



Land and Environment Court
New South Wales

Case Name: McKavanagh v Northern Beaches Council

Medium Neutral Citation: [2020] NSWLEC 1662

Hearing Date(s): 22 and 23 September 2020

Date of Orders: 21 December 2020

Decision Date: 21 December 2020

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders that
(1) The appeal is dismissed.
(2) The Development Application DA2018/0304 seeking approval for the demolition of the existing dwelling and construction of a new boarding house at 22 Redman Road, Dee Why, legally identified as Lot K in Deposited Plan 402030 is refused.
(3) The exhibits returned, except Exhibits 2, 6, A and G.

Catchwords: DEVELOPMENT APPEAL – boarding house – pedestrian access – streetscape – suitability of site – orders

Legislation Cited: Environmental Planning and Assessment Act 1979
Land and Environment Court Act 1979
State Environmental Planning Policy (Affordable Rental Housing) 2009
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 55 – Remediation of Land
State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development
Warringah Local Environmental Plan 2011

Cases Cited: Epping Property Developments Pty Ltd v Parramatta City Council [2017] NSWLEC 1095
PRJM Pty Ltd v Hawkesbury City Council [2016] NSWLEC 1217
Project Venture Developments v Pittwater Council (2005) 141 LGERA 80; [2005] NSWLEC 191
Revelop Projects Pty Ltd v Parramatta City Council [2013] NSWLEC 1029

Texts Cited: Warringah Development Control Plan 2011

Category: Principal judgment

Parties: Ralph McKavanagh (First Applicant)
Lucy McKavanagh (Second Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
T To (Applicants)
J Lazarus SC (Respondent)

Solicitors:
Shaw Reynolds (Applicants)
Wilshire Webb Staunton Beattie Lawyers (Respondent)

File Number(s): 2019/114712

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an appeal against the actual refusal of a development application DA2018/0304 seeking approval for the demolition of the existing dwelling and construction of a new boarding house (the Proposed Development) at 22 Redman Road, Dee Why, legally identified as Lot K in Deposited Plan 402030 (the Site).
- 2 The hearing commenced with an on-site inspection of the Site and the surrounding area including the right of way adjacent to the Site and walking to the Dee Why town centre. The location of the Site is at the end of a cul-de-sac within the area referred to as “upper Redman Road” and the area referred to as “lower Redman Road” is accessed via a pedestrian pathway consisting of 71

steps at the bottom of which is Burne Avenue. This is the pathway taken to Dee Why town centre during the on-site inspection at the commencement of the hearing.

- 3 Objectors gave evidence following the on-site inspection and the Court was provided with a copy of written submissions (Notice of Objectors Exhibit 3) as well as a copy of speaking notes of those resident objectors who gave evidence (Speaking Notes Tab 1 of Exhibit 4).
- 4 The parties agree that there are two principle issues that remain in dispute for assessment and determination by the Court which I accept to be the case in addition to a consideration of whether the Proposed Development is in the public interest and consideration of submissions received. The issues for determination are summarised below.
- 5 However, firstly, it is relevant to note at the outset that the State Environment Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) does not apply to the Proposed Development. From transcript pg 27 at [36] the Respondent in opening statement explained that “the affordable rental housing SEPP 2009 does not apply to the determination of this development application because the subject property is not within an accessible area as defined.” Nonetheless, “The council maintains the position that even though it is not in an accessible area, and therefore the SEPP technically does not apply to the determination of the DA, it remains – or certain provisions of the SEPP remain relevant to your assessment.” (Tcpt, 22 September 2020, p 27(36))
- 6 The Applicant agrees that the SEPP ARH does not apply to the Proposed Development but disagrees that the SEPP ARH is relevant in any way.
- 7 The first issue for determination is whether the Site is suitable for the Proposed Development, in particular insofar as pedestrian access is concerned. Site suitability is a relevant consideration pursuant to s 4.15(1)(c) of the EPA Act. Providing a high level of access to the Proposed Development is identified by the Respondent as one of the relevant objectives of the Warringah Development Control Plan 2011 (WDCP). The overriding objective of the WDCP, set out at A.5 of the WDCP, is to create and maintain a high level of environmental quality throughout Warringah and states that “Development

should result in an increased level of local amenity and environmental sustainability.” The other relevant objectives set out in the WDCP are as follows (refer folio 519 of Exhibit 1):

- (1) To ensure development responds to the characteristics of the site and the qualities of the surrounding neighbourhood.
- (2) To provide a high level of access to and within the development.

