premises above ground floor retail in King Street as the basis of his assessment as they are the nearest residences to the Beaches Hotel. As I understand his evidence, applying the levels obtained from previous noise monitoring Mr Favoretto determines an A-weighted background noise level of 46dB(A) across the octave bands to apply to Saturday and Sunday evenings. Adding the maximum 5dB level required in the licensing condition of the Beaches Hotel Mr Favoretto determines the maximum L10 noise levels permitted to be emitted when measured at any existing residence.

151 In other words, on the assumption the Beaches Hotel operates within its license, Mr Favoretto concludes by deduction that the following are the maximum sound levels that would be measured at the existing residential premises in King Street.

Octave Band	62.5	125	250	500	1000	2000	4000	8000	A
SPL dB	57	63	52	47	43	37	32	26	51

(Exhibit 17)

152 The final step in Mr Favoretto's analysis is to utilise the distance measured between the Beaches Hotel and the existing residential premises in King Street to determine the maximum sound power level exiting the roof of the Beaches Hotel. Mr Favoretto then applies this maximum sound power level to determine the resultant predicted noise levels within the residential components of the proposed development. He concludes:

Using this sound power level [exiting the roof of the Beaches Hotel] and correcting for distance and barrier effects where applicable the resultant noise level was predicted at the proposed development. It indicates that the only units where noise through the roof would exceed the licencing requirements are A 207 Bed 1 and A 304 Living Bed 1 and Bed 2. All other units by virtue of additional distance would comply, and are therefore would not be adversely impacted.

(Exhibit 17)

153 Applying the mitigation measures identified in the Acoustic Assessment to these results Mr Favoretto concludes that 'the treatment recommended in the AL noise assessment ref: 20211271.1/0311A/R1/VF Rev 0 dated 31/03/2022 (the AL report in the previous joint report) is over and above what is needed once the existing noise limits on the Hotel are considered.' (Exhibit 17)

154 In other words, Mr Favoretto concludes that no additional acoustic measures are required for the residential apartments to achieve compliance with the existing license conditions of the Beaches Hotel.

155 In the supplementary joint report Mr Favoretto then applies a similar methodology to assess the noise emissions from the western terrace roof of the Beaches Hotel which adjoins the subject site. Consistent with his earlier reasoning, at the end of this analysis Mr Favoretto concludes:

63. Taking the licencing noise limit into consideration, the only units in the proposed development impacted by terrace noise would be A 207 Bed 1, A 208 and A 304 Living Bed1 and Bed 2. The treatment proposed for these units in the report is over and above what is needed once the existing noise limits on the Hotel are considered.

64. All remaining units do not require mitigation of noise from the western terrace because they are more distant and screened from the terrace (refer Attachment E in the previous Joint Report). The treatment proposed for these units in the AL report is over and above what is needed once the existing noise limits on the Hotel are considered.

(Exhibit 17)

- 156 On the preceding basis Mr Favoretto concludes that '(t)he proposed mitigation will allow the Hotel to operate as it currently operates. The proposed development is a permitted use for the site and the proposed mitigation represents a reasonable compromise that allows the Hotel to operate whilst providing a reasonable level of amenity of (sic) the future residents.' (Exhibit 17)
- 157 Finally, Mr Favoretto makes reference to his previous experience with the NSW Office of Liquor and Gaming (OLGA) and asserts that it is likely, in his view, that the regulator would give weight to the pre-existence of the Beaches Hotel when considering any action in response to a complaint from the residential apartments which form part of the proposed development. (Exhibit 12)
- 158 In the supplementary joint report Mr Atkins disagreed with the analysis of Mr Favoretto and maintained the view, expressed in the first joint report, that the noise emissions from the Beaches Hotel would exceed both of the guidelines from the Office of Liquor and Gaming being: firstly, +5dB(A) above background when measured at the boundary of the residential development; and secondly the criteria of inaudibility within a habitable room after midnight. Given this exceedance of the acoustic criteria, Mr Atkins concludes that the proposed residential development will have unacceptable residential amenity. (Exhibit 12)
- 159 Mr Atkins notes that noise from a licensed premise (such as the Beaches Hotel) is required by OLGA guidelines to be measured at the boundary of the affected residence. He contends that so much is clear from the specific license conditions for the Beaches Hotel. He concludes that:
- "[the Applicant] has not assessed noise from the Beaches Hotel in accordance with OLGA assessment requirements and in my opinion cannot support the claim [that] the current operation of the Beaches Hotel would be unaffected"
- (Exhibit 12)
- 160 In his evidence Mr Atkins noted he does not support the methodology or conclusion drawn by Mr Favoretto, summarised at [142-143].
- 161 In his oral evidence Mr Seton put to Mr Favoretto that the licence conditions for the Beaches Hotel require the measurement of noise at the boundary of an affected residence, an approach which is inconsistent with his assessment. Mr

