



Land and Environment Court  
New South Wales

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Case Name: KRV Investments Pty Ltd v Liverpool City Council

Medium Neutral Citation: [2024] NSWLEC 1738

Hearing Date(s): 18 and 19 June, 19 July 2024

Date of Orders: 15 November 2024

Decision Date: 15 November 2024

Jurisdiction: Class 1

Before: Kullen AC

Decision: The Court orders:  
(1) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed resulting from the amending of the development application, pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.  
(2) The appeal is dismissed.  
(3) Development Application DA-267/2022 seeking development consent for the construction of 6 residential flat buildings (including affordable housing), 2 shop top housing developments above basement parking and associated works on land legally described as Lot 20 in DP1228502, being 225 Croatia Avenue, Edmondson Park, 2174 is refused.

Catchwords: DEVELOPMENT APPEAL – orders – further amendments proposed by the Applicant in conditions of consent – loading and service access to village centre

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.12, 4.64, 8.7, 8.15  
Land and Environment Court Act 1979, s 39  
  
Environmental Planning and Assessment Regulation 2021, s 29, 38

Liverpool Local Environmental Plan 2008, Pt 6, cll 4.1, 4.3, 4.4, 4.6, 7.11,  
State Environmental Planning Policy (Housing) 2021,  
Ch 4, Schs 7A, 9, ss 8, 19, 144, 145, 147  
State Environmental Planning Policy Amendment  
(Housing) 2023  
State Environmental Planning Policy No. 65 – Design  
Quality of Residential Apartment Development

Cases Cited: KRV Investments Pty Ltd v Liverpool City Council  
[2023] NSWLEC 1436

Texts Cited: Apartment Design Guide 2015  
Liverpool Development Control Plan 2008

Category: Principal judgment

Parties: KRV Investments Pty Ltd (Applicant)  
Liverpool City Council (Respondent)

Representation: Counsel:  
J Reid (Applicant)  
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File Number(s): 2022/310390

Publication Restriction: Nil

## JUDGMENT

- 1 **COMMISSIONER:** Development Application DA-267/2022 (the DA) (as lodged) sought consent for the construction of 6 residential flat buildings (including affordable housing), 2 shop top housing developments and 1 child care centre above basement parking and associated works on land legally described as Lot 20 in DP1228502, being 225 Croatia Avenue, Edmondson Park, 2174 (the site).
- 2 The DA has been amended on numerous occasions since the Applicant in these proceedings filed an appeal in Class 1 of the Land and Environment Court's jurisdiction on 17 October 2022. Most notably, the proposed child care

centre has been removed from the proposed development, and the final of number of residential units sought on the site is 214.

## **Background**

### *Development Application DA-1122/2021 for Subdivision of the Site*

- 3 By way of background, Development Application No DA-1122/2021 was lodged with the Respondent on 27 September 2021 as the first step in the development of the site. That application sought consent for the subdivision of the land into 3 Torrens title lots, demolition of existing structures, tree removal, construction of public roads, stormwater drainage and other associated civil works on land legally described as Lot 20 in Deposited Plan 1228502 also known as 225 Croatia Avenue, Edmondson Park.
- 4 Development Application No DA-1122/2021 was determined by the Court on 10 August 2023 (*KRV Investments Pty Ltd v Liverpool City Council* [2023] NSWLEC 1436). The Appeal was upheld and development consent was granted to the subdivision proposed in Development Application No DA-1122/2021, following a s 34 conciliation conference where the parties reached an agreement.
- 5 This subdivision approval provides the structure for the development of the site, consistent with Part 2.11 of the Liverpool Development Control Plan 2008 (DCP). The current DA, if approved, provides for the construction of buildings on Lot 1 and Lot 3 of the approved subdivision. Lot 2 of the approved subdivision was created as a residue lot which is required to be consolidated with adjoining Lot 6 in DP 1227875 in accordance with the conditions of consent of the subdivision approval.
- 6 The residue lot of 192m<sup>2</sup> was approved pursuant to cl 4.6 of the Liverpool Local Environmental Plan 2008 (the LEP). This cl 4.6 request sought flexibility in the application of the Council's minimum lot size control which required a minimum lot size of 300m<sup>2</sup>.
- 7 The Applicant advised that the land has not yet been subdivided in accordance with DA-1122/2021, and that those works will necessarily precede the built form development of the site.