- 8 The Respondent contends that the pedestrian access route is in part over a very steep topography and will present future occupants and visitors of the boarding house with significant inconvenience and that the necessity for pedestrians to negotiate a series of 71 steps over a distance of 70 metres in order to access the Dee Why town centre and bus stops does not meet the objective of WDCP “to provide a high level of access to the development.” It is noted that Contention 1 of the Amended Statement of Facts and Contentions filed 28 July 2020 (ASOFAC) marked Exhibit 2 particularises this issue.
- 9 The Applicant tendered architectural plans (Exhibit A) being the plans for which leave was granted by the Court in June 2020 to amend the Proposed Development. The Applicant’s case is that the Court will be satisfied that a high level of access to the development is provided, because there is “a good level of access provided by way of those very steps that are the council’s focus” and that there are at least two other paths to public transport. Further, “this particular development provides a high level of access to and from it because it provides a range of access options not limited to walking” including the provision of car parking spaces, including 2 accessible car parking spaces, motorcycle parking, a shared bicycle, and a shared car. In essence, the Applicant submits that “the development as proposed, in the site that it’s located, will provide a high level of access consistent with the DCP objective because of the full range of measures that is proffered.” (Tcpt, 22 September 2020, p 32(33, 44))
- 10 The second issue for determination by the Court is the combined consideration of Contentions 2 and 3 of the ASOFAC which the parties refer to as “Streetscape and Character” or “Streetscape and Density” being the impact of the Proposed Development on the streetscape. The Respondent contends that there is excessive bulk resulting in unacceptable impact on the streetscape and

that the Proposed Development is inconsistent with the objectives of the R2 Low Density Residential zone in the Warringah Local Environmental Plan 2011 (WLEP 2011), particularly with the first objective being:

- To provide for the housing needs of the community within a low density residential environment.

- 11 There is dispute between the parties as to whether the Proposed Development achieves the R2 Low Density Residential zone objectives as set out in the WLEP 2011. It is agreed that cl 2.3 of the WLEP 2011 requires that the consent authority, or the Court in this instance, must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone. I am satisfied that there has been regard to the zone objectives in consideration of the second issue for determination, namely streetscape and density, as set out in this judgment.
- 12 The Respondent contends that the Proposed Development is not a low density development itself and that alone results in the inability to achieve this objective.
- 13 Whereas the Applicant's case relies predominantly on the topography of the Site, the East orientation of neighbouring properties and the range of dwelling sizes in the visual catchment.
- 14 The last issue that remains in dispute is whether the Proposed Development is in the public interest and consideration of the submissions received as required by s 4.15(1)(d) and (e) of the EPA Act. The Respondent submits that although the ARH SEPP does not apply, the fact that there has been a recent amendment to the ARH SEPP to the effect that any boarding house in a low density residential zone should have no more than 12 rooms, it is relevant to consider, to the extent that it is a policy statement from the state government regarding boarding houses in low density residential zones. As a result, the Respondent contends that it is not in the public interest to approve boarding houses of a size greater than 12 rooms in a low density residential zone. The Applicant submits that as the ARH SEPP does not apply to the Proposed Development, the Court should not consider any part of the ARH SEPP for any reason.

- 15 The last aspect of this consideration is the objectors submissions of which fifty six residents have objected to the Proposed Development and they all support the Council's refusal of the Proposed Development and they support the Panel's refusal of the Proposed Development.
- 16 The parties relied on evidence contained in the Joint Expert Report filed 14 September 2020 (Exhibit 6) prepared by Mr Steven Layman, Consultant Planner and Architect for the Respondent and Mr Charles Hill, Consultant Planner for the Applicant.

Suitability of the Site - accessibility

- 17 The first issue I will deal with is whether the Site is suitable for a boarding house as proposed. Suitability of the Site for the Proposed Development is a statutory consideration required by s 4.15(1)(c) of the EPA Act and the Respondent raises it as a contention and as a reason the Court should consider for refusal of the Proposed Development. The Respondent relies on a number of factors to support its contention that the Site is not suitable for the Proposed Development and in opening states:

“turning to the question of accessibility, the ultimate position – and it really is a very simple proposition – is that the site is poorly located for a boarding house of this scale given the likely reliance of residents – as well as visitors, I might add – on walking or on public transport, and the obvious way – and, indeed, the only sensible way – of getting to the nearest shops, which are conveniently located, but for the 71 steps, is to navigate those steps. So that, we say, particularly for the return journey, cannot represent a high level of access as required by the DCP and certainly does not provide for a route, even if one is considering non-pedestrians, that is accessible by wheelchair or by a bicycle, and of course you would note that there are two wheelchair accessible units within the development.” (Tcpt, 22 September 2020, p 30(1))

- 18 The Applicant refers to 2 other pathways and claims that the Site is “well served in terms of access because in addition to the path down to Dee Why town centre, there are at least two other paths, which are easily negotiated, gentle” (Tcpt, 22 September 2020, p 32(24)) being a bus stop on McIntosh Road (folio 11 in the attachments to Exhibit 6) and a second bus stop at May Road, walking in the opposite direction, to the south (folio 13 in the attachment to Exhibit 6).
- 19 The Statement of Environmental Effects prepared by Charles Hill Planning dated February 2018 and filed with the Class 1 Application (Exhibit G)

addresses Suitability of the Site at section 10 page 39 and makes reference to the proposal being consistent with cl 27(2)(c) of the SEPP ARH, “in respect of being an **Accessible area** as defined by that Policy. Mr Hill states that

“The subject land is close to, and accessible to regular public transport as indicated by the traffic consultant’s report. [...] Evidence has been provided that a bus stop is within 400 metres of the subject site; that a regular bus service is available in accordance with the State Policy; the pedestrian access does not traverse private property, and that the distance may be safely walked.”

