



Land and Environment Court  
New South Wales

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Case Name:	Williamson v Northern Beaches Council
Medium Neutral Citation:	<b>[2020] NSWLEC 1110</b>
Hearing Date(s):	17-18 February 2020
Date of Orders:	11 March 2020
Decision Date:	11 March 2020
Jurisdiction:	Class 1
Before:	Horton C
Decision:	<p>The Court directs that:</p> <p>(1) The parties are to confer to finalise the appropriate wording for the conditions of consent resulting to give effect to the agreed position of the experts at [48], and from the findings of the Court at [67]-[68].</p> <p>(2) If an agreement is reached on the conditions of consent referred to in [98(1)] and [98(2)] above, the final conditions of consent are to be filed by the Council by 24 March 2020.</p> <p>(3) If no such agreement is reached, the parties are to lodge an Online Court request by 12:00pm on 25 March 2020 setting out agreed available dates for a further court mention.</p> <p>(4) Liberty to restore is granted on 2 days' notice.</p>
Catchwords:	DEVELOPMENT APPLICATION – boarding house development – R2 Low Density Residential zone – character of local area – visual and acoustic impact – provision of onsite car parking in accessible area
Legislation Cited:	Conveyancing Act 1919 Environmental Planning and Assessment Act 1979 Land and Environment Court Act 1979 Protection of the Environment Operations Act 1997 State Environmental Planning Policy (Affordable Rental

	Housing) 2009 State Environmental Planning Policy (Affordable Rental Housing) Amendment (Boarding House Development 2019) Warringah Local Environmental Plan 2011
Cases Cited:	Freedom Development Group v Willoughby City Council [2020] NSWLEC 1037
Texts Cited:	Occupant Survey of Recent Boarding House Developments in Central and Southern Sydney, UNSW Warringah Development Control Plan 2011
Category:	Principal judgment
Parties:	Michael Williamson (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: T Hale SC (Applicant) A Gough (Solicitor) (Respondent)  Solicitors: Conomos Legal (Applicant) Gough & Storey Lawyers (Respondent)
File Number(s):	2018/332566
Publication Restriction:	No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act), against the refusal by the Northern Beaches Local Planning Panel on behalf of Northern Beaches Council (the Respondent) of Development Application No. 2018/0849 (development application) seeking consent for the construction of a three-storey, 27 bedroom Boarding House, car parking for 11 cars, 5 motorcycles and 5 bicycles and ancillary works at No.10 Naree Road, Frenchs Forest (the site).

- 2 On 29 August 2019, the Applicant was granted leave to amend the application and rely upon amended plans and documents responsive to contentions raised by the Respondent (Exhibit B).
- 3 On the eve of the hearing, the Applicant was again granted leave to further amend the application and rely upon amended plans marked Exhibit C, that incorporate amendments agreed in the joint conferencing undertaken by the urban design experts, and planning experts.

### **The site and its context**

- 4 The site is located on the northern side of Naree Road, which has recently been the subject of roadworks associated with the development of the Northern Beaches Hospital which is located around 700m to the east of the site.
- 5 The site is legally described as Lot 16 in DP 23317, being 21.3m wide, and 45.7m deep, having a total area of 975.5m<sup>2</sup>. The land slopes towards the rear of the site in the order of 4m, and has a cross fall of around 1m at the rear boundary.
- 6 The site is located within the R2 Low Density Residential zone pursuant to the Warringah Local Environmental Plan 2011 (WLEP), in which boarding house development is permitted with consent, and wherein the objectives of the zone are in the following terms:
  - 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.
  - To ensure that low density residential environments are characterised by landscaped settings that are in harmony with the natural environment of Warringah.
- 7 The site is within the area subject to the Northern Beaches Hospital Precinct Structure Plan (HPSP) which the parties agree is not determinative in the matter. While Phase 2 of the HPSP envisions medium density residential zoning to Naree Road, it is commonly held that Wareham Crescent will remain zoned R2 Low Density Residential.

## **The onsite view and public submissions**

8 In accordance with its usual practice, the proceedings commenced with an onsite view at which the Court heard three public submissions that are recorded in notes agreed by the parties (Exhibit 12) and which may be summarised as follows:

(1) Mr Robert Brennan, No 8 Naree Road:

- The proposal is not consistent with the character of the local area which comprises dwellings with small footprints and generous grassed backyards.
- While the application has been amended, it should be no more than 12 rooms and conditions should be imposed to ensure it is for affordable housing and not marketed as luxury suites.
- Stormwater and sewer management needed to be addressed.
- Waste removal, noise, traffic and visitor parking may impose adverse impacts on residents and pedestrians using the footpath on Naree Road.
- The bulk and scale of the proposed development will impose overshadowing and privacy impacts on his property.

(2) Mr Peter Cooper-Southam, 21 Wareham Crescent

- The bulk and scale of the proposed development is excessive.
- The location and use of the proposed outdoor communal area may adversely impact on his entertaining area which abuts.
- Stormwater runoff is a concern.
- The proposal will worsen car parking in the area, which is already dangerous.