- 8 The Applicant submits that the cl 4.6 request was upheld by the Court in the matter of 2022/299473 on the basis that the non-compliance was not permanent, as the residue lot is required to ultimately be consolidated with the adjoining lot.
- 9 At paragraph [21] of *KRV Investments Pty Ltd v Liverpool City Council* [2023] NSWLEC 1436, Horton C noted that:

“...[I]t is relevant to record here that the proposed subdivision conforms to the Indicative Edmondson Park Layout Plan notwithstanding the otherwise abrupt change in subdivision pattern from the existing subdivision pattern evident today”.

*Development Application DA-267/2022 for Development of the Site*

- 10 The DA was lodged by the Applicant with the Liverpool Council (the Respondent) on 14 March 2022. The DA has been amended numerous times, most recently on 19 July 2024 (the further amended DA) – refer to paragraph [23] below.
- 11 The proposed development of the site has been designed as separate buildings A1, A2, A3, and A4 and buildings B1 and B2 contained within the approved Lot 1, and Buildings C, D1, D2 and E which are contained within the approved Lot 3. The buildings are located above basement carparking on each lot. The village centre commercial space is contained in the ground floors of Buildings B1 and B2. This general development layout has been retained through the various amendments to the DA.
- 12 The Applicant does not propose to construct anything on the residue lot (Lot 2) as part of this DA.
- 13 The DA was notified between the 28 June 2022 until the 13 July 2022. One submission raising issues with the building height, scale and layout and impacts on privacy and daylight was raised by an adjoining landowner.
- 14 On 17 October 2022 the Applicant in these proceedings filed an appeal in Class 1 of the Land and Environment Court’s (the Court) jurisdiction, under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 15 The Sydney Western City Planning Panel subsequently refused the DA on 31 August 2023.

## **Evolution of the Appeal**

- 16 The matter was the subject of a s 34 conciliation conference on 3 April 2023. The s 34 conciliation conference was adjourned and subsequently terminated on 16 June 2023.
- 17 On 29 November 2023, the Court granted a notice of motion permitting the Applicant to rely on amended plans. These amended plans removed the child care centre component from the DA. (The amended Statement of Facts and Contentions (Amended SOFAC) prepared by the Respondent dated February 2024 deleted the contention relating to the previously proposed child care centre.)
- 18 The matter was listed for hearing on 4, 5 and 6 December 2023. The Applicant's request to vacate these dates and list the hearing for 18 and 19 June 2024 was granted by the Court.
- 19 On 31 May 2024 the Applicant was granted leave by the Court to rely on an updated set of amended plans (the amended DA) as contained in Exhibits EJF-3 and EJF-4 filed with the Court. The Court ordered that the Applicant was to pay the Respondent's costs, as agreed or assessed, pursuant to s 8.15(3) of the EPA Act.

## **The Hearing – Days 1 and 2**

- 20 The hearing commenced with an on-site view on 18 June 2024, attended by two submitters. Proposed amendments to the amended DA were discussed at the on-site view with the submitters, who indicated their general satisfaction that the proposed amended plans substantially addressed their concerns. At the commencement of the hearing, the Applicant made a formal request to file these amended plans.
- 21 At the end of the first two days of the hearing, the parties requested that the matter be adjourned to allow time for the Applicant to prepare further amendments to the proposed development, and for the town planning experts to prepare a report on these amendments prior to finalising a further amended DA.
- 22 On 19 June 2024 the Court ordered that:

- (1) The list of units where solar access is in dispute to be filed by the parties with the Court by 5:00 PM on 19 June 2024.
- (2) The parties are to file an agreed list of remaining issues with the Court by 5:00 PM on 20 June 2024.
- (3) The Applicant is to provide further clarification of solar access in units nominated as in dispute to be filed with the Court by 26 June 2024.
- (4) The Town Planners are to prepare a further joint expert report documenting the solar access issues by 8 July 2024.
- (5) Council is to file draft conditions of consent with the Court by 26 June 2024.
- (6) The Applicant is to file a response to the draft conditions of consent with the Court by 8 July 2024.
- (7) Parties are to exchange written submissions and file them with the Court by 17 July 2024.
- (8) The Hearing is adjourned to 10am on 19 July 2024.

