



Land and Environment Court
New South Wales

Case Name: Antoniou v Northern Beaches Council

Medium Neutral Citation: [2021] NSWLEC 1734

Hearing Date(s): 8-9 November 2021

Date of Orders: 30 November 2021

Decision Date: 30 November 2021

Jurisdiction: Class 1

Before: Gray C

Decision: The Court orders that:
1) The appeal is upheld.
2) Development consent is granted for the demolition of existing structures and the construction of a centre based child care facility at 11 Lewis Street Balgowlah Heights, subject to the conditions in Annexure A.
3) Exhibits 1, 4, C, E and F are returned.

Catchwords: APPEAL – development application – child care centre – adjacent to primary school – traffic impact – pedestrian safety – adequacy of parking arrangements – all contentions resolved

Legislation Cited: Environmental Planning and Assessment Act 1979 ss 4.15, 8.7
Environmental Planning and Assessment Regulation 2000 cl 55
Manly Local Environmental Plan 2013 cl 2.3, 4.3, 4.4, 4.6, 6.2, 6.4
State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 cl 23, 26
State Environmental Planning Policy No 55—
Remediation of Land cl 7

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council
(2018) 236 LGERA 256; [2018] NSWLEC 118

Texts Cited: Manly Development Control Plan 2013
National Construction Code

Category: Principal judgment

Parties: George Antoniou (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
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File Number(s): 2021/52122

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JUDGMENT

- 1 **COMMISSIONER:** Immediately to the north of Balgowlah Heights Public School, the applicant in these proceedings, Mr George Antoniou, seeks to build a centre based childcare facility. He lodged a development application with Northern Beaches Council (the Council) on 7 January 2021. Following the expiry of the period after which a development application is deemed to be refused, Mr Antoniou lodged this appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 2 During the course of the hearing, Mr Antoniou amended the development application, and the amendments to the development application were lodged on the NSW Planning Portal with the agreement of the Council, as required by cl 55(1) of the Environmental Planning and Assessment Regulation 2000.
- 3 The proposed development, as amended, is for the demolition of the existing dwelling house and associated structures, and for the construction of a 3-storey centre based child care facility containing an excavated lower ground floor level with car parking and pedestrian entry, a ground level with an office, two indoor play areas and an outdoor play area, and a first floor containing an

additional indoor and outdoor play area. Internal stairs provide access from the lower ground level to the ground level, and external return stairs provide access from the ground level to the first floor. A common lift also provides access to each level. The proposed development seeks to provide child care for 57 children, and to operate within the hours 7am to 7pm, Monday to Friday.

- 4 The lower ground floor accommodates a total of 16 car spaces, with 12 of the spaces provided by 4 single car stackers (8 spaces) and a dual platform car stacker (4 spaces). The proposal is for staff to use the upper level of the car stackers and some of the lower levels of the car stackers, and for the parent pick up and drop off to occur on the two of the lower levels of the car stackers as well as utilising the four spaces not containing stackers. The proposed driveway is double width, allowing for cars to pass in either direction and vehicles to enter and exit the site in a forward direction. A raised triangular-shaped median within the proposed driveway will enforce a restriction to left-in and left-out turn movements from and to Lewis Street.

The Council's position and the outcome of the appeal

- 5 As a result of the amendments to the development application, the Council agrees that the contentions it raised on the appeal have now been resolved, and that there are no contentions that remain outstanding that would warrant refusal of the development application.
- 6 Notwithstanding the Council's position, I am required to carry out an assessment under s 4.15 of the EPA Act to determine if it is appropriate to grant development consent. Section 4.15(1)(a) of the EPA Act requires that the Court, in exercising the functions of the consent authority, consider the provisions of any applicable environmental planning instrument, development control plan, and regulations. Amongst other things, s 4.15(1) also requires consideration of the likely impacts of the development, the suitability of the site for development, any submissions made by the local residents, and the public interest.
- 7 For the reasons that are set out below, I accept the evidence of the experts and find that each of the contentions raised by the Council have been resolved. I am satisfied that the matters raised by the resident objectors have been

adequately addressed through the amendments to the development application. The proposed development has acceptable arrangements in place to ensure that it does not have an adverse impact on traffic or on pedestrian safety. There is adequate parking provided in an acceptable form, and the design of the proposed development is acceptable in its context. Further, I am satisfied that development consent can be granted notwithstanding the minor non-compliance with the height development standard.