(3) Mr Jonathan Gormley, 23 Wareham Crescent

- The bulk and scale of the proposed development is excessive, being 3 storeys when viewed from his rear yard.
- Proposed excavation may adversely impact on the foundations, pool and garden in his property.
- The existing stormwater connection overflows at present and will need to be fixed and the means of executing the easement is unclear.
- 40+ people that may use the outdoor communal area and create noise, which is located adjoining the rear yard of his property.
- Car parking is insufficient.
- Mr Gormley is a fire engineer and has concerns in relation to compliance with the Building Code of Australia (BCA).

- 9 In the company of the parties, and the experts, the Court was also taken to properties at No 8 Naree Road, No 21 Wareham Crescent, and No 31 Forest Way which is the location of a recently constructed boarding house.
- 10 The Council's bundle of documents, marked Exhibit 2, contains written submissions responsive to the original application and amended application, including submissions in support of the proposal.

### **The issues**

- 11 The parties are agreed that the amended plans resolve a number of the contentions contained in the Amended Statement of Facts and Contentions (Exhibit 1), and that those contentions remaining may be summarised as follows:
- Contention 1 – The proposed development is incompatible with the character of the local area and is not consistent with cl30A of the SEPP ARH.
  - Contention 3 – The height and bulk of the proposed development is excessive.
  - Contention 4 – The proposed development results in unreasonable privacy impacts on the neighbouring and nearby properties.
  - Contention 9 – The provision for parking for cars and motorcycles does not comply with the SEPP ARH or the WDCP.
- 12 Flowing from these contentions, the Respondent further contends that the proposed development is not in the public interest, pursuant to s 4.15(1)(e).
- 13 In general terms, the dispute centres on the bulk and scale to the rear of the proposed development, the adverse impacts that result, and the provision of parking for cars onsite.
- 14 It is my view that the principal matters fall into three categories:
- Height, bulk, scale and character
  - Privacy Impacts
  - Car parking provision
- 15 Given the nature of the issues in dispute, the Court was assisted by the following experts:

<i>Discipline</i>	<i>Applicant</i>	<i>Respondent</i>
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<i>Planning</i>	Mr Daniel McNamara	Mr Alex Keller
<i>Urban design</i>	Mr Paul Walter	Ms Lea Lennon
<i>Landscape Architecture</i>	Mr Darrell McLean	Mr Anthony Powe
<i>Hydraulic</i>	Mr Stanley Leung	Mr Alex Kwok
<i>BCA</i>	Mr Mardiros Tatian	Mr Peter Rowan
<i>Traffic</i>	Mr Oleg Sannikov	Mr James Brocklebank

- 16 As the parties did not intend to call the landscape experts for evidence in proceedings, the Court's attention was drawn onsite to existing trees at the rear of the site, and provided with a description of the proposed landscaping at the rear, and along the side boundary setbacks.
- 17 Oral evidence was provided in relation to planning by Mr Damian McNamara for the Applicant, and Mr Alexander Keller for the Respondent, and in relation to traffic by Mr Oleg Sannikov for the Applicant, and Mr James Brocklebank for the Respondent.

### **Statutory framework**

- 18 The development the subject of the development application falls within the scope of the State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH). Accordingly, as the site is within the R2 zone and in an accessible area, the provisions of clauses 29, 30 and 30A apply.
- 19 Clause 29 provides, relevantly:

#### **29 Standards that cannot be used to refuse consent**

...

(2) A consent authority must not refuse consent to development to which this Division applies on any of the following grounds—

(a) building height

if the building height of all proposed buildings is not more than the maximum building height permitted under another environmental planning instrument for any building on the land,

...

(d) private open space

if at least the following private open space areas are provided (other than the front setback area)—

(i) one area of at least 20 square metres with a minimum dimension of 3 metres is provided for the use of the lodgers,

(ii) if accommodation is provided on site for a boarding house manager—one area of at least 8 square metres with a minimum dimension of 2.5 metres is provided adjacent to that accommodation,

(e) parking

if—

...

(iia) in the case of development not carried out by or on behalf of a social housing provider—at least 0.5 parking spaces are provided for each boarding room, and

(iii) in the case of any development—not more than 1 parking space is provided for each person employed in connection with the development and who is resident on site,

...

(4) A consent authority may consent to development to which this Division applies whether or not the development complies with the standards set out in subclause (1) or (2).

20 Clause 30 of the SEPP ARH provides standards for boarding houses that are not contested.

21 Clause 30A of the SEPP ARH is in the following terms:

A consent authority must not consent to development to which this Division applies unless it has taken into consideration whether the design of the development is compatible with the character of the local area.

22 As the application was lodged before the commencement of the State Environmental Planning Policy (Affordable Rental Housing) Amendment (Boarding House Development 2019) (Amending SEPP), cl 54C(2) of the SEPP ARH requires the Court to determine the application as if the Amending SEPP had not commenced.