### **The Hearing – Day 3**

- 23 Leave was granted for the Applicant to rely on the amended plans (the further amended DA) tabled on Day 3 of the Hearing on 19 July 2024 as Exhibit “O” filed with the Court.
- 24 The Court in granting the Applicant leave to rely upon the amended plans and other documents the subject of the Notice of Motion and exercised, under s 39(2) of the *Land and Environment Court Act 1979*, the functions and discretions of Liverpool City Council, as the relevant consent authority, to approve the amending of the DA by the Applicant, pursuant to s 38 of the Environmental Planning and Assessment Regulation 2021 (the Regulation), in accordance with the amended plans and other documents for which leave was granted.
- 25 The parties were ordered to provide an updated set of draft conditions of consent by 26 July 2024. These draft conditions were provided to the Court.
- 26 The Applicant agreed in its final submission to pay the costs of the Respondent thrown away as a result of the amendments of the DA pursuant to s 8.15(3) of the EPA Act.

## **The site and its context**

### *Site Description*

- 27 The site comprises one lot, legally described as Lot 20 DP 1228502, otherwise known as 225 Croatia Avenue, Edmondson Park.
- 28 The site is irregular in shape, with western and eastern boundaries not parallel, with the south-western corner shaped to account for the junction of Bernera Road and the road proposed along the southern boundary.
- 29 The survey submitted by the Applicant indicates that the site has a total area of 2.1ha. The western boundary adjoins the Bernera Road reserve (previously Croatia Avenue), whilst the eastern boundary several dwellings and streets, including McCay Lane, a semi-attached dwelling (Lot 35 DP1242681) located at the western end of a row of attached dwellings, the Dunkirk Road turning head and a cleared area adjacent to Lillian Bratkovic Park. The northern boundary adjoins 50 Brennan Way which is improved by residential flat buildings and the turning head of Hutton Road. 215 Croatia Avenue, which comprises of two allotments, adjoins the subject site to the south, with a double storey dwelling located on the western allotment.
- 30 The northern boundary has a length of 117.965 metres, whilst the southern boundary has a length of 128.05 metres. The site generally falls from the south to the north, with a fall of approximately 7 metres. The levels of the site have not been significantly altered by earlier residential development.
- 31 The site is currently occupied by an existing single storey, split level, brick dwelling located at the southern end of the site, with a further brick building sitting to the east of the dwelling. A domestic swimming pool is located towards the rear of the dwelling house, and a tennis court is located towards the south-eastern corner. The survey indicates that two shipping containers are located further to the north, adjacent to the eastern boundary, with two large awnings attached to the container. In respect to vegetation, the site is relatively cleared of vegetation, however there are existing trees located within proximity of the dwelling and to the north-east corner of the site. Two trees are also existing towards the north west corner of the site.

- 32 The locality surrounding the site is predominantly characterised by low and medium density development which includes single and double storey dwellings as well as several residential flat developments located to the north and north-west of the Site. The locality is gradually experiencing a period of urbanisation, noting that land adjoining to the north, east and west has been developed.

#### *Strategic Planning Context*

- 33 Edmondson Park was rezoned for urban development in 2008. It was one of the first areas to be planned in the South West Growth Area.
- 34 Liverpool City Council states on its website in relation to Edmondson Park that:
- “... over the next 10-15 years the suburb will become home to approximately 25,000 new residents, who will live in about 8200 homes. Edmondson Park will offer an urban lifestyle with plenty of open green spaces to encourage cycling and walking. The area is well supported by public transport with several regional bus routes and direct train services from Edmondson Park Station”.
- 35 The DCP provides detailed controls for the development of Edmondson Park. Part 2.11 of the DCP includes an Indicative Layout Plan (ILP) for the Edmondson Park area which the Respondent advises provides for:
- (1) Broad level development outcomes and outline of development footprint, land uses, density ranges, open space, major transport linkages and location of community facilities and schools;
  - (2) The south-western portion of the site to be developed as a Village Centre with the balance of the site either higher urban densities or urban transition;
  - (3) An area of public open space (a neighbourhood passive recreation park) located adjoining the north east corner of the site;
  - (4) An internal road network for the site with a central north-south road, two east-west half roads along the northern and southern boundaries, and two laneways to be constructed in the western portion of the site; and
  - (5) An off-street shared pedestrian /bicycle path running along the southern boundary of the site.

#### *Liverpool Environmental Plan 2008 controls*

- 36 The site is zoned R3 – Medium Density Residential and R1 General Residential Zone under the LEP.