The site and the locality

- 8 The site is legally described as Lot B in DP 369977, and is known as 11 Lewis Street, Balgowlah Heights. It is located on the western side of Lewis Street, and is regularly shaped with a frontage of 15.09m. It has a site area of 781.8m², and a lot depth of 51.8m. The site falls from the rear boundary to the Lewis Street frontage, with a fall of around 3.7m. The site currently contains a two-storey dwelling house above a garage, which is excavated.
- 9 A site inspection was carried out in the afternoon on the first day of the hearing. It included a view of the site the subject of the proposal, the adjoining site to the north, the school to the south, and a walk along Lewis Street, Abbott Street, Radio Avenue, and along the pedestrian path that links Lewis Street and Radio Avenue.
- 10 The grounds of Balgowlah Heights Public School are located both on the western and eastern side of Lewis Street, immediately to the south of the site. The locality is otherwise characterised by residential dwelling houses, of varied ages, sizes and architectural styles, which are largely oriented to take advantage of views to North Head and the harbour to the east. The newer dwelling houses in the locality (or those which have been recently altered) are two storeys in height above a basement or lower ground level garage.

The planning framework

- 11 The site is zoned R2 Low Density Residential, pursuant to the Manly Local Environmental Plan 2013 (MLEP). Clause 2.3 of the MLEP requires that the Court, in exercising the functions of the consent authority, have regard to the objectives of the zone when determining a development application. The objectives of the zone are as follows:

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

- 12 Clause 4.4 establishes a FSR development standard for the site of 0.45:1. The proposed development complies with this development standard.
- 13 Clause 4.3 of the MLEP 2013 establishes a 8.5m building height development standard in accordance with the Height of Buildings Map. When measured from the surveyed excavated basement level, the proposed development exceeds the height development standard, with a total height of 8.53m at the ridge level above the surveyed excavated basement level.
- 14 On the basis that there is a breach of the height development standard, cl 4.6 of the MLEP precludes consent from being granted unless a written request is provided that justifies the contravention of the standard. Clause 4.6 provides, at (3) and (4):

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

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard.

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

- (a) the consent authority is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
 - (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
- (b) the concurrence of the Secretary has been obtained.

- 15 The State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 (Childcare SEPP) applies to the proposed development. Clause 23 provides as follows:

23 Centre-based child care facility—matters for consideration by consent authorities

Before determining a development application for development for the purpose of a centre-based child care facility, the consent authority must take into consideration any applicable provisions of the ***Child Care Planning Guideline***, in relation to the proposed development.

- 16 The Child Care Planning Guideline (CCPG) contains a number of design quality principles in Part 2, and a number of considerations in Part 3. The design quality principles include ensuring that the design responds and contributes to its context (principle 1), that it achieves a scale, bulk and height appropriate to the existing or desired future character (principle 2), that it achieves sustainable design (principle 4), that the landscape and buildings are integrated to result in attractive development (principle 5), and that it optimises the use of the built and natural environment for safe learning and play (principle 7).
- 17 Part 3 of the CCPG includes a range of considerations and controls, including considerations relating to site selection and location, compatibility with the local character and streetscape, delineation between the child care facility and public places, minimising impact on adjoining buildings, providing parking that satisfies the needs of users, and to provide a safe and connected environment for pedestrians both on and around the site.
- 18 The Manly Development Control Plan 2013 (MDCP) also applies to the site, and contains general principles in Part 3, and built form and setback controls in Part 4. The general principles of particular relevance in the current proposed development are protecting the amenity of existing residents by minimising the impact of new development on privacy, views, solar access and protecting general amenity from noise and vibration (Part 3.4), ensuring equitable access (Part 3.6), and maintaining safety and security (Part 3.10).
- 19 The built form controls in Part 4 of the MDCP include a 2-storey control and a wall height control that is based on the building length and the slope of the site. The relevant provisions in Part 4.1.4 concerning street front setbacks, side setbacks and rear setbacks are as follows:

“4.1.4.1 Street Front setbacks

See also paragraph 3.2.4 in relation to Heritage and paragraph 4.2 in relation to controls in LEP Business Zones.

- a) Street Front setbacks must relate to the front building line of neighbouring properties and the prevailing building lines in the immediate vicinity.
- b) Where the street front building lines of neighbouring properties are variable and there is no prevailing building line in the immediate vicinity i.e. where building lines are neither consistent nor established, a minimum 6m front setback generally applies. This street setback may also need to be set further back for all or part of the front building façade to retain significant trees and to maintain and enhance the streetscape.

...”