Seton questioned Mr Favoretto on the acoustic amenity of Unit 304 (directly adjacent the common boundary with the Beaches Hotel), in particular the outdoor terrace, noting that the sound level at the terrace would exceed +5dB(A) above background.

162 In response Mr Favoretto noted the following: the modelled sound level is not high in absolute terms; it would be experienced only on Friday, Saturday and Sunday nights and not during daytime; that there would be a large proportion of the time noise at this level is not experienced; and finally, that the focus is not on external areas but rather internal spaces of residential dwellings.

163 However, in cross examination, Mr Favoretto made a number of concessions: firstly, that in Block D the terraces of D102 and D201 and the balconies of units A304 and A208 would not meet the requirements of The Beaches license condition if it applied to external spaces; and secondly, that if noise emissions were measured at the boundary between the subject site and the Beaches Hotel the +5dB(A) in the Beaches Hotel license standard would not be met.

164 In his submissions Mr Seton argues that the proposed development ignores the existing function and operation of the Bayview Hotel and in doing so creates unacceptable adverse acoustic amenity for apartments D102, D201, A304 and A208. Further, he submits it has the potential of creating a reverse amenity burden on the Beaches Hotel of the kind considered in: *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd* (1996) 90 LGERA 68. (Inghams v Kira Holdings)

165 I note the principle Mr Seton refers is that cited in in *Concrite Pty Ltd v South Sydney City Council* [2001] NSWLEC 227 at [38]

38. Furthermore, it now seems to be an established principle, and in the Court's view a correct one, that any new development should be expected to accommodate the impact of existing lawful development on adjoining or nearby land. It is consistent with the reasoning adopted by the Court of Appeal in *Inghams Enterprises Pty Ltd v Kira Holdings Pty Ltd and Another* (1996) 90 LGERA 68 to recognise that any future residential development on adjacent land will need to take account of and accommodate the impact of existing development including, in this instance, the operation of the batching plant.

166 Mr Seton submits that the Court should prefer the evidence of Mr Atkins on the basis that Mr Favoretto makes two incorrect assumptions in his evidence.

Firstly, that the Beaches Hotel will not be subject to any enforcement action for any breaches of its license that arise from the residential component of the proposed development on the basis that it came after the Beaches Hotel was operating. Secondly, that Mr Favoretto assumes compliance with the license conditions is measured at the external face of the individual residential units, rather than at the boundary of the affected property (the subject site) as specified in the license. Mr Seton notes that in oral evidence Mr Favoretto conceded (consistent with the evidence of Mr Atkins) that noise emission requirements of the Beaches Hotel would not be met on the Applicant's modelling if measured at the boundary of the affected property (the subject site).

167 Further, Mr Seton notes the Acoustic Assessment includes an assumption that windows and doors in the proposed residential apartments are closed in order to manage noise from the adjacent rail line and achieve the mandated noise levels in SEPP TI. He argues that a reliance on mechanical ventilation represents a reduction in amenity for future residents.

168 In his submissions Mr Galasso noted that the acoustic experts agreed that the proposed development will comply with internal noise levels required by SEPP TI in relation to traffic and rail noise. Further, he submits that the Beaches Hotel can operate to its license conditions and the internal noise levels will be met by the proposed residential development.

169 In response to the Respondent's submission on acoustic compliance of the proposed external spaces, Mr Galasso submits that audible noise on a residential terrace is insufficient to be unacceptable on two grounds: firstly, residents can choose to move indoors; and secondly, as such exceedances are likely to be infrequently experienced.