## Consideration

### *Height, bulk, scale and character*

23 According to the Respondent, the proposed development is:

- (1) Out of character with the established single and double storey dwellings in the area that are surrounded by landscape settings, and generous rear yards.
- (2) Inconsistent with the current R2 Low Density residential zone in Frenchs Forest, and particularly at the rear of the site where the bulk and scale is viewed from adjoining properties.
- (3) The built form is incompatible with the typical built form expected in the area, and is not consistent with the proposed amendment to the SEPP ARH as set out in the Explanation of Intended Effect (EIE) marked Exhibit 9.

24 In considering the character of the local area, the Urban Design experts found no matters of disagreement in their joint report (Exhibit 4). In arriving at their agreed position, the experts rely upon drawings and images prepared by the Applicant's architect, Mr Kavanagh, as evidence of an analysis of existing and desired future character that, in their joint opinion, adequately addresses future context.

25 While it is commonly held by the planning experts that the proposed development complies with the maximum height control of 8.5m according to cl 4.3 of the WLEP, it is the three-storey appearance of the rear half of the development that is out of character with the predominantly single and two storey dwellings in the R2 zone according to Mr Keller.

26 The planning experts agree that the footprint of the ground floor is acceptable and the two-storey presentation of the building bulk to Naree Road is acceptable in the form shown.

27 The experts also accept that the proposed development adopts a stepped setback from the rear boundary of the site, being 6m at the lower ground floor, 7.5m at the ground floor and 10.8m at the first floor. However as the walls to the side setbacks do not progressively set in at the upper levels, Mr Keller believes it cannot be said to step down the site (Part D9 of the Warringah Development Control Plan 2011 (WDCP), Requirements 1, 2, 3 and 4).

28 Part D9 of the WDCP relevantly provides:



## **Objectives**

- To encourage good design and innovative architecture to improve the urban environment.
- To minimise the visual impact of development when viewed from adjoining properties, streets, waterways and land zoned for public recreation purposes.

## **Requirements**

1. Side and rear setbacks are to be progressively increased as wall height increases.
2. Large areas of continuous wall planes are to be avoided by varying building setbacks and using appropriate techniques to provide visual relief.
3. On sloping land, the height and bulk of development (particularly on the downhill side) is to be minimised, and the need for cut and fill reduced by designs which minimise the building footprint and allow the building mass to step down the slope. In particular:

The amount of fill is not to exceed one metre in depth.

Fill is not to spread beyond the footprint of the building.

Excavation of the landform is to be minimised.

4. Building height and scale needs to relate to topography and site conditions.
5. Orientate development to address the street.
6. Use colour, materials and surface treatment to reduce building bulk.
7. Landscape plantings are to be provided to reduce the visual bulk of new building and works.
8. Articulate walls to reduce building mass.

- 29 Instead, the wall height at Rooms 26, 27 and 28 exceeds the maximum permissible of 7.2m by a dimension of around 600mm when measured from the existing ground level to the underside of the uppermost ceiling line (Part B1, Requirement 1).
- 30 To Mr Keller, this breach could be remedied by the deletion of Rooms 14, 15 and 26, which would also have the effect of reducing the large areas of wall plane (Part D9, Requirement 2 of the WDCP), and in better articulating walls to reduce building mass (Part D9, Requirement 8).
- 31 While Mr McNamara accepts that the side setbacks do not progressively increase with wall height, he considers it relevant that the rear setback does, and that side setbacks exceed the minimum 900mm (Part B5) to provide 3m on the western side, and between 3.96m and 5.8m to the eastern side. Both side setbacks will provide for deep soil and landscape planting that the Landscape

experts agree are conditions in which trees will be capable of attaining heights of 5m, to the eastern setback, and between 8-10m to the western setback (Exhibit 5, Section 4.1, p4).

- 32 Mr McNamara also considers the sloping nature of the topography to be a factor in the apparent bulk and scale of the proposed development when viewed in context with the street. During the onsite view it was agreed that four existing two-storey properties on Naree Road are located at No's 2, 6, 8 and 12 Naree Road. This places them in close proximity with the proposed development. Furthermore, the property at No 8 Naree Road will remain in excess of 2 metres taller than the proposed development at the ridgeline of the pitched roof due to the topography in the area, according to Mr McNamara.

### *Finding*

- 33 Compatibility with the character of the local area is a distinct test that must be achieved in order to enliven the Court's power to grant consent. In considering whether the proposed development is compatible with the character of the local area, I am satisfied that the proposed development is compatible pursuant to cl 30A for the following reasons.

- (1) Firstly, I accept the conclusion of the urban design experts (Exhibit 4 [3.1.1(a)]) that amendments incorporated into the application adequately address the inter-related issues of context, bulk and scale and desired future character. Both experts have qualifications in architecture and urban design, and the annexures appended to the joint expert report provide, in my view, a fine grain level of detail that I am told by the parties have been incorporated in to the amended plans at Exhibit C.
- (2) Secondly and relatedly, I accept that the Precinct Character analysis, prepared by Mr Walter documents a character that is undergoing rapid transformation in terms of form and material use with which the proposed development is compatible.
- (3) Thirdly, I consider the two storey presentation to Naree Rd to be compatible with the localised concentration of two-storey dwellings already evident on Naree Road. Furthermore, as the topmost level of the proposed development will remain well below the ridgeline of No 8 Naree Road, the existing stepping of built form down the slope from Frenchs Forest Way towards Rabbett Street is retained.
- (4) Fourthly, I accept the agreed position of the landscape experts (Exhibit 5, Section 4.1, p3) that the amended plans provide for a landscape setting that is in harmony with the natural environment, which the Respondent considers to be an aspect of the character of the local area.