“4.1.4.2 Side setbacks and secondary street frontages

- a) Setbacks between any part of a building and the side boundary must not be less than one third of the height of the adjacent external wall of the proposed building.

...”

“4.1.4.4 Rear Setbacks

- a) The distance between any part of a building and the rear boundary must not be less than 8m.

...

- d) Rear setbacks must relate to the prevailing pattern of setbacks in the immediate vicinity to minimise overshadowing, visual privacy and view loss.”

20 The objectives of these provisions include the following:

“Objective 1) To maintain and enhance the existing streetscape including the desired spatial proportions of the street, the street edge and the landscape character of the street.

Objective 2) To ensure and enhance local amenity by:

- providing privacy;
- providing equitable access to light, sunshine and air movement; and
- facilitating view sharing and maintaining adequate space between buildings to limit impacts on views and vistas from private and public spaces.
- defining and adding character to the streetscape including the provision of adequate space between buildings to create a rhythm or pattern of spaces; and
- facilitating safe and adequate traffic conditions including levels of visibility around corner lots at the street intersection.

....”

Issues raised on the appeal

- 21 An Amended Statement of Facts and Contentions was filed by the Council on 22 September 2021, which raises a number of contentions that the Council now agrees are resolved.
- 22 The contentions concern the traffic impact of the proposed development, including potential risks to pedestrians using the footpath in front of the site (contention 1), as well as the adequacy of the basement car parking (contention 2). The Council also raised contentions concerning compliance with the CCPG (contention 3), the bulk and scale of the built form and its streetscape presentation (contention 4), the extent of excavation (contention 5), acoustic impacts (contention 6) and accessibility (contention 7).

The resident objector evidence

- 23 Following its lodgement with the Council, the development application was publicly exhibited from 13 January 2021 to 27 January 2021. It was subsequently re-notified and advertised from 5 to 19 February 2021 following a clerical error in the original advertisement. As a result of the public exhibition 101 submissions were received. In addition, a number of residents spoke at the commencement of the hearing and a town planner, Mr Jason Perica, spoke on behalf of one of the residents. By way of summary, the matters raised by the residents in the written submissions and in the evidence given at the hearing, include concerns with respect to the following:
 - Traffic impacts, particularly given the current traffic congestion on Lewis Street arising from the existing primary school.
 - Pedestrian safety risks as vehicles from the proposed development cross the footpath.
 - Insufficient parking.
 - Overdevelopment of the site, including its bulk and scale as a result of the excavation for the car parking.
 - Streetscape impacts and compatibility with the residential dwellings.
 - Visual and acoustic privacy impacts.
 - The adequacy of the disability access, and the emergency and evacuation plan.
 - Waste management and site contamination.

- The need or demand for an additional childcare centre in the area.
- 24 The issues with respect to traffic impacts, pedestrian safety and parking are all dealt with in my consideration below. Similarly, the concerns with respect to overdevelopment, streetscape impacts, visual and acoustic privacy, and the adequacy of the disability access and evacuation plan, are all considered below and found to be satisfactory.
- 25 With respect to the issue raised concerning whether there is an established need or demand for a childcare centre, cl 25(2)(a) of the Childcare SEPP provides that “the development may be located at any distance from an existing or proposed early education and care facility”, and cl 26 of the Childcare SEPP makes it clear that any provisions of the MDCP that specify a requirement to demonstrate need or demand for child care services, or that specify a control in relation to the proximity of a facility to other early education and care facilities, do not apply.

Expert evidence

- 26 Expert opinion evidence on the traffic, parking and pedestrian safety issues was given by Mr Craig McLaren, a traffic engineer engaged by Mr Antoniou, and Mr Paul Corbett, a traffic engineer engaged by the Council.
- 27 As a result of the amendments to the development application that now form part of the proposed development, Mr McLaren and Mr Corbett agree that the car parking is adequate, the car parking arrangements are acceptable, that vehicles can enter and exit the site without impeding the traffic on Lewis Street, and that there are sufficient sight lines to ensure that vehicles can give way to pedestrians on the pedestrian path on the site’s frontage.
- 28 Expert opinion evidence on the town planning and urban design issues was given by Garry Chapman, a town planner engaged by Mr Antoniou, Mr Gyula Toth, an urban design expert engaged by Mr Antoniou and Mr Steven Layman, a town planner and urban design expert engaged by the Council.
- 29 The amendments to the development application have resulted in a proposed development that Mr Layman and Mr Chapman agree is appropriately designed for its streetscape context and does not have an unacceptable adverse impact.