- 37 The proposed development as amended (specifically multi dwelling housing, shop top housing and neighbourhood shops) is permissible with consent in the R3 and R1 zones of the LEP.
- 38 The Respondent advised that under the LEP, the site is not mapped as being subject to any significant environmental or planning hazards.
- 39 Clause 4.1 of the LEP prescribes a minimum lot size for subdivision. The site is mapped within "Area 2" and "Area 3" under the provisions of cl 4.1 of the LEP 2008. Pursuant to cl 4.1, Area 2 requires lots to be no less than 250m<sup>2</sup> and lots connected to side or rear lanes to be no less than 200m<sup>2</sup>. Whereas Area 3 requires lot to be no less than 300m<sup>2</sup> and lots connected to side or rear lanes to be no less than 240m<sup>2</sup>. The parties advise that the proposed development complies with cl 4.1 of the LEP.
- 40 Clause 4.3 of the LEP prescribes the maximum height of buildings (HOB) on the site. The site is mapped within "Area M" and "Area O" under the provisions of cl 4.3 of the LEP 2008. Area "M" has a maximum height of 12m and Area "O" has a maximum height of 15m. The proposed development does not comply with cl 4.3 of the LEP, as elements of the roof structures exceed the maximum HOB.
- 41 Clause 4.4 of the LEP prescribes a maximum floor space ratio (FSR) on the site. The site is mapped within "Area I" and "Area N" under the provisions of cl 4.4 of the LEP. Area "I" has a maximum FSR of 0.75:1 and Area "N" has a maximum FSR of 1:1. The parties advise that the proposed development complies with cl 4.4 of the LEP.
- 42 As the further amended DA includes some lift over-runs and roof elements above the HOB applying to the site, cl 4.6 of the LEP (exceptions to development standards) is relied upon to comply with cl 4.3 of the LEP. A cl 4.6 report (prepared by GLN Planning consulting strategy dated 21 May 2024) was submitted in support of the further amended DA.
- 43 Part 6 of the LEP applies to the site as it is located within an urban release area.

- 44 Clause 7.11 of the LEP prescribes a minimum dwelling density. Two separate minimum dwelling densities apply to the site. The western section of the site has a minimum density of 28 dwellings per hectare and the eastern portion has a minimum density of 17 dwellings per hectare. The parties advise that proposed development complies with cl 7.11 of the LEP.

*Liverpool Development Control Plan 2008 controls*

- 45 Part 2.11 of the DCP includes an ILP for the Edmondson Park precinct. As stated in paragraph [35], the ILP provides broad level development outcomes and outlines development footprint, land uses, density ranges, open space, major transport linkages and location of community facilities and schools.
- 46 The ILP shows that the south-western portion of the site is planned to form part of a village centre. Additionally, the ILP indicates a north-south road is to be constructed centrally through the site, two east-west half roads are to be constructed along the northern and southern boundaries.
- 47 The site is situated at a key location in the Edmondson Park precinct, providing for the development of one of the three proposed village centres in the area. Part of the village centre will be built on the site, with the balance of the village centre to be constructed on land directly to the south of the site.

*State Environmental Planning Policy (Housing) 2021*

- 48 The proposed development includes development of residential apartments of at least three storeys.
- 49 State Environmental Planning Policy Amendment (Housing) 2023 (Housing SEPP amendment) commenced on 14 December 2023 and served to, inter alia, repeal the State Environmental Planning Policy No. 65 – Design Quality of Residential Apartment Development and insert the provisions into the State Environmental Planning Policy (Housing) 2021 (Housing SEPP) at Ch 4 and Sch 9.
- 50 Section 8(2A) of Sch 7A of the Housing SEPP confirms that the matters in Ch 4 of the Housing SEPP apply to the further amended DA.

- 51 The Respondent operates a Design Excellence Panel (DEP) and therefore a referral of the DA to the Respondent's DEP was required under s 145 of the Housing SEPP.
- 52 The consent authority must consider the matters in s 147(1) of the Housing SEPP.
- 53 The Applicant advised that the DA (prior to the latest amendment) was reported to the DEP and comments have been included at Contention 5 of the Amended SOFAC. The DEP's comments have led to amendments to the DA, culminating in the changes made in the further amended DA.
- 54 Pursuant to ss 4.12 and 4.64 of the EPA Act and s 29 of the Regulation, the further amended DA must be accompanied by a statement by a qualified designer which addresses the matters in s 29(2) of the Regulation. An updated design verification statement has been prepared by HCKL Architecture Pty Ltd for the Applicant which addresses the matters in s 29(2) of the Regulation in respect of the further amended DA.
- 55 Section 147 of the Housing SEPP provides that development consent must not be granted to residential apartment development unless the consent authority has considered the quality of the design of the development, evaluated in accordance with the design principles for residential development set out in Schedule 9 of the Housing SEPP, the Apartment Design Guide (ADG), and any advice received from a design review panel.