- 34 Next, the Court must consider Clause 29(2)(a) of the SEPP ARH which provides that a consent authority, or the Court exercising the functions of the Council on appeal, must not refuse consent to development if the building height of all proposed buildings is not more than the maximum building height permitted under another environmental planning instrument for any building on the land.
- 35 It is commonly held by the parties that the proposed development complies with the height control set out in cl 4.3 of the WLEP and so I consider the effect of cl 29(2)(a) is to prevent me from refusing the grant of consent on the basis of a breach in relation to the wall height provision contained in the WDCP.
- 36 However in arriving at this conclusion, I consider the extent and visual impact of the breach to be limited, and I have sympathy for the Applicant's submission which is, in the words of Mr Hale, that to the extent that the side setbacks do not increase along with the height of the building which would bring it in to full compliance, it is because the building already adopts a larger side setback than the minimum that is required of it by Part B5 of the WDCP.
- 37 Finally, for the reasons that follow, I consider the proposed development is in substantial compliance with the Objectives and Requirements of Part D9. Firstly, while the breach of the wall height is acknowledged, I consider the 'mansard roof' form to be responsive to the objective for the visual impact to be minimised when viewed from adjoining properties. Secondly, in their joint report, the landscape experts agree that the proposed levels along the side setbacks are acceptable when compared to the existing survey plan, which I consider to be in substantial conformity with Requirement 3, Part D9.
- 38 Finally, the side elevations illustrate a form that does step down the site, from the Naree Road frontage. There is a step of around 500mm at the location of the side landscape courtyards, and a further stepping down at the rear as evidenced by the progressive setback, achieving a level of compliance with Requirement 4 of Part D9 of the WDCP.

#### *Privacy impacts*

- 39 According to the Respondent, the proposed development imposes unreasonable privacy impacts on adjoining properties, and offends the

objectives and controls of Part D8 of the WDCP. Of greatest concern to the Respondent is that a high level of visual and acoustic privacy is not achieved because of the siting of the communal open space at the rear of the site, adjoining the private open space of properties in Wareham Crescent.

40 In his written submissions, Mr Gough for the Respondent, agrees that amendments to the development application resolve the contentions related to visual privacy, but do not address the acoustic impacts which are pressed.

41 Part D8 of WDCP is in the following terms:

**Objectives**

- To ensure the siting and design of buildings provides a high level of visual and acoustic privacy for occupants and neighbours.
- To encourage innovative design solutions to improve the urban environment.
- To provide personal and property security for occupants and visitors.

**Requirements**

1. Building layout should be designed to optimise privacy for occupants of the development and occupants of adjoining properties.
2. Orientate living areas, habitable rooms and windows to private open space areas or to the street to limit overlooking.
3. The effective location of doors, windows and balconies to avoid overlooking is preferred to the use of screening devices, high sills or obscured glass.
4. The windows of one dwelling are to be located so they do not provide direct or close views (ie from less than 9 metres away) into the windows of other dwellings.
5. Planter boxes, louvre screens, pergolas, balcony design and the like are to be used to screen a minimum of 50% of the principal private open space of a lower apartment from overlooking from an upper apartment.

*The Applicant objects to evidence on acoustic privacy*

42 Mr Hale SC, Counsel for the Applicant, objected to the Respondent seeking to adduce evidence from the planning experts in relation to acoustic privacy as he submits that the experts did not have acoustic expertise, and the contention and its particulars failed to identify acoustic privacy as a matter in dispute.

43 In the alternative, Mr Gough submits that Contention 4, particular (d) identifies objective 1 and 2 of Part D8, and particular (a) and (b) identifies Requirements 1, 2 and 4 of Part D8 and the planning experts had engaged with the particulars in the joint expert report.

- 44 As such the Respondent's particular (d) brings acoustic privacy within the domain of the contention by reference to Objective 1 of Part D8. Objective 1 of Part D8 invokes privacy with reference to both visual and acoustic characteristics, for both occupants and neighbours and seeks, via Requirement 1, for this objective to be realised through the building's layout.
- 45 The Communal Room is located at the rear of the site, and the Communal Open Space adjoins. In the first instance, this is a matter that has its origins in the provisions of the WDCP, and for which I allowed the planning experts to provide their expert opinion.
- 46 Late on the final day of the hearing, Mr Hale then sought to tender a letter prepared by an acoustic expert providing an opinion of the likely acoustic impact of the Communal Open Space on adjoining properties. The Respondent submitted that, should the Court allow the letter, prepared by a person whose curriculum vitae was unknown and purporting an opinion that the Respondent should be permitted to interrogate, the Respondent would seek an adjournment to bring on its own expert evidence.
- 47 After a short adjournment to consider the letter handed up by the Applicant, I ruled that the letter did not assist as it was presented too late in proceedings and in any event, the contention originated as a planning matter for which experts had provided their opinion.