20 As mentioned earlier, the parties agree that the SEPP ARH does not apply to the Proposed Development.

21 Mr Hill, in cross examination, gave the following oral evidence:

- (1) He agreed that the obvious route to reach the Dee Why town centre or the Dee Why Grand shopping centre (the nearest convenient shops and services) is by foot via the 71 steps, even though there are other routes;
- (2) Good pedestrian access will be important to the proper functioning of the Proposed Development;
- (3) When the DCP talks about a high level access this includes good pedestrian access to shops, services and public transport;
- (4) It is possible that residents of the Proposed Development would potentially be ascending and descending those steps up to several times a day in order to access those services which may involve them being laden with heavy shopping bags;
- (5) It would be inconvenient to walk up those stairs laden with shopping;
- (6) Although a range of people might occupy the Proposed Development, retirees may be amongst them and it would be more inconvenient for them to navigate those steps;
- (7) The steps are definitely not wheelchair friendly; and
- (8) It is unlikely that any resident of the Proposed Development will be a regular user of either taxis or ride share services like Uber. The use of taxi/uber or other ride share service by the boarding house residents is unlikely.

22 The Applicant asked Mr Layman a number of questions regarding accessibility. Mr Layman describes the provision of seating and lighting of the steps as follows:

“There are two seats along the way, in between the bottom and the top of the steps. There’s a light at the top, a light at the bottom and one in the middle. I wouldn’t say it’s well-illuminated, but it is partially illuminated.”

(Tcpt, 23 September 2020, p 6(44))

- 23 There is no dispute that there are other modes of transport which residents of the Proposed Development might use to access the Site. In fact, Mr Layman states in response to the Applicant's questions:

"They do have options in terms of access; but convenient free options, in the form of pedestrian access are limited."

(Tcpt, 23 September 2020, p 8(14))

- 24 Mr Layman was also asked about the provisions in the WDCP in part D18 titled Accessibility and Adaptability and he explains as follows:

Adaptability requirements for residential and accessibility requirements for non-residential [...] it's not to say that council has no concerns about accessibility requirements to residential land at all. It's just that they haven't been elaborated in this section, and clearly there's to be some common sense consideration of accessibility where it's appropriate for residential purposes."

(Tcpt, 23 September 2020, p 14(35))

- 25 The Applicant referred Mr Layman to the specific controls inserted in the WDCP for the Dee Why Town Centre and put to Mr Layman that specifically there are controls inserted, qualitative controls, about how pedestrian connections are to be provided, however Mr Layman responds as follows:

"I don't agree with that. I think it's taken a site-specific consideration of the Dee Why Town Centre in this part of the DCP that's in front of us. I don't know that it's necessarily implied from that that it has done so for the rest of the LGA."

(Tcpt, 23 September 2020, p 14(21))

- 26 Mr Layman was challenged by the Applicant on the concept of common sense and the Applicant quoted the second last paragraph on page 5 of the Joint Report to Mr Layman which relevantly reads as follows:

"In my opinion, a high level of access suggests suitable pedestrian access for a broad range of uses, not only by person without any mobility issues and who are in good health, a high level of access suggests at least that access by means of electric wheelchair, motorised cart or the like is afforded to cater for person who may not be in good physical health or may have a mobility impairment, whether it be permanent or intermittent."

- 27 In response Mr Layman confirms:

"That's my opinion as a full-time experienced architect and town planner."
(Tcpt, 23 September 2020, p 15(32))

- 28 Mr Layman explains that he forms his opinion and provides a common sense approach to interpret the objective of providing high level access, in the absence of controls in the LEP or the DCP in a manner that is not inconsistent

with the SEPP ARH which “talks about a safe walking distance to public transport” (Tcpt, 23 September 2020, p 16(32)).

- 29 In closing submissions the Applicant summed up its case regarding site suitability and access by confirming that the SEPP ARH is irrelevant to the Proposed Development and that:

“The application is to be judged by the standards and controls that are contained in the local suite of controls through the LEP and the DCP. The only provision of substance here is the general aim in the DCP A1.5, relevant to this question of site suitability and access, [...] expressed in terms of a general objective to provide a high level of access to and within the development.”