- 30 Expert opinion evidence on the accessibility of the proposed development was given by Mr Peter Antcliffe, a building surveyor and town planner engaged by Mr Antoniou. His evidence is that the proposed development meets the accessibility requirements of the MDCP and the National Construction Code (NCC).

The breach of the height development standard

- 31 As a result of the surveyed levels of the existing garage and undercroft storage area, the height of the ridge results in a breach of the 8.5m height development standard if the “ground level (existing)” is taken to be excavated garage and undercroft storage area.
- 32 The ridge corresponds to an undercroft storage level at RL 83.722, at which point the building has a maximum height measured to the ridge of 8.53m. The proposed development therefore exceeds the height development standard by 30mm.
- 33 Clause 4.6(3) and (4) of the MLEP precludes the grant of development consent for development that contravenes a development standard, unless certain conditions are satisfied. In particular, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that the written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) and cl 4.6(4)(a)(i)) and adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) and cl 4.6(4)(a)(i)). The Court must also be satisfied that the proposed development will be consistent with the objectives of the zone and with the objectives of the standard in question, which means that the development is in the public interest (cl 4.6(4)(a)(ii)).
- 34 Mr Antoniou relies on the written request dated 9 November 2021, prepared by Mr Chapman, pursuant to cl 4.6 of the MLEP. Further, Mr Chapman’s evidence is that the 3-storey built form is an acceptable design for the subject site, noting that it is compatible with the existing building on the site, and with the dwelling to the north at 13 Lewis Street.

- 35 Mr Layman opines that the breach is inconsequential and will not be discernible. He considers that it is a minor exceedance and that, in the streetscape, the building will be lower than the existing dwelling on the site, and will appear as though it complies with the height development standard.

Development consent should be granted notwithstanding the contravention

- 36 I note that I have not been asked to adjudicate on whether there is, in fact, a contravention of the height development standard. On the assumption that there is such a contravention, on the basis of the cl 4.6 request and the evidence of the town planners, I am satisfied that consent should be granted notwithstanding the contravention.
- 37 I am satisfied that the written request, lodged pursuant to cl 4.6 of the MLEP, adequately establishes sufficient environmental planning grounds that justify the breach in the height development standard. It does so by demonstrating that the breach occurs over an existing excavated level, and results from the sloping topography of the site and the inclusion of a pitched roof in the design of the built form to achieve a building presentation that is consistent with the existing housing in the locality. These grounds are environmental planning grounds that are adequate to inform, or justify, the minor breach of the height development standard. Further, it is noted in the written request, and I accept, that the building complies with the height development standard measured from external levels at the perimeter of the building, which ensures that the building height is compatible with the context of the surrounding buildings.
- 38 I am also satisfied that the written request demonstrates that compliance with the standard is unreasonable and unnecessary given that the proposed development is consistent with the objectives of the standard notwithstanding the non-compliance, and as the building meets the height development standard measured from existing levels at the perimeter of the building and from the estimated natural ground levels below the building when calculated based on the existing levels at the perimeter. The objectives of the height development standard are as follows:

“(a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,

- (b) to control the bulk and scale of buildings,
- (c) to minimise disruption to the following—
 - (i) views to nearby residential development from public spaces (including the harbour and foreshores),
 - (ii) views from nearby residential development to public spaces (including the harbour and foreshores),
 - (iii) views between public spaces (including the harbour and foreshores),
- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,
- (e) to ensure the height and bulk of any proposed building or structure in a recreation or environmental protection zone has regard to existing vegetation and topography and any other aspect that might conflict with bushland and surrounding land uses.”

- 39 As set out in the written request, the proposed development has a pitched roof form that is consistent with the form of dwellings within the visual catchment of the site, and is 3-storey presentation is compatible with the prevailing building height along Lewis Street. The height of the building does not result in a disruption of views, and will not result in any unreasonable overshadowing. I therefore accept that compliance with the height development standard is unreasonable and unnecessary as the proposed development achieves the objectives of the development standard notwithstanding the contravention.
- 40 Further, I am satisfied, based on the content of the written request, that the proposal is in the public interest because it is consistent with the objectives of the zone and, as per the above, the objectives of the building height development standard.
- 41 Clause 4.6(4)(b) of the MLEP also requires that the concurrence of the Planning Secretary be obtained for development consent to be granted to development that contravenes a development standard. Whilst s 39(6) of the LEC Act gives the Court the power to grant development consent without obtaining the concurrence of the Secretary, in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [29], Preston CJ stated that the Court should “consider the matters in cl 4.6(5) when exercising the power to grant development consent for development that contravenes a development standard”. The Council has not raised any of the

matters in cl 4.6(5) as a basis upon which the power in cl 4.6(4) ought not be exercised, and I am satisfied that the proposed development does not raise any matter of significance for State or regional environmental planning, and that breach of the height development standard is appropriate in the circumstances. There is, therefore, limited public benefit in maintaining the development standard on this site for the proposed development.