#### *Expert planning evidence*

- 48 While unrelated to acoustic impact, the planning experts agreed in their oral evidence that a screen wall shown between the Communal Open Space and the rear landscape planting in Exhibit B plans, and initially removed in Exhibit C plans at the suggestion of the landscape experts, would be appropriate to reinstate at a lower level to act as a barrier to occupants entering the landscape area. This is a position with which the Landscape experts agreed at the onsite view.
- 49 In the course of their oral evidence the experts agreed that a maximum of 50 persons can be accommodated by the proposed development and there is a potential for all, or a large proportion, of these residents to be in the communal open space.

- 50 To Mr Keller, the surrounding land is generally occupied by low density family homes with wide landscape buffers, and the location of the communal spaces have a very high potential occupancy that could impose upon the acoustic privacy of those adjoining properties.
- 51 In the alternative, Mr McNamara asserts that the communal space is sensitively located so as not to unreasonably impact upon the visual or aural privacy of neighbours and that there are sufficient safeguards in the Plan of Management dated August 2019 (Exhibit F) to protect neighbours from nuisance, including provisions found at:
- Section 6 – Use of Outdoor Communal Area limiting the hours of use, and prohibiting amplified music at any time within the outdoor communal areas
  - Section 10 – House Rules wherein lodgers are to respect neighbouring residents and to keep noise at a reasonable level, Nuisance includes noise generating activities outside permissible times, the consumption of alcohol in the indoor and outdoor communal areas is prohibited, and where failure to observe the rules may constitute misconduct requiring the lodger to vacate the premises and/or may result in the termination of the occupancy agreement
  - Section 16 – Complaints and Incident Register which details the process for complaints to be made
- 52 The Respondent considers a boarding house will likely produce a greater level of noise-generating activity as identified in *Freedom Development Group v Willoughby City Council* [2020] NSWLEC 1037 (*Freedom Development*) where Commissioner Dickson held, at [94] that a boarding house "...is a form of development that can produce additional impacts and operate differently to other forms of residential accommodation" and, at [96], that "communal rooms and outdoor communal spaces were potential noise generating activities".
- 53 Mr Hale submits that *Freedom Development* differs in the facts and contentions to those in dispute in this matter, not the least of which is that acoustic experts were relied upon by the parties in *Freedom Development*, and that acoustic reports were entered in evidence.
- 54 On the second day of the hearing, the Applicant tendered, unopposed by the Respondent, a revised Plan of Management dated February 2020 (Exhibit G) which amended the particulars under 'Noise' (p8), and clarified that the

maximum number of residents of the boarding house is 49, inclusive of the manager.

- 55 In his closing submissions, Mr Gough submits that the amended Plan of Management at Exhibit G does not go far enough, such as seeking to limit the number of residents permitted in the outdoor communal space, and that it is the responsibility of the Applicant to establish the extent, if any, of environmental impacts resulting from the development the subject of the development application.

### *Finding*

- 56 In Contention 4, particular (d), the Respondent brings acoustic privacy within the scope of its contentions by reference to the objective in Part D8, which encompasses both visual and acoustic privacy. The contention is not further particularised beyond the Objectives of Part D8 which are addressed by satisfying the Requirements of the Part.
- 57 I consider Requirement 1 to be addressed in part by the decision taken in the building layout to ensure that the communal room is located on the lower ground floor, and not on an upper level terrace for example, and adjacent to the communal open space. In this location, the Requirement to optimise privacy for occupants is achieved. The question is whether the building layout optimises the privacy for occupants of adjoining properties.
- 58 I consider this a matter of balancing the operation of the SEPP ARH which sets aside certain provisions of local environmental planning instruments to facilitate affordable rental housing, with the public interest in providing a degree of comfort that households in Wareham Crescent will continue to enjoy the amenity of their own private open space.
- 59 I concur with Commissioner Dickson in *Freedom Development* that boarding house development operates differently to other forms of residential accommodation and that communal rooms and outdoor communal spaces, by the nature of their function as a shared facility for the enjoyment of all residents, are a potential focus or hub of potential noise-generating activities.