(Tcpt, 23 September 2020, p 49(1))

- 30 The Applicant relies on the provisions of D18 and D20 and the distinction between the requirements for residential development and non-residential development as well as the specific qualitative requirements for pedestrian connections within the Dee Why Town Centre to support the argument that “all of this informs how one should understand this general objective of providing high level of access to development”. This argument is put by the Applicant to support the submission that these controls “focus upon things that are in the immediate vicinity of the development site” and that “none of that is, or could reasonably be considered to be directed to requiring paths to meet particular standards, to particular services” (Tcpt, 23 September 2020, p 49(31)) . The high level of access objective is met by the Proposed Development, according to the Applicant,

“because there is provided not only the access down to Dee Why Town Centre via the stepped footpath [...] but that is not the only form of access to shops and nor is it the only form of access to these shops. [...] in addition to the range of available option to walk, that if persons have a particular desire or need that can’t be accommodated by either walking back up the stairs or taking the bus instead of walking and then walking flat ground, they can avail themselves, if they don’t have a private car of their own, to a privately owned and dedicated car for the use of residents. Taking those matters in combination, the Court will conclude that the development satisfies the objective of providing a high level of access to the site.”

(Tcpt, 23 September 2020, pp 49(48), 50(1, 42))

- 31 I agree with and accept the Respondent’s submission that the specific controls in the WDCP in sections D18 and D20 and those relating to the Dee Why Town Centre do not exclude the consideration of accessibility as a general matter in residential development.

- 32 A relevant factor for my reasoning is that because the Proposed Development is a boarding house I give more weight to pedestrian accessibility when assessing the suitability of the Site and I accept the Respondent's submission that:

"the question of pedestrian access, is highly significant in the context of this present development application, and that is because we are dealing with a boarding house development which is expressed to be a form of low cost accommodation where no assumptions can be made as to the ability of residents to use motor vehicle transport."

(Tcpt, 23 September 2020, pp 60(47), 61(1))

- 33 I have considered carefully the Applicant's argument however, I am satisfied that the evidence of Mr Hill and Mr Layman is sufficiently consistent in this matter and which leads me to the conclusion that the Site is not suitable for the Proposed Development for the reasons given by each Mr Hill and Mr Layman. In its simplest expression the reason is in essence that the obvious pedestrian access route to shops and services from the Site is via the 71 steps which is inconvenient and does not achieve the objective of a development that provides a high level of access. By reaching this conclusion I acknowledge that the Proposed Development has other paths to public transport and other modes of transport including shared bicycle, motorcycle and motor vehicle (including a shared vehicle) and I also acknowledge that the objective is not constrained to pedestrian access however, on balance the inconvenient pedestrian access from the Site to shops and services (including to public transport) override the other means and forms of access rendering the Site, in my view, not suitable for the Proposed Development.

Streetscape and density: Impact of bulk and scale on the Streetscape and whether the zone objectives are achieved.

- 34 The second issue identified by the parties is a consideration of the combined contentions 2 and 3 of the ASOFAC titled "Streetscape" and "Objectives of the zone".
- 35 The Respondent relies on a number of factors to support its contention regarding the unacceptable impact of the Proposed Development on the streetscape including:

- (1) the bulk and scale of the Proposed Development, evidenced by the need to address privacy concerns with what the Respondent refers to as excessive and incompatible privacy screening;
- (2) the excessive proportions of the Proposed Development in the context of a low-density area; and
- (3) the comparison with the smaller built form of most of the dwellings on the right of way.

36 In relation to the zone objectives, the Respondent contends that the Proposed Development is inconsistent with the objectives of the R2 Low Density Residential Zone, because the Proposed Development is of itself not a low density residential development by reason of its scale, number of occupants and intensity of use and therefore does not achieve the objective of development “to provide for the housing needs of the community within a low density residential environment.”

37 There is no dispute that a boarding house is permitted within the R2 Zone as set out in the WLEP 2011. The Respondent’s opening statement included the following explanation (Tcpt, 22 September 2020, p 27(32))

“it’s common ground, of course, that boarding houses are a permissible use within the R2 zone, but that of course does not mean that all types, all sizes and all scales of boarding houses are necessarily consistent with the zone objectives. It’s a starting point and no more than that.”

38 I will deal first with the impact of the Proposed Development on the streetscape where the Respondent refers to the intensity of use, the bulky presentation, especially when viewed from the cul-de-sac, the properties on the adjoining right of way and “even more so when viewed from the affected properties in Burne Avenue”. The Respondent also describes the Proposed Development as being “covered with privacy screening” which it submits makes the development much more akin to a residential flat building which is prohibited in the R2 zone and states that “there is nothing closely or even remotely approximating the look of this development anywhere in the vicinity.” (Tcpt, 22 September 2020, p 30(39)). The final reference by the Respondent to streetscape impact of the Proposed Development is to the wide, deep and “very substantial use of land that is entirely out of character with what surrounds it.” (Tcpt, 22 September 2020, p 30(45))

39 In relation to the Respondent's contention that there is excessive bulk resulting in unacceptable impact on the streetscape, the Respondent refers to the excessive privacy screens as evidence of the Applicant addressing the impact of the excessive bulk. Mr Hill agrees that without the privacy screens the Proposed Development would not be capable of obtaining development consent (refer [44 below]).