*Proposed Amendments to the DA submitted on the third day of the Hearing*

- 56 At the commencement of the Hearing the Applicant foreshadowed an application to the Court for leave to further amend the DA.
- 57 The Hearing was adjourned to 19 July 2024 to allow time for the expert witnesses to assess the further amended plans and update their expert witness reports.
- 58 On the third day of the Hearing, the Applicant tabled Exhibit P which detailed four pages of changes from Revision E of the plans dated 20/5/2024 to Revision I of the plans dated 9/7/2024.

- 59 The latest amendments to the DA (constituting the further amended DA) were made to address the contentions remaining between the parties and include both further details and information added to the plans and changes to the proposed development arising from the Further Supplementary Joint expert report prepared on Town Planning by Mr Paul Grech (for the Applicant) and Mr Gerard Turrisi (for the Respondent) dated 11 July 2024.
- 60 The Applicant's request to amend the DA (the further amended DA) was granted by the Court on 19 July 2024.
- 61 The key changes incorporated in the further amended DA include:
- (1) Double storey houses scheme for the residue lot have been added to the site plan with relocation of indicative parking entry to the eastern side of the residue lot;
  - (2) Temporary turning heads have been added to the drawings;
  - (3) The substation has been relocated;
  - (4) Basement 2 layout has been updated to add more carparking spaces;
  - (5) Bicycle parking has added to the basements;
  - (6) The basement has been cut back and updated to match with revised unit numbers and more deep soil zone for sites C, D and E;
  - (7) The entry for site A and B has been enclosed with a glass wall;
  - (8) Unit layouts have been updated to provide the area of sun inside the living rooms and balconies;
  - (9) AC units on all balconies/terraces have been added;
  - (10) Skylights have been enlarged to provide the area of sun inside the living rooms and balconies as requested;
  - (11) Fire stairs have been amended in Buildings A3 and A4;
  - (12) A number of ground floor units on the ground floor of sites C/D/E have been updated, including two units with bedroom changes to study and three units with fence wall in front of bedrooms changed to 1.5m;
  - (13) Site C/D, one unit has been added to increase the GFA and several unit areas have been increased and the floor plan has been redesigned to address overlooking;
  - (14) The Solar Access and Cross-Ventilation Diagram has been updated; and
  - (15) The Solar Study for 21 Units (as identified in the Town Planning Expert Witness Report) has been provided.

62 No changes have been proposed to the loading arrangements and facilities for the village centre commercial component of the proposed development in the further amended DA.

### **Expert Evidence**

63 The Court was assisted by expert evidence in the following disciplines:

- (1) Town Planning:
  - (a) Mr Paul Grech of GLN Planning for the Applicant; and
  - (b) Mr Gerard Turrisi of GAT and Associates for the Respondent;
- (2) Traffic:
  - (a) Robert Varga Director Varga Traffic Planning Pty Ltd for the Applicant (single expert report);
- (3) Contamination:
  - (a) Steven Wallace Managing Consultant Sydney Environmental Group for the Applicant (single expert report).

64 The town planning experts attended the hearing and were cross-examined on their evidence relating the further amended DA.

### **Design Verification Statement**

65 A Design Response Statement and Design Verification Statement prepared by HCKL Architecture Pty Ltd were submitted by the Applicant in support of the further amended DA.

### **Solar Access Development Standard**

66 The further amended DA is accompanied by a written variation request to the non-discretionary development standard relating to solar access in s 19(2)(d) of the Housing SEPP. The Applicant advised that the variation seeks to vary the 3 hour solar access to the living rooms and private open spaces of the apartments in mid-winter so as to generally apply the former design criteria of 2 hours, the criteria prior to the Housing Amendment SEPP.

### **Remaining Merit Issues in Contention**

#### **The Respondent's submission**

67 At the end of the hearing of the expert evidence on the further amended DA, the Respondent submitted in its closing submission that it considered that there

were sixteen merit issues remaining between the parties, which could be broadly placed in the following categories:

- (1) Amenity for residents, which comprises impacts from:
  - (a) Insufficient building separation;
  - (b) The location of some building entry points deep within the site;
  - (c) The proximity of footpaths to units;
  - (d) The location and design of the common open space;
  - (e) Cross-ventilation;
  - (f) Ceiling heights; and
  - (g) Overlooking to future development on the residue lot to the east.
- (2) Bulk and scale, and visual impact, comprising:
  - (a) The presentation of Building C to the street;
  - (b) The design of the commercial lift between buildings B1 and B2;
  - (c) The impact of the articulation zone on the presentation of Buildings A1 and A4; and
  - (d) The design of the driveways, parking, loading and garbage areas, and the adequacy of screening and landscaping.
- (3) Useability, comprising:
  - (a) The means of access from the loading dock to commercial tenancies; and
  - (b) The overlapping amenity concerns particularly with respect to the communal open space.
- (4) The Respondent submitted that these issues, taken together,

“... are indicative of a development that is riddled with poor design, which will not provide sufficient amenity for future residents. While a similar better designed development is appropriate for this site, it is not the development the subject of the application. The application should be refused”.