- 42 For all of the reasons set out above, I am satisfied that each of the matters required by cl 4.6(4) of the MLEP are satisfied, and that there is power, pursuant to cl 4.6(4), to grant development consent notwithstanding the non-compliance with the building height development standard.

Each of the contentions raised by the Council has been resolved

- 43 As a result of the amendments made to the development application, and the evidence of the experts, each of the contentions raised by the Council on the appeal have been resolved.

Traffic, parking and pedestrian safety

- 44 The first and second contentions raised by the Council on the appeal are that the proposed development will create an unacceptable traffic impact, will create a risk to the safety of pedestrians using the footpath, and that the parking arrangements are unsuitable and inadequate.
- 45 Mr McLaren and Mr Corbett agree that the revised access arrangement will physically enforce left-in and left-out movements to the site, which satisfactorily addresses both the traffic impacts of the proposed development and the pedestrian safety issues. This arrangement means that there will be no queuing of traffic on Lewis Street as a result of the proposed development.
- 46 Mr McLaren opines that, based on the number of vehicles using Lewis Street and the 40km/h speed limit, there are sufficient gaps in the traffic during which there is time for vehicles to turn right into the site, without causing unreasonable queuing on Lewis Street. His modelling supports this opinion. However, he has agreed that a left-in and left-out restriction can be physically enforced as a result of the revised design for the driveway entrance, and that there are diverted routes around the site that can easily accommodate the displaced right turn entry with little or no impact.

- 47 Mr McLaren and Mr Corbett agree that the restriction to left-in and left-out also addresses the sight distance issue that was previously raised by Mr Corbett and therefore addresses the safety issues at the driveway access. In particular, the proposed design includes the provision of sight line splays to pedestrians as required by the Australian Standard AS2890.1:2004 Parking Facilities Figure 3.3, which ensure mutual sight lines between pedestrians and drivers, and achieves compliance with Figure 3.2 of AS 2890.1:2004 for sight line splays to the south of the proposed access.
- 48 Further, Mr McLaren and Mr Corbett agree that the pedestrian safety issues along Lewis Street can also be addressed by public domain works for the removal of the pram ramp crossing on the eastern side of Lewis Street opposite the driveway of 11 Lewis Street, and the erection of Type 1 pedestrian fencing 5m either side of the location of the midpoint of the existing pram ramp which is to be removed. This will mean that pedestrians using that footpath will be directed to continue along the footpath, rather than to cross the road using the pram ramp (which currently would lead a pedestrian to the driveway of the site). This work is required to be carried out by the agreed conditions of consent.
- 49 Mr McLaren and Mr Corbett also agree that the revised car park arrangements address the aisle width issue previously raised by Mr Corbett, and that concerns with respect to head height clearance can be addressed through the imposition of a suitable condition of consent. The condition agreed upon is as follows:
- “• 2.2 metre head height clearance shall be provided for all car parking spaces on the lower levels of the car stacker bays 5-10
 - 2.0 metre head height clearance shall be provided on the upper levels of car stacker bays 5-8
 - 1.9 metre head height clearance shall be provided on the upper levels of car stacker bays 9-10”
- 50 They agree that concerns regarding car space widths for visitor spaces (parent pick up and drop off) and for staff parking can also be dealt with by way of conditions of consent. In addition, they agree that a change to the Plan of Management and a suitable condition of consent requiring visitor parking to be

limited to 6 minutes will ensure that there is adequate visitor car parking provision.