40 The Applicant relies on the topography of the land of the Site to support its submission that the development sits compatibly and comfortably in the streetscape and will not present as excessively bulky as it would present effectively as a two-storey development. The Applicant does concede that:

“the subject site will have a footprint that will be, as Mr Hill accepted, larger, but not significantly so, not drastically so, and certainly not to the point of being – creating a result where we don't have a low density residential character.”

(Tcpt, 23 September 2020, p 52(30))

41 The Statement of Environmental Effects prepared by Charles Hill Planning dated February 2018 and filed with the Class 1 Application (Exhibit 6) addresses character commencing at page 8 and addresses the objectives of section D9 Building Bulk of WDCP 2011 (namely, to minimise visual impact of development when viewed from adjoining properties) at page 32 and he makes the following statements:

“It is noted that the local area is characterized by detached style housing comprising a mixture of single and two/three storey dwellings, generally in a landscaped setting.”

“the proposed building essentially complies with Council's requirements in relation to height, building envelope and wall height controls, and whilst the boarding house obviously occupies a greater footprint than surrounding detached dwelling houses in some cases, the overall height and appearance of the building is considered to be compatible with the streetscape”

“the proposed development appears as one building”

“it was considered that the development is compatible with adjoining development, and satisfactorily responds to the predominant bulk and scale of development in the local area and to the topography of the site, complimented by the landscaping on the perimeter of the site and in the public domain.”

42 Mr Hill does not mention the use of privacy screens in his assessment of compatibility and impact of the Proposed Development on the streetscape in the Statement of Environmental Effects.

43 I am satisfied that the Proposed Development occupies a greater footprint than the adjoining properties and in the visual catchment. I have reviewed the Site plan compared with the aerial photograph at folio 69 of Exhibit H which shows the extent of site coverage and the size and scale of the Proposed Development relative to the other properties in the vicinity. I have also considered and accept the evidence of Mr Hill that the Proposed Development occupies a greater footprint which he states in the Statement of Environmental Effects (quoted above) and again in the Joint Expert Report on page 11. I note that Mr Layman describes the Proposed Development as being “much, much longer in terms of building footprint than what we see at photo 5 on SK08” which is a reference to the photo of the neighbouring building at 32 Redman Avenue depicted in Drawing SK08 Rev D in Exhibit A.

44 Mr Hill agrees in cross examination that the privacy screens are a ‘distinctive feature’ of the Proposed Development (Tcpt, 23 September 2020, p 25(40)) and even that they are a ‘dominant feature’ and agrees (Tcpt, 23 September 2020, p 28(1)) that at least in council’s DCP there is an active discouragement of the use of privacy screening in order to address overlooking impacts. Also, that the Proposed Development would not, in his opinion, be capable of approval without the privacy screening on both sides. Mr Hill refers to the privacy screens as being ‘uncharacteristic” and that it’s a form of look that is more closely associated with a residential flat building permissible in the R3 zone.

45 The Respondent submits that:

“This development, while permissible, when it is considered at this scale is in the wrong zone.”

(Tcpt, 23 September 2020, p 65(49))

46 I have considered also the following oral evidence of Mr Layman given during cross examination by the Applicant during the hearing as follows:

- (1) Mr Layman is referred to the evidence of Mr Hill in the Joint Expert Report at page 10 regarding consistency and compliance with the controls of part B and part D of the WDCP. Mr Layman does not agree with Mr Hill for the reason that there is a need for the extensive privacy screening, which is not contemplated by part D8. Mr Layman states that the provisions in Part D also need to be considered. He concedes that

some provisions in part D are met and he agrees that part B provisions are met.

- (2) In the context of there being a variety of building lot sizes, a variety of footprints, a variety of roof form Mr Layman responds saying: "Look you're emphasising the variety. It's fairly consistent in terms of the lots north of Redman and in terms of the lots south of Redman, except for the group which is surrounding the right of way." (Tcpt, 23 September 2020, p 3416))
- (3) In acknowledging that the WLEP does not provide floor space ratio controls in the R2 zone but does provide built form controls in the DCP such as setback, site coverage, envelope controls and landscaping requirements. He explains that:

"the model that's adopted by this planning regime is that the height and the form of development should be determined by the characteristics of the site, not just numerical relationship to site area. [...] "what those controls do is define an envelope, and it's not to say that it's as of right to fill that envelope. There's a planning principle to that effect, actually, PDE No 8 v Manly."

(Tcpt, 23 September 2020, pp 36(12)), 37(5))
- (4) It is put to Mr Layman that compliance with the Part B built form controls demonstrates that "this built form is one that sits compatibly, even if it is larger than its neighbours" and his response is as follows:

"I don't think it demonstrate compatibility. I think it demonstrates compliance with numerical controls, however, it doesn't demonstrate satisfaction of objectives."