### **The Applicant's submission**

68 The Applicant considered that the parties had formulated an agreed list of outstanding issues and addressed those issues in its closing submission under the headings of various contentions, as follows:

- (1) Contention 3(1) – whether the relationship between building C and the residue lot to the east is acceptable in terms of privacy and bulk and scale;

- (2) Contention 3(2) – whether the relationship between building D and the residue lot to the east is acceptable in terms of privacy and bulk and scale;
- (3) Contention 3(3) – whether the communal open space:
  - (a) For buildings C, D and E achieves solar compliance with Objective 3D-1 of the ADG; and
  - (b) [will provide] the occupants of Building C with convenient access to usable communal open space that meets the minimum 50% open space requirement;
- (4) Contention 3(4) – The proximity of the proposed footpaths to ground floor units meets Objective 3F-2 and Objective 4H-1 of the ADG;
- (5) Contention 3(5) – Whether the proposed commercial lift between building B1/B2 integrates with the built form acceptably;
- (6) Contention 3(6) – Whether adequate cross-ventilation is provided to the corridors on levels 2-4 on Buildings A1-A4 and Building E to achieve compliance with Objective 4F of the ADG. Additional windows may need to be provided to Buildings D1 and D2;
- (7) Contention 3(7) – Whether Buildings A1-A4 comply with Section 4C – Ceiling Height, under the ADG and the NCC requirements, in respect of the floor to height in the living areas immediately below bathrooms;
- (8) Contention 3(8) – Whether the building separation between D2.101 and D2.201 and Building C is sufficient;
- (9) Contention 3(9) – Whether:
  - (a) There is sufficient separation between units D1.102-104 and D2.101-103 to the stairwell and the lifts opposite the internal bedrooms; and
  - (b) That separation will have an adverse impact;
- (10) Contention 3(11) – Whether the articulation zone in the setback of Buildings A1 to A4 are acceptable;
- (11) Contention 3(12) – Whether the entry to Buildings D and E is appropriate in circumstances where the ADG provides that entry locations should relate to the street and address the public domain;
- (12) Contention 4(13) – Whether there is convenient and appropriate access from the loading dock to the commercial tenancies;
- (13) Contention 5(14) – Whether the design should have driveways wholly integrated within the building;
- (14) Contention 5(15) – Whether the landscaping between building A, the pathway and the retail spaces visible to the street are adequate to soften the visual impact of the hardstand and the wall;
- (15) Contention 5(16) – Whether:

- (a) The loading and garbage areas have an adverse visual impact when viewed from the streetscape; and
- (b) The screening of those areas is adequate.

69 The Applicant concluded that “the proposal, as amended, is a well-considered development that will deliver some 214 residential dwellings to market, including substantial affordable housing.”

70 Further, the Applicant submitted that the Court uphold the appeal, for the following reasons:

“Council’s concerns have been reduced to the minutia through a number of iterations;

The Applicant has attempted to resolve as many of the issues as possible, and invites conditions as identified in its submission to further refine the design, responsive to the Council’s concerns;

None of the issues pressed by Council are matters that should lead to refusal, rather they identify other preferred design options; and

In this instance, the proposal is an acceptable design that will provide housing with acceptable amenity and good design.”

71 The Applicant has provided in the Draft Conditions of Consent the following condition requiring detailed amendments to the further amended DA, to address the remaining contentions, as follows:

“16. Prior to the issue of a construction certificate amended plans shall be provided to the satisfaction of Council’s Principal Planner that includes but not limited the following elements of the design:

(a) Amended architectural plans shall be provided to address the following:

1. Fire boosters should be enclosed in a cupboard design to match the architectural style and materials of the development.
2. Ground floor courtyard walls of units D1.UG101 - 104, facing the communal open space in Building D, should adopt fence type 4 as shown on fencing plan TP04.22.
3. Units EUG106-107 in Building E should provide fencing in the location shown in plan TP04.22 for the east facing courtyards, adopting fence type 4 shown in TP 04.22.
4. The development is to comply with a minimum of 2.7m floor to ceiling height for residential habitable spaces, and 2.4m floor to ceiling height for non-residential spaces. For abundant caution, this condition does not authorise an increase in the overall height of the buildings.
5. An updated material and finishes plan is to be prepared.