- 60 The Applicant submits that it should not be assumed that the boarding house will be fully occupied, and so the number of residents who may use the communal room or communal open space is likely to be less than the 49 persons limited by the Plan of Management.
- 61 Plainly, in my view, it is a safe assumption for the Court to make that the interests of the owner of the boarding house lie in it being fully occupied and no steps would be taken to prevent such an outcome. Furthermore, a well-used communal room or outdoor communal space is, presumably, a sign of a healthy and socially connected resident community that every boarding house would wish for itself.
- 62 However, I also accept that the occasions on which all occupants of the boarding house are in the Communal Open Space may be rare, and the use of the communal space does not, of itself, presume offensive noise or nuisance will be the result. Just as the Court consistently expects conditions of consent will be complied with, I start with the expectation that the House Rules, and other provisions of the Plan of Management, will be followed by the occupants.
- 63 The proposed Plan of Management imposes limits on the times during which the outdoor communal space may be used, and outlines sanctions for those who do not observe the rules set for its proper use. Provision is made for an offending occupant to vacate the premises or for the rental agreement to be terminated.
- 64 A degree of self-regulation may also occur, especially from occupants of rooms adjacent to the communal room such as Room G05 which the Respondent contends may be impacted by users of the communal room.
- 65 Finally, Condition No 47 (Exhibit 14) requires that use of the premises must not give rise to 'offensive noise' pursuant to the Protection of the Environment Operations Act 1997.
- 66 For the reasons above, I consider there are sufficient constraints on the use of communal spaces to provide a sufficient level of confidence that the acoustic privacy of adjoining properties will be safeguarded.



- 67 However, in order to rise to the high level of acoustic privacy desired by the objective of Part D8 of the WDCP, I consider it appropriate for the Court to impose a condition of consent that the Plan of Management be further amended to impose a limit on the number of people, being occupants and their visitors, that are permitted in the outdoor communal space at one time.
- 68 In arriving at this conclusion, I consider the provisions of s 4.15(3A)(b) to apply inasmuch as the objective at Part D8 of the WDCP seeks to set standards with respect to the high level of acoustic privacy with which the proposal does not currently appear to comply, but which may be achieved by further amendment to the Plan of Management so that a reasonable alternative solution may deal with that aspect of the development.

**The provision for parking for cars does not comply**

- 69 The Respondent objects, pursuant to s 34(11) of the *Land and Environment Court Act 1979* (LEC Act), to references made by Mr Sannikov in the joint traffic expert report (Exhibit 8) to discussions and documents prepared for the purposes of the conciliation conference. At this stage it is helpful to note that the annexures to Exhibit 8 are themselves titled in the evidence as 'exhibits'. However to avoid confusion, I will refer to them as Annexures.
- 70 Responsive to the objections, the parties agreed to strike out those references, and to excise page 53-54 of Annexure D, and Annexure H in its entirety.
- 71 Clause 29(2)(e) of the SEPP ARH is in the form of a must not refuse provision in relation to boarding house development where, at (iia), in the case of development not carried out by or on behalf of a social housing provider at least 0.5 parking spaces are provided for each boarding room.
- 72 There are 28 rooms in the proposed development, including a manager's room. Applying the rate at cl 29 (2)(a), the experts agree that 15 car spaces are required. 11 are shown in total, including a dedicated car parking space for the manager, and an accessible car space.
- 73 It is agreed between the parties that the proposed development does not achieve the number of car parking spaces set out in the SEPP ARH and for

this reason, an assessment of the merits of the parking provided is referable to Part C3 of the WDCP. Most relevantly, Requirement 2 and 4 provide:

...

2. Off street parking is to be provided within the property demonstrating that the following matters have been taken into account:

- the land use;
- the hours of operation;
- the availability of public transport;
- the availability of alternative car parking; and
- the need for parking facilities for courier vehicles, delivery / service vehicles and bicycles.

...

4. Carparking is to be provided in accordance with Appendix 1 which details the rate of car parking for various land uses. Where the carparking rate is not specified in Appendix 1 or the WLEP, carparking must be adequate for the development having regard to the objectives and requirements of this clause. The rates specified in the Roads and Traffic Authority's Guide to Traffic Generating Development should be used as a guide where relevant.

- 74 Having regard to Requirement 2, the Respondent submits that the land use proposes accommodation for 49 persons and adopting research on which the Applicant relies, would suggest that around 17 of those occupants would own a car that requires a space to park. Discounting the space dedicated for the manager, and the space proposed for a car share vehicle will see the occupants competing for only 9 spaces, one of which is dedicated as an accessible space. Considering Naree Road is a 24 hour clearway, many of the occupants who have a car will be forced to park it on one of the residential side streets, some distance away.
- 75 Requirement 4 refers to a table found in Appendix 1 to Part C3 of the WDCP that directs “comparisons must be drawn with developments for a similar purpose” to determine car parking requirements for boarding house development.
- 76 To the Respondent, this is a general statement that does not specify a car parking rate, in which case Requirement 4 provides that car parking must be adequate for the development in accordance with the objectives and requirements of Part C3. As the Respondent contends the car parking is not

adequate for the proposed development, it is neither consistent with the SEPP ARH or the WDCP.