(Tcpt, 23 September 2020, p 47(7))
- (5) The Applicant refers Mr Layman to the requirement in Part D8 of the DCP to "orientate living areas to the street" but Mr Layman seeks to clarify that the orientation of the western side of the Proposed Development is oriented to the shared driveway and does not agree that the driveway along the right of way is a street. (Tcpt, 23 September 2020, p 38)
- (6) Mr Layman agrees that separation is a relevant consideration in relation to privacy however he does not agree that the driveway of the right of way is a sufficient separation explaining that the width of the shared driveway is about 10 metres "so it's not 20 metres, as you might expect in a road reserve." (Tcpt, 23 September 2020, p 39). Further, in relation to window to window separation relative to the adjoining properties fronting Burne Avenue, Mr Layman clarifies that requirement 4 in Part D8 Privacy "is specifically referring to window, but they are not the only concerns evident in the requirements of D8, Privacy [...] it's overlooking, including rear private open space. private open space". (Tcpt, 23 September 2020, p 41(35))
- (7) Finally, Mr Layman was asked questions regarding his description of the perception of the Proposed Development as a 3 storey building when having regard in particular to Drawing A202 which depicts the east

elevation (Tcpt, 23 September 2020, p 43). The Applicant put to Mr Layman that the east elevation on A202 is drawn in a conventional manner and that the residents in 29, 31 and 33 Burne Avenue will simply not have the eastern façade, in the manner depicted in the east elevation because of the significant fall in the land. Mr Layman responds as follows:

“I don’t agree, and the reason is, they’re not always on the ground floor, you know, at the base of the cliff. They occupy all parts of the house equally, and it’s clear that, you know, if one looks in section CC or DD, it’s clear that residents on those upper levels of those houses would perceive the three storeys of this proposal.”

(Tcpt, 23 September 2020, p 43(34))

- (8) In response to whether the fence and landscaping will result in the perspective changing to a two-storey building Mr Layman explains that “it’s two storeys sitting above a 1.8 metre high boundary fence. That’s not a two-storey building, it’s a three-storey building. You’ve got two storeys elevated above a fence.” (Tcpt, 23 September 2020, p 46(4))

47 The Applicant submits that Mr Hill was asked by the Respondent whether a low density residential environment necessarily requires a development to be of low density character and states that that proposition just cannot fit with the permitted forms of land use. I do not accept this submission as Mr Hill was being asked about the boarding house, being a residential development, and not just a development within the low density residential zone. I accept that a residential development in the R2 low density residential zone must be low density to achieve the objective of the zone. The proposition does not apply to the range of other permitted uses which are not residential development.

48 *Epping Property Developments Pty Ltd v Parramatta City Council* [2017] NSWLEC 1095 is a decision of Commissioner Smithson which the Applicant drew the Court’s attention to as a relevant boarding house decision regarding the character test under the ARH SEPP where there is no designated floor space ratio. The Applicant notes that Smithson C recites the Project Venture planning principle and in particular at [24] of Project Venture where the Court gave some guidance about how compatibility should be evaluated divided into terms of physical impacts and visual impacts. There are no contentions regarding the Proposed Development regarding physical impacts and the Applicant relies on the decision of Smithson C as an illustration of the reasoning method which can be applied in a case where someone says, in effect, you’re not in keeping with the character of what’s around you.

49 The Applicant also referred the court to another boarding house decision in *Revelop Projects Pty Ltd v Parramatta City Council* [2013] NSWLEC 1029 as a case that demonstrates the manner of reasoning to evaluate whether there is consistency, or how one achieves or shows compatibility with an aim or objective such as expressed for the R2 zone, particularly where there is an absence of a control for density.

50 I note that both decisions to which the Applicant drew to the Court's attention extensively quoted passages of the planning principle decision of *Project Venture Developments v Pittwater Council* (2005) 141 LGERA 80; [2005] NSWLEC 191 (Project Venture).

51 The parties made submissions regarding compatibility relying on the planning principle judgment of Project Venture and I accept, as agreed between the parties, that buildings can exist together in harmony without having the same density, scale or appearance. The Respondent emphasises the next few words from Project Venture at [22]:

“Though, as the difference in these attributes increases, harmony is harder to achieve.”

52 The Respondent also refers to the visual impact of the Proposed Development and emphasises the question asked in Project Venture just before [26] as follows:

“Is the proposal's appearance in harmony with the buildings around it and the character of the street?”

53 Before I make my findings on whether the Proposed Development has an unacceptable impact on the streetscape of the local vicinity, I will consider whether the Proposed Development achieves the objectives of the R2 low density residential zone as required by cl 2.3 of the WLEP.

Does the Proposed Development achieve the Zone objectives?

54 The parties focused on the first two objectives set out in the land use table of the WLEP 2011 and for completeness I set out the provision for Zone R2 Low Density Residential as it appears in the WLEP 2011 as follows:

Zone R2 Low Density Residential

1 Objectives of zone

- 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.