- 51 As a result, they agree that there are sufficient car parking spaces of a range of different head heights to accommodate different vehicles, adequate arrangements in place to ensure that visitors (parents) do not operate the car stackers, and sufficient aisle width for manoeuvring clearance. Mr McLaren opines that smaller aisle widths can be accommodated in light of the fact that visitors are regular users of the car park, and that the revised arrangement is “over-engineered” allowing more circulation than what is typically needed for a child care centre.
- 52 I accept the evidence of Mr McLaren and Mr Corbett. The left-in and left-out restriction ensures that there will be no queuing on Lewis Street as a result of vehicles turning right into the site, and addresses the pedestrian and traffic safety issues by ensuring that the applicable sight lines are achieved. The public domain works will also mean that pedestrians on the eastern side of Lewis Street will not cross the road at the location of the driveway entrance to the site. I accept their evidence that the proposed conditions of consent and the revised car parking layout will ensure that there is adequate car parking provision and adequate circulation for vehicles within the carpark. As such, I am satisfied that the issues regarding traffic, pedestrian safety and car parking arrangements raised by the Council and by the objectors have been adequately addressed by the proposed development and do not warrant refusal of the development application.

Bulk, scale and streetscape presentation

- 53 The Council also raised a contention that the bulk and scale of the built form and its streetscape presentation was inappropriate and out of character (contention 4). On the basis of their position on the bulk and scale and streetscape presentation, the Council also raised a contention concerning compliance with the design quality principles in Parts 2 and 3 of the CCPG relating to context, built form, sustainability, landscape and amenity (contention 3). In particular, the Council was concerned about the non-compliance with

setback controls in the MDCP, and breaches of the FSR and height development standards.

- 54 As a result of the amendments to the design, the proposed development no longer breaches the FSR development standard and the breach of the height development standard, set out in more detail above, is minor. Further, the building has been set back with the making of some internal configuration changes, so that it now complies with the predominant front setback, which is 7.2m.
- 55 Mr Layman, Mr Chapman and Mr Toth agree that the northern elevation provides adequate articulation which breaks the wall length. Further, Mr Layman now agrees that the reconfiguration at the first floor, which moves part of the external wall at the first floor away from the southern boundary, provides adequate articulation and setbacks to the school to the south. Whilst the rear setback remains inconsistent with the setbacks of the dwelling houses to the north, Mr Layman agrees that it nevertheless exceeds the minimum numerical requirement of 8m and does not cause any overshadowing, visual privacy impacts or view loss. In oral evidence, Mr Layman indicated his acceptance that it is inevitable that a child care centre will have setbacks that are inconsistent with adjoining dwelling houses, but that this is acceptable in the present circumstances where there are no unacceptable impacts and where there is compliance with the FSR and the numerical rear setback requirement. Mr Layman opines that the increased front setback and the corresponding increase in the landscaping achieves a design that is more consistent with the streetscape, and reduces the bulk that presents to the street. As such, Mr Layman opines that the design of the proposed development now achieves reasonable consistency with the provisions in the MDCP and the current character of the area.
- 56 This is also supported by the evidence of Mr Chapman, who opines that the 3-storey form of the proposed development, with a pitched roof form, is consistent and compatible with existing dwelling houses on Lewis Street, in particular when compared to dwelling houses on the western side of Lewis Street, where the land falls toward the street. Mr Chapman points out that the

third storey is set further back, and is confined to the front of the site due to the site topography.

- 57 Mr Chapman also considers that the reduced side setbacks will not result in any unreasonable visual building bulk and scale, solar impacts or visual privacy impacts.
- 58 It is also agreed, by Mr Layman, that the proposed development complies with the minimum total open space requirements in the MDCP of 55% of the site area, and the landscaped area requirement of 35% of the total open space. It is also agreed between the parties that the side setbacks can accommodate landscaping of a suitable species. A condition of consent has been proposed for the landscape plans to be updated to reflect the changes to the design of the development.
- 59 I accept the evidence of Mr Layman, Mr Chapman and Mr Toth with respect to the bulk and scale of the proposed development, the appropriateness of the setbacks, and the streetscape presentation. The proposed development is of an appropriate bulk and scale, has acceptable setbacks and articulation, and is compatible in the existing streetscape. I also accept that, for these reasons, the proposed development is consistent with the design quality principles in Part 2 of the CCPG, and the site planning and related considerations in Part 3.
- 60 With respect to the impact of the built form of the proposed development on the residents at 13 Lewis Street, which is raised by a resident objector, I consider that there is no privacy impact and that the visual impact from the rear yard is not unacceptable. The proposed development contains a one storey element at the rear, with the upper storey set back and generally aligned with the built form on 13 Lewis Street. As such, the visual outlook from the rear private open space at 13 Lewis Street, across the site, will be to a one storey element that will be visible above the fence line. I accept the evidence of Mr Layman that, in circumstances where the proposed development has a compliant FSR, this visual impact is not unacceptable. Further, I accept the agreed evidence of the experts that there is sufficient articulation on the northern elevation, which adjoins 13 Lewis Street.