6. The hard paved area shown on architectural plan TP01.22 in front of Building C adjacent to C.U06, must be removed and landscaped.

- (b) Amended architectural plans shall be provided that nominate the units to be managed as affordable housing.
- (c) The installation to any of the commercial premises that are intended to be used as food and drink premises by future users, suitable waste water facilities and air quality devices (these include but are not limited to grease traps and exhausts systems).
- (d) Toilets are to be provided either within each of the five commercial premises or as a shared facility.
- (e) In order to ensure CPTED and amenity values are achieved, amended plans are to be provided that achieve a higher level of articulation and passive surveillance to the through site links between all buildings on the site. These facades are currently shown on the plans as blank walls which need to be articulated through the re-orientation of the units to which the blank walls relate to provide windows and other articulation features.
- (f) There are to be no columns within the entry statements to Buildings A1 to A4.
- (g) The floor plans in the buildings include external staircases to the southern and northern end of Building A3 & A4 which are to be amended or removed. If it is the case that these are required for fire safety purposes they are required to be internalised and incorporated into the design. It is noted that the external stairs to the northern end of Building A3 & A4 are not connected to any of the floors so serve no purpose. Amended plans are required that demonstrate that adequate visual privacy impacts to the two storey developments to the east (measures relating to Building D1 and D2, and building D2 with Building C, which is separated by the driveway of the site will be minimised through the provision of either highlight windows or privacy screens.
- (h) Further activation of the street is required for the development facing Poziers Road rather than having bedrooms facing the street.
- (i) The amended plans shall include the use of robust and durable self-finished materials with an integral finish (face bricks, concrete) rather than rendered and painted finishes.
- (j) The commercial lift abutting Building B2 shall be clad in a durable non-paint finish that is compatible with the approved finishes for the building.
- (k) Condensers and mechanical equipment should not be located within the balconies, front gardens or anywhere visually apparent from the public domain. Any air conditioning condensers must be appropriately screened from view and can be located within the basement carpark.
- (l) The provision of the required landscaping elements listed in condition 18 of this consent.

(m) Sustainability design elements are to be provided on the amended plans and include but are not limited to the following:

1. Use of rooftop photovoltaic system for environmental benefits and for power/lighting common areas and courtyards
2. Provide rainwater tank to allow collection, storage and reuse within the site for both sites.
3. Ceiling fans should be provided to all habitable areas of the apartments, as a low energy thermal comfort alternative to air conditioning.

(n) Due to the adoption of FOGO by council between the previous referral advice and this document, Council will need to be provided with a plan of how this development will deal with FOGO. Council would recommend the conversion of a second chute to a FOGO chute and provide residents with a transfer bin on the floors for the disposal of co-mingled recycling

(o) Prior to issue of a Construction Certificate, the basement floor plan is to be amended to show that the bulky household waste room has been provided with a double-leaf access door, and show the locations where the bin mover and bin tipper will be stored.

(p) The fire doors to the corridors on level 2 to 3 in Buildings A3 and A4 are to be glass to an appropriate fire rating.

(q) The entry foyers to Buildings A1, A2, A3 and A4 are to be fully enclosed with glass.

(r) The eastern edge of the balconies of Units D2-U207 and D2-U306 shall incorporate an opaque glass screen to a minimum height of 1.5m above floor level."

## **Consideration**

### *Proposed Amended Plans Condition*

72 Despite the series of design changes for the proposed development as part of the on-going amendment of the DA, there remain numerous contentions between the parties as listed above. The Applicant's proposed amended plans condition (at [71] above) sets out what the Applicant believes still needs to be done to address the remaining contentions, but only in relation to the residential components of the proposed development.

73 There are clearly outstanding matters relating to the design of the residential component of the proposed development that require further work by the parties to resolve the "minutia" of design changes, as the Applicant expresses it. The unintended consequences associated with the numerous further amendments proposed have not been fully assessed.