2 Permitted without consent

Home-based child care; Home occupations

3 Permitted with consent

Bed and breakfast accommodation; Boarding houses; Boat sheds; Building identification signs; Business identification signs; Centre-based child care facilities; Community facilities; Dwelling houses; Educational establishments; Emergency services facilities; Environmental protection works; Exhibition homes; Group homes; Health consulting rooms; Home businesses; Hospitals; Oyster aquaculture; Places of public worship; Pond-based aquaculture; Recreation areas; Respite day care centres; Roads; Secondary dwellings; Tank-based aquaculture; Veterinary hospitals

- 55 Mr Layman states a number of times in cross examination that to create a low density residential environment it should consist of low density residential development.
- 56 Evidence of Hill in cross examination is that the Proposed Development is not a low density boarding house. (Tcpt, 23 September 2020, p 31) Mr Hill was asked whether he agreed that this particular boarding house, “having 14 units, so potentially 28 occupants, plus a manager, plus nine parking spaces, plus motorbike and bicycle spaces within the basement, could not on any view be described as a low density development, could it?” and he replied “No”. This answer together with his evidence in cross examination that a development cannot be consistent with the R2 Zone objective if it is not itself of a low density character is relevant and to some extent conclusive, in my view, that the Proposed Development is not consistent with the R2 Zone objective to provide for the housing needs of the community within a low density residential environment.
- 57 The Respondent submits in closing that of the first two objectives of the R2 Low Density Residential zone, the first deals with residential development and the second objective deals with ‘other land uses’. The Respondent embraces the evidence of Mr Hill which was that in order to comply with the first objective,

that is, to provide for the housing needs of the community within a low density residential environment, the residential development itself needed to be of a low density character and the Respondent concludes that while boarding houses are a permissible use unambiguously in the R2 Low Density Residential zone, they have to be low density, otherwise they are inconsistent with the first objective.

- 58 The Respondent relies on the decision of Commissioner Dixon in *PRJM Pty Ltd v Hawkesbury City Council* [2016] NSWLEC 1217 regarding whether or not a development can be described as being low density and therefore is consistent with the objective outlined in bullet point 1 of the R2 low density residential zone, to provide for the housing needs of the community within a low density residential environment. I agree that the issue is the same albeit with very different facts as the decision of Dixon C (as she then was) related to a caravan park. Dixon C in that matter found at [43] that where the Local Environmental Plan did not define density or adopt a floor space ratio:

“it is entirely appropriate to adopt the Macquarie Dictionary definition of “density” [...] I accept for the purpose of this case that density is best measured by having regard to the development area of the site, which Ms Haron describes as: ... the area taken up by the buildings and associated setbacks and open spaces which contribute to the area’s sense of compactness or not ...”

- 59 The Applicant submits that the decision of Dixon C is based on ‘wildly different’ facts. As I said, I agree that the facts are very different however the issue is the same and relevant to the consideration of these proceedings. I note that at [48] Dixon C makes a statement regarding the caravan park being permissible but not offering a low-density residential environment and states as follows:

“While I accept that it may be possible to design a caravan park which offers a low-density residential environment, this application does not fall into that category.

Accordingly, I find that the development does not “provide for the housing needs of the community within a low density residential environment”. Therefore, the application, in my assessment, is not consistent with the first dot-point objective of the R2 Low Density Residential Zone, which is a relevant consideration in my assessment of this development application.”

- 60 My findings in relation to the impact of the Proposed Development on the streetscape and in relation to whether the Proposed Development achieves the objectives of the R2 Low Density Residential zone are as set out above in this

judgment and I conclude that the use of the Site as a boarding house as proposed will be more intense and not of low-density because of the cumulative impacts of the number of rooms, the overall size of the building and the site coverage, the resulting bulk and the excessive use of privacy screens depicting a form more akin to a residential flat building.

- 61 The Proposed Development, in my view will have an unacceptable impact on the streetscape for the reasons given by Mr Layman and I accept the submissions of the Respondent and I have considered the whole of the evidence.

The public interest

- 62 Lastly, I will give consideration to whether the Proposed Development, being a boarding house of 15 rooms is in the public interest. As mentioned earlier in this judgment the Respondent made submissions and relies on the recent amendments to the ARH SEPP limiting boarding houses in low density residential zones to a maximum of 12 rooms to support the argument that the Proposed Development should be refused because it is larger than the state government policy statement indicating a maximum size in a low density residential zone. The Respondent submits as follows: (Tcpt, 22 September 2020, p 27(36))

“It’s common ground that the affordable rental housing SEPP 2009 does not apply to the determination of this development application because the subject property is not within an accessible area as defined. [...] The council maintains the position that [...] certain provisions of the SEPP remain relevant to your assessment. Whether that be as part of your consideration of the public interest or otherwise, we contend that they are relevant, at least in this sense: that it is a policy statement by the government as to the limited acceptability [...] of boarding houses within the R2 zone [...] council does rely upon the amendments made last year to the SEPP to limit boarding houses within R2 zoned land to those which are 12 rooms only. We say that this is indicative of a policy shift and a recognition on the part of government that large boarding houses – and by large I mean anything more than 12 boarding rooms – are inconsistent with the R2 low density residential environment that the R2 zone is meant to preserve.”