### *Findings*

170 As noted at [5] I am satisfied that the proposed development should be refused in the basis of three matters related to acoustics:

- Firstly, the acoustic assessment fails to provide sufficient information to evaluate the likely impacts of the operation of Anita's Theatre on the proposed residential development;

- Secondly, the development application does not sufficiently demonstrate how it proposed to accommodate or mitigate the existing acoustic impacts from the Beaches Hotel; and
- Thirdly on the preceding basis I find that it is uncertain that the proposed development will provide an acceptable level of acoustic amenity for future residents.

171 In relation to the first matter, I accept the evidence of Mr Atkin's that the development application lacks sufficient noise measurement and assessment to determine any likely impacts that may arise from the noise generated by the operations of Anita's Theatre. Relevantly, I note that unlike the Beaches Hotel, the liquor license for Anita's Theatre does not contain a time limitation for live music nor any acoustic criterion. As such without noise logging or measurement during a live event/s in my view there is insufficient data, analysis or reasoning to support the conclusion asserted. Namely that the occupants of the proposed residential development would not be adversely impacted by Anita's Theatre operation and that the proposed development would not impose additional noise obligations on Anita's operation.

172 Further, the Applicant's Acoustic Assessment relies on a comparative assumption of acceptable noise impacts at existing residential receivers. However, no verification has been provided that demonstrates that compliance with an acoustic criterion (for example 5dB(A) above background) is achieved for these existing residences on which the comparison relies. On this basis the reasoning is unhelpful in determining the acceptability of any impact.

173 On the preceding basis I am satisfied that the proposed development application does not provide sufficient information for the consent authority to properly evaluate the likely impact of the existing noise source (Anita's Theatre) and the noise environment on the proposed development and to determine whether those impacts are acceptable nor whether they can be, or are, mitigated by the proposed development.

174 In relation to the second matter, I am satisfied on the evidence of Mr Atkins, and the submissions of Mr Seton, that the proposed development will result in land use conflict with the Beaches Hotel when it operates within its existing license conditions. I accept that a plain reading of the license requires compliance with the nominated acoustic criterion at the boundary of the

nearest residential receiver. The acoustic assessment undertaken by Mr Favoretto represents a misunderstanding of the licensing condition. Mr Favoretto conceded that the acoustic standard required by the license would, on his calculations, not be met. A literal interpretation of the license condition would mean the criterion be met at the common boundary with the subject site. Even if a more purposive approach is taken to the interpretation of the license condition, the point of measurement may include the external terrace of the affected units (identified as units D102, D201, A304 and A208) as the strata boundary of these units would represent the boundary of an affected residence. On Mr Favoretto's calculations the acoustic criterion is exceeded in each of these locations.

175 Applying the principle in *Inghams v Kira Holdings* I am satisfied that the proposed development does not sufficiently demonstrate how it proposes to accommodate, or mitigate, the acoustic impacts arising from the lawful operation of the Beaches Hotel whilst ensuring appropriate residential amenity is achieved for the proposed residential apartments.

176 On the preceding basis I find that the Applicant has not demonstrated that the proposed residential development is compatible with the existing acoustic environment principally in two ways: firstly, by providing insufficient data on which to base an assessment of any acoustic impact arising from Anita's Theatre; and secondly by incorrectly applying the Beaches Hotel licensing conditions. Both of these factors raise uncertainty. I find that I am not persuaded that the existing acoustic environment (and noise impacts) can be appropriately mitigated to ensure the residential amenity of the apartments is acceptable.

## **Conclusion**

177 After an assessment of all the evidence under s 4.15 of the EPA Act including the evidence of the objectors, I am satisfied that the amended development application warrants refusal. As a result of these findings, the outcome of the proceedings is that the appeal is dismissed, and the development application is refused.

## Orders

178 The Court orders that:

- (1) The appeal is dismissed.
- (2) Development application number 2020/363 which seeks consent for Lot consolidation, demolition of existing structures, removal of 32 trees and construction of a 3 storey mixed use development containing 77 residential units across 4 building forms, wellness centre and swimming pool, commercial premises (14 shops, 2 kiosks and 1 supermarket) and 2 basement levels containing 299 carparking spaces (206 retail parking spaces, 77 residential visitor spaces), 51 bicycle parking spaces and 13 motorcycle parking spaces and associated road upgrade works at 282-298 and 302-304 Lawrence Hargraves Drive, Thirroul is determined by way of refusal.
- (3) The exhibits are to be returned except for Exhibits A, E, and 1.

.....

**D Dickson**

**Commissioner of the Court**

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