- 77 Responsive to Requirement 4, Mr Sannikov has undertaken a comparative analysis of 22 properties in the Northern Beaches area (Exhibit 8, Annexure D p40), and 11 properties in the former Warringah Council Local Government Area (Exhibit 8, Annexure D p41). In addition, he has undertaken an observational survey of 4 boarding house developments in the area (Exhibit 8, Annexure E).
- 78 Mr Sannikov is of the opinion that the 11 car parking spaces shown, being a rate of 0.39 space per unit is supported firstly, by the comparative analysis and observational survey of boarding houses in the Northern Beaches area which suggests a lower number of car parking spaces of eight (8) spaces is appropriate and secondly, research undertaken by the University of New South Wales, "Occupant Survey of Recent Boarding House Developments in Central and Southern Sydney" (UNSW study) (Exhibit 8, Appendix D, p21) suggests that only 33% of residents own a car which, if applied to the number of rooms in the development, would suggest 9 spaces are appropriate.
- 79 Furthermore, the UNSW study shows that 74% of respondents live alone and so the underlying demand by occupants of boarding house development is less than that of the traditional family home.
- 80 Mr Brocklebank considers the studies undertaken by Mr Sannikov to be flawed as the observational surveys informing the studies were undertaken during wild weather on the weekend of 9-10 February 2020. Firstly, the excessive wind and rain on that weekend would have resulted in aberrant behaviour that was not representative of the usual pattern of use by occupants of the sites surveyed. Secondly, as the individuals undertaking the survey did not follow or engage with occupants at the sites surveyed, it is impossible to ascertain how many residents had parked on side streets.
- 81 According to the Respondent, the comparative analysis is also lacking as there is no certainty as to whether dedicated spaces were allocated to a manager on those sites, and no assessment as to whether the number of spaces provided were adequate for the demand of the occupants of the sites surveyed. In fact,

in one instance, Mr Sannikov advised that the observational survey recorded that a car was parked on the front lawn of a site which to Mr Gough is indicative that the parking provided was inadequate.

- 82 Additionally, Mr Brocklebank considers it important that adequate car parking is provided in Frenchs Forest which has a higher rate of car ownership than the norm in Greater Sydney, and while the B-line bus express service to the Sydney CBD has the benefit of dedicated bus lanes, local bus services in Frenchs Forest are slow and contribute to car dependency.
- 83 In his oral evidence, Mr Sannikov accepts that the comparative analysis does not establish which, if any, of the boarding house developments the subject of the survey, are 'New Generation' boarding houses, which are allocated in accessible centres, and which, if any, have dedicated spaces for managers and the like.
- 84 However, Mr Sannikov's observational surveys were undertaken at 6pm-9pm Sunday and Monday evenings which is a time when a majority of people are at home, and parking demand is at its greatest. The surveys show that the 11 spaces proposed represent a rate that is greater than all of those sites surveyed, except for two which have a rate of 0.478 and 0.433 of car spaces per room.
- 85 Furthermore, if the proposed 'carshare' vehicle is considered to replace five car spaces, as suggested by Mr Sannikov, then the application would comply with the requirement of the SEPP ARH and enliven the 'must not refuse' provision under cl 29(2)(e)(iia).

*A carshare vehicle is proposed*

- 86 The Applicant relies upon a letter from GoGet (Exhibit 8, Annexure D, p6-7) which states that, based on various data, one carshare vehicle can comfortably replace 10-12 vehicles in the Northern Beaches LGA.
- 87 Mr Sannikov does not suggest that the application relies upon this rate, but instead considers that the proposed onsite carshare vehicle would effectively replace five (5) vehicles, which is both a conservative approach to the GoGet

advice, and is consistent with the rate applied by the Inner West Council in its DCP.

- 88 However, according to the Respondent, a rate that may suit circumstances in the inner city where public transport is more readily available and reliable, is not appropriate to outer suburban areas such as Frenchs Forest where car ownership is proven to be higher. Furthermore, the UNSW research relied on at [78]-[79] makes no mention of carshare and so the effect of a shared vehicle on occupant behaviour is unknown. Additionally, Mr Brocklebank considers demand for carshare in the area is low.
- 89 While carshare vehicles are commonly available to a wide pool of users, or subscribers, at on-street locations, Section 17 of the proposed Plan of Management (Exhibit G) sets out the carshare vehicle is to be for the exclusive use of building occupants and is to be provided, maintained, insured and operated by the building management and be available 24 hours a day via an online booking platform, for which building management is responsible.

### *Findings*

- 90 I am satisfied that in the particular circumstances of this proposal, a carshare vehicle operated under the terms outlined at [89] would make a reasonable contribution towards ensuring the proposed development provides parking that is adequate. In particular as it is proposed to be privately operated by building management, and reserved for the exclusive use of the occupants of the boarding house, the pool of likely users is limited to those with familiarity of the carshare arrangement and with a sense of shared interest in its operation.
- 91 While I acknowledge the Respondent's argument that the basis for the figure provided by GoGet is not publicly available and so cannot be verified, I accept Mr Sannikov has arrived at the figure of five vehicles by applying a moderating factor and by reference to a local government policy, albeit in an inner city environment, and for these reasons I accept that the function of a car share vehicle would be to effectively replace five privately owned vehicles.
- 92 Having arrived at this conclusion, however, it is also my view that the must not refuse provisions of cl 29 (2)(e) are not enlivened as the focus of the provision is expressed as the number of car spaces proportional to the number of rooms

in the development. The number of car spaces is 11. While one of those car spaces may perform a particular function, that particular function does not serve to increase the number of car spaces proposed.