- 63 The Applicant submits in opening on page 31 Transcript 22 September 2020, that:

“to the extent that the council invites the Court to infer a particular policy intent from the state government’s SEPP, it is one that cannot and ought not inform the Court’s consideration of what is otherwise permissible under the LEP,

judged, of course, by the reference to controls in the LEP and its accompanying DCP.”

(Tcpt, 22 September 2020, p 31(41))

64 I am not satisfied that the ARH SEPP should be considered as part of the public interest consideration notwithstanding that I understand why the Respondent makes this submission. The Applicant’s argument that the ARH SEPP is not applicable is compelling and I accept it. However, I do agree with the Respondent that the Proposed Development is not in the public interest for the reason that it is too large, too intense and is not appropriate within this particular low density residential setting.

65 As part of the public interest consideration I have considered the evidence of the resident objectors and they used language like the following in their objection to the Proposed Development:

“In addition to the documented original letters that have come through over the last couple of years, I’ve submitted also to the Court 18 supporting letters from neighbours giving me permission to object today on their behalf and I hope you see that this gives an indication of the objection and close community support for the panel’s and council’s decision to refuse this DA.” (Tcpt, 22 September 2020, p 3(24)) “[...] we would ask you to support council and panel’s refusal of this development application.” (Tcpt, 22 September 2020, p 4(44))

“Fifty-six residents have objected to this proposal alone. I have seen the effect of this application on these residents. The community implores the Commissioner to consider that if this is approved and built it will be a boarding house on the outskirts on an accessible area in a zone which may longer permit the use and will be a planning anomaly in perpetuity.” (Tcpt, 22 September 2020, p 8(44))

“I speak in support of the council and the panel’s decision to refuse the application and I also object to the current amended plans.” (Tcpt, 22 September 2020, p 10(15))

“So I implore the Court upholds the decision by the panel and refuse consent for the proposed development. It would not be in the public interest, and as I’ve said, a terrible precedent to allow such a high intensity development going ahead on that site.” (Tcpt, 22 September 2020, p 13(15))

“[...] we support the council and the planning panel’s decision and feel that that is still applying to the amended plans.” (Tcpt, 22 September 2020, p 13(45))

66 I have reviewed the Resident speaking notes (Exhibit 4) as well as written submissions in the Amended Notice of Objectors (Exhibit 3).

- 67 The Applicant, in closing submissions addressed one of the concerns raised by the neighbours described as the driveway flash point in relation to pedestrian safety and vehicular safety (Tcpt, 23 September 2020, p 55) and I have considered the plans for the ramp for the basement car park in drawing A223 and A102 and acknowledge that although the driveway and the right of way do not come at each other at 'sharp angles' as described by the Applicant I do not accept that they are parallel or generally of the same alignment. I am unable to conclude one way or the other whether the design of the ramp for the driveway results in a flashpoint creating safety concerns for pedestrians and vehicular access.
- 68 The other concern raised by the neighbours addressed by the Applicant in closing submissions is the acoustic concern resulting from the basement car park. It appears a reasonable conclusion that the basement and ramp will be acoustically shielded by a retaining wall that's proposed on the north-eastern corner for landscaping purposes which can be seen on the ground floor plan at A102 and I accept that the noise impacts which the objector expressed concern about do not seem to be demonstrated objectively on the evidence.
- 69 The final objector concern addressed by the Applicant is overshadowing and I accept that the shadow diagrams do not support this concern.
- 70 I have considered the concerns as expressed by the neighbours however, I do not rely on these submissions to make my determination in these proceedings. I have determined the matter for the reasons set out in this judgment

Findings

- 71 Having considered all the evidence and the submissions of the parties, I make the following findings:
- (1) The Site is not suitable for the Proposed Development as the access is not high level to the extent that the undisputed evidence is that the obvious route to services and public transport is via the 71 stairs which is highly inconvenient and not accessible to all.
 - (2) The Proposed Development while permissible in the R2 Low Density Residential zone, is not a low density residential development and is not consistent with the objectives of the R2 Low Density Residential zone as set out in the WLEP 2011. I also find that the Proposed Development will have an unacceptable impact on the streetscape.

- (3) It is not in the public interest to approve a boarding house in the form as proposed by the Applicant because on balance it is too large and too intense to be appropriate in this low density residential setting.

Orders

72 The Court orders that

- (1) The appeal is dismissed.
- (2) The Development Application DA2018/0304 seeking approval for the demolition of the existing dwelling and construction of a new boarding house at 22 Redman Road, Dee Why, legally identified as Lot K in Deposited Plan 402030 is refused.
- (3) The exhibits returned, except Exhibits 2, 6, A and G.

.....

E Espinosa

Commissioner of the Court

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.