- 61 Where there is non compliance with the numerical requirements of the MDCP, in particular the 3-storey control and the side setbacks, s 4.15(3A)(b) of the EPA Act requires me to take a flexible approach to applying those requirements and allows me to consider “reasonable alternative solutions that achieve the objects of those standards”. I am satisfied that the design of the proposed development meets the objectives of the built form controls, which include maintaining and enhancing the desired spatial proportions of Lewis Street, on which a number of 3-storey dwellings are located, and provides adequate space on the northern and southern side boundaries to maintain the rhythm of spaces between residential buildings on the western side of Lewis Street.

The extent of excavation

- 62 The Council contended that the extent of excavation is excessive, and offends a number of the provisions in cl 6.2(3) of the MLEP. Clause 6.2(3) provides:

(3) Before granting development consent for earthworks (or for development involving ancillary earthworks), the consent authority must consider the following matters—

(a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,

(b) the effect of the development on the likely future use or redevelopment of the land,

(c) the quality of the fill or the soil to be excavated, or both,

(d) the effect of the development on the existing and likely amenity of adjoining properties,

(e) the source of any fill material and the destination of any excavated material,

(f) the likelihood of disturbing relics,

(g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,

(h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

- 63 In the joint report of Mr Layman, Mr Chapman and Mr Toth, Mr Layman remained concerned that the excavation would “limit the adaptive reuse to other uses of the building and land over time”, and would “cause construction impacts”.

- 64 Following the amendment to the plans that now form part of the proposed development, Mr Layman agrees that there is no numerical control that applies to the site that limits the depth of excavation, and the increased front setback and landscaping means that the extent of excavation is effectively out of sight and not apparent from the street and neighbouring properties. As such, he agrees that the extent of excavation is not, of itself, fatal to the development application.
- 65 Further, Mr Chapman opines that the excavation of the site for the purpose of basement carparking is a better outcome than providing car parking at grade and therefore reducing the landscaping proposed as part of the proposed development.
- 66 I accept the evidence of Mr Chapman and Mr Layman. The extent of excavation does not warrant refusal of the development application, and provides an acceptable car parking design that meets the requirements for the child care centre. I accept that an excavated car park provides a better planning outcome than the provision of car parking at grade, which is typically at the expense of providing a landscaped front setback. I do not accept that the excavation will prevent future development on the site, but I consider that it instead facilitates the delivery of the proposed development with acceptable car parking arrangements. Similarly, none of other matters in cl 6.2(3) of the MLEP warrant refusal of the development application. The proposed development, including the required excavation, is supported by a Geotechnical Assessment by Ascent Geotechnical Consulting dated 17 December 2020, which concludes that no geotechnical hazards will result from the proposed development, subject to adherence to its recommendations.

Acoustic impacts

- 67 The Council raised a contention that the proposed development ought to be refused on the basis that it was not supported by an updated acoustic report.
- 68 The Council no longer maintains this contention. The proposed development is supported an Environmental Noise Assessment prepared by Day Design Pty Ltd and dated 17 August 2021, which considers the acoustic impact based on the design of the development with the location of the children's indoor and

outdoor play areas in the location where they are now proposed. It recommends a Noise Management Plan and acoustic treatments, including sound barrier walls, absorptive treatment above the first floor outdoor play area, and glazing requirements. These measures are required to be implemented by the proposed conditions of consent.

- 69 The Environmental Noise Assessment concludes that, if the recommendations in the report are implemented, the level of noise emission by the proposed Child Care Centre will meet the noise level requirements of the Childcare SEPP, the CCPG, the Association of Australasian Acoustical Consultant's Guideline for Child Care Centre Acoustic Assessment, and the NSW Environment Protection Authority Road Noise Policy.
- 70 I am therefore satisfied that the acoustic impact of the proposed development will be acceptable.