- 74 I do consider that the changes put forward by the Applicant in proposed Condition 16 may not be achieved without some consequent changes to the design and layout of the proposed development, which will in turn may require a further iteration of changes to the proposed development.
- 75 Given the extent of the design changes proposed by the Applicant, I do not consider that I can make a decision supporting these changes to the residential buildings as proposed in Condition 16 by the Applicant. My findings on the commercial building loading facilities and access below will require some redesign of the proposed development.
- 76 I would observe that given the green field nature and the size of the site, it should be possible to design a residential development on the site which achieves the built form and scale and amenity outcomes contained in the Design Principles for residential apartment design in Schedule 9 of the Housing SEPP, including for Building C. This is notwithstanding whether (as submitted by the Respondent) Building C is considered to be subject to Ch 4 of the Housing SEPP (as part of the wider development scheme), or if (as submitted by the Applicant) the Housing SEPP does not apply to Building C pursuant to s144 (3)(b) as the proposed building is only 2 storeys above an underground car park.
- 77 Given the extent of the design changes proposed by the Applicant to the residential component of the proposed development, and as submitted after the Hearing was completed, I do not consider that I can support the changes to the residential buildings as proposed in Condition 16 by the Applicant.
- 78 In any case, my findings on the commercial building loading facilities and access below will require some redesign of the proposed development and an opportunity to address the design changes already proposed by the Applicant.

*Proposed Commercial Building Loading Facilities and Access*

- 79 A contention raised by the Respondent consistently through the process is that the proposed commercial loading facilities and access are poorly designed and inadequate for the proposed commercial buildings in the village centre area of the site.

80 The Respondent stated in their final submission that the commercial loading dock is located within building B1.

“A simple look at the plan raises the question as to how the tenants in commercial premises 03, 04, and 05, will access the loading dock and move their deliveries from the loading dock. There is no direct access”.

81 Further, the Respondent pointed out that:

“the evidence is that it requires a walk of about 115 metres around the perimeter of the property, to the tenancies. Not only is that suboptimal and inconvenient, but the impacts of it on the residents along that route (for example in terms of acoustic privacy), have not been assessed”.

82 The Applicant’s response (in their final submission) is that:

“the amended plans now provide access from the loading dock directly into the common area of the commercial premises in Building B2. It is noted that the commercial units are relatively small and the largest commercial unit is nearest to the loading dock. When vehicles use the loading dock trolley access is provided for goods delivery through the colonnade on the site thereafter”.

83 The Applicant submits that:

“in the circumstances where the commercial units are small in nature, the access is reasonable and efficient.”

84 No detailed evidence was put forward by the Applicant to support the proposed loading facilities and access to the commercial premises in Buildings B1 and B2. The Respondent’s expert Town Planner, Mr G Turrisi, stated at paragraph 41 of the Joint Experts’ Report – Town Planning dated 24 May 2024 that:

“what remains unresolved is a concern as to how one loading dock can service both buildings [Buildings B1 and B2] as there is no practical connection between the two buildings”.

85 I also note that the proposed commercial loading facilities and access to Building B1 are at grade, with truck movements potentially impacting on the residential components of Building A3 and the upper levels of Building B1. No attempt has been made to utilise the basement area underneath Building B1 and Building B2 for loading facilities and access to service commercial spaces in these buildings.

86 I consider that the design of the commercial loading facilities and access to the commercial area in the village centre have not been satisfactorily resolved. To do so will require design changes to access to and layout of the basement

carpark servicing the village centre, and will affect various components of the development proposal, which is subject to one development application.

## **Conclusion**

- 87 The proposed development is clearly consistent with the adopted strategic planning for the Edmondson Park precinct, as expressed in Part 2.11 of the DCP.
- 88 However, there remain numerous detailed design issues yet to be fully resolved. The parties have worked towards resolving these issues for the residential component, and after this Hearing had been completed further amendments were proposed by the Applicant in an extensive amended plans condition.
- 89 However, I am satisfied that the scope of the amendments required to the proposed development cannot be dealt with through an amending plans condition, as the impacts of the latest proposed changes to the residential component's design need to be fully assessed.
- 90 The proposed commercial loading facilities and access to the commercial area in the village centre (Buildings B1 And B2) have not been satisfactorily resolved. Changes to the location and operation of the village centre commercial buildings' loading facilities and access will also lead to further changes being required to the proposed development of the site.

## **Orders**

- 91 The Court orders:
- (1) The Applicant is to pay the Respondent's costs thrown away as agreed or assessed resulting from the amending of the development application, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
  - (2) The appeal is dismissed.
  - (3) Development Application DA-267/2022 seeking development consent for the construction of 6 residential flat buildings (including affordable housing), 2 shop top housing developments above basement parking and associated works on land legally described as lot 20 in DP1228502, being 225 Croatia Avenue, Edmondson Park, 2174 is refused.

**G Kullen**

**Acting Commissioner of the Court**

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