93 Nevertheless, on an assessment of the merits of the car parking proposed, I am satisfied that it is adequate for the development. In arriving at my conclusion, I consider the following:

- (1) Firstly, while I accept the comparative analysis and observational survey undertaken by Mr Sannikov is imperfect, I consider the number of properties included in the analysis and survey, comprising 33 in all, is a sufficient sample size from which a pattern may be derived. To the extent that the weather resulted in atypical behaviour on the weekend of the survey, it is my view that the aspect of behaviour most likely to have been affected is on street parking to which occupants may have otherwise walked but for the rain and wind. In relation to which, I note that Condition 48 (Exhibit 14) prohibits the award of resident parking permits to occupants of the boarding house which would act as a restraint on the availability of alternative car parking arrangements.
- (2) Secondly, being located in an accessible area with employment hubs in close proximity, that affordable housing for key workers is intended to support, I accept that some occupants are likely to be attracted to the development for its proximity to those places of employment that would not demand of them ownership of a car.
- (3) Thirdly, in my view it is reasonable to expect potential occupants of the building will consider the availability of car parking in the context of their own needs when evaluating the suitability of this development as a place to reside. Those prospective occupants with a car, but without a guaranteed space in which to park it, may opt for accommodation elsewhere. Those without a car may be attracted by having access to a carshare vehicle for those times when one is needed.
- (4) Fourthly, the carshare vehicle is proposed to be available on a 24 hours basis via an online booking system with which occupants of the boarding house are likely to become familiar.
- (5) Fifthly, while the performance of local public transport may be the focus of some criticism, Requirement 2 of Part C3 of the WDCP applies the test of “*availability*” (emphasis added) to public transport which I consider to be excellent given the very close proximity of bus stops on Forest Way and Naree Road (Exhibit 8, Annexure F).

### **Public submissions**

94 While a number of the issues raised in public submissions are addressed through the above consideration of the contentions, I regard the concerns expressed in relation to stormwater to be deserving of further consideration.

Recent storms in Sydney brought substantial rain after a period of drought, and this recent experience may have informed resident submissions on the overland flow of water.

- 95 Mr Gormley expressed concern at the potential impact on the proposed stormwater easement into, and through, his property. Of particular concern to him is the continued health of two mature trees in the back yard of No 23 Wareham Crescent as the proposed easement is shown in close proximity to the roots. As I understand it, he is also concerned as to how the easement may be constructed as it may require excavation or horizontal boring under his home.
- 96 I am satisfied that the stormwater plans (Exhibit C) have been informed by root mapping conducted by Advanced Treescape Consulting on 30 October 2018, contained in Exhibit A, and I further note that conditions of consent, at Condition 26A requires the works adjacent to trees for the purposes of the stormwater works on adjacent land to be overseen by a Project Arborist with minimum AQF level 5.
- 97 I am also satisfied that the conditions of consent, at Condition 1, prevent commencement of the works until and unless evidence of the creation of an easement pursuant to s 88 of the *Conveyancing Act 1919* is provided to the Council, and at Condition 3(e), detail the circumstances in which excavation for the purposes of the stormwater easement is to be constructed.

## **Directions**

- 98 For the above reasons, I conclude that it is appropriate to grant development consent. However issues arose from the oral evidence of the planning experts, and from the Respondent's closing submissions that, in my view, are responsive to the public interest and should be incorporated in to conditions of consent. These matters are:
- (1) Firstly, there is now agreement between the landscape and planning experts that a screen wall, initially shown on the architectural plans at a height of 1800mm marking the edge of the Communal Open Space, would provide some benefit in preventing occupants from entering the landscape area which abuts the property at No 23 Wareham Crescent, and adjoins No 21 Wareham Crescent, if reinstated at a height of

between 1000mm-1200mm in the location previously shown. As currently worded, Condition 24A (Exhibit 14) requires its deletion.

- (2) Secondly, for the reasons stated at [67]-[68], I have determined that the acoustic impact of the proposed development is acceptable with the imposition of appropriate conditions of consent, pursuant to s 4.17(1)(a) of the EPA Act requiring that the Plan of Management be further amended to limit the number of residents and their guests to the outdoor Communal Open Space at one time.

99 The parties ought to have the opportunity to agree on the terms of the conditions that I consider ought to be imposed. The Court directs that:

- (1) The parties are to confer to finalise the appropriate wording for the conditions of consent resulting to give effect to the agreed position of the experts at [48], and from the findings of the Court at [67]-[68].
- (2) If an agreement is reached on the conditions of consent referred to in [98(1)] and [98(2)] above, the final conditions of consent are to be filed by the Council by 24 March 2020.
- (3) If no such agreement is reached, the parties are to lodge an Online Court request by 12:00pm on 25 March 2020 setting out agreed available dates for a further court mention.
- (4) Liberty to restore is granted on 2 days' notice.

.....

**T Horton**

**Commissioner of the Court**

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