Accessibility

- 71 The Council also raised a contention that the proposed development has a poor accessibility outcome due to the reliance on a single lift, the lack of a ramped pathway linking key areas of the site, and the use of steps in the northern passageway between the building and neighbouring allotment.
- 72 However, the expert evidence of Mr Antcliffe is that none of these matters result in poor accessibility of the proposed development. His evidence, which is contained in an expert report and is uncontested, is that:
- Reliance on a single lift is considered acceptable under the NCC, Clause D3.1, which requires all areas of the proposed building to be accessible to occupants. A single lift is 'the gold standard' as it can facilitate independent use of a building for most persons on the disability spectrum. A ramp doesn't necessarily provide the same level of access. Lift breakdowns and maintenance are not relevant to the consideration under the NCC, and lift maintenance is expected to occur as part of the maintenance regime for the development.
 - Neither the NCC nor the relevant Australian Standards (AS1428.1 Design for Access and Mobility) require areas to be linked by grade access or pedestrian ramps.
 - The egress from the building on the northern side boundary, which contains a path with a gradient not steeper than 1:8 and stairs, complies with the minimum deemed to satisfy provisions of Volume 1 of the Building Code of Australia for

an exit path used for the purposes of occupants egressing in an emergency. It also complies with NCC D1.10 and NCC D3.2.

- Ramps are not required as part of an emergency path of travel, as the life safety requirements to provide means to get out of the building and to a safe place supersedes any accessibility requirement. The egress pathway is not considered a path for the purpose of access to the building.
- The principal pedestrian entry for the proposed development has complying access, not less than 50% of the pedestrian entries to the proposed development are accessible, and the doorway to the northern pathway is not more than 50m from the principal pedestrian entry, which means that the pathway need not be accessible.
- The proposed development therefore complies with the requirements of the Disability Discrimination Act 1992, the requirements of the NCC in relation to a continuous accessible path of travel, and general requirements of the MDCP concerning accessibility.

73 I accept this evidence. The proposed development provides access to and within the building through the lift, which is accessed either from the car park, or from the pedestrian entrance at the lower ground floor. The lift is adequate to provide access for a person with disabilities, and the egress along the northern side boundary meets the relevant requirements of the NCC and the BCA and is not required to contain a ramp.

Development consent should be granted

74 For the above reasons, each of the contentions raised by the Council on the appeal have now been addressed through the amendments to the proposed development and on the basis of expert evidence. The Council relies on that expert evidence and agrees that there are no remaining contentions that warrant refusal of the development application.

75 The proposed development is appropriately sited next to the primary school, has acceptable traffic and parking arrangements, and does not cause any unacceptable impacts.

76 Consideration has been given as to whether the subject site is contaminated as required by cl 7(1) of State Environmental Planning Policy No 55—Remediation of Land. As the site has a history of use as residential premises, it is unlikely to be contaminated.

- 77 Further, I am satisfied, based on the stormwater management plan, of the matters set out in cl 6.4(3) of the MLEP.
- 78 It is therefore appropriate for development consent to be granted subject to the conditions of consent that are largely agreed by the parties.

Conditions of consent

- 79 There is one condition of consent in dispute, concerning whether the manufacturer specifications for the car stackers should be provided prior to the issue of the construction certificate or prior to the issue of an occupation certificate. It is agreed that the parking spaces on the lower levels of the car stacker bays 5-10 shall be provided with a 2.2 metre head height clearance, with a 2m head height clearance on the upper levels of car stacker bays 5-8 and a 1.9 metre head height clearance on the upper levels of car stacker bays 9-10. Whereas the Council seeks that the condition require the manufacturer specifications demonstrating compliance with these requirements to be submitted prior to a construction certificate and therefore before the basement is constructed, Mr Antoniou says that this will unnecessarily delay the issue of any construction certificate (including an early works demolition/excavation Construction Certificate). Mr Antoniou instead submits that the details of the car stackers can be provided prior to the construction certificate, with final manufacturer specifications prior to the occupation certificate.
- 80 Whilst I accept the Council's position that submitting the details of the car stackers ought not to be deferred, in my view it is sufficient that the details are submitted without the final manufacturer's specifications. This enables the development to be commenced with sufficient detail to ensure that the basement will be adequate, but without requiring the final manufacturer specifications. Condition 24 requires the details to be submitted prior to the construction certificate, so that the basement will be designed to accommodate the above head height clearance requirements, and condition 48 requires the final manufacturer's specifications prior to the issue of the Occupation Certificate. I consider that these steps are appropriate to ensure that there is compliance with the head height requirements set out above.
- 81 The remaining conditions are agreed.

Final orders

82 The Court orders that:

- (1) The appeal is upheld.
- (2) Development consent is granted for the demolition of existing structures and the construction of a centre based child care facility at 11 Lewis Street Balgowlah Heights, subject to the conditions in Annexure A.
- (3) Exhibits 1, 4, C, E and F are returned.

.....

J Gray

Commissioner of the Court

[Annexure A \(356347, pdf\)](#)

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