

---

**From:** Kerry Nash - KN Planning  
**Sent:** 1/03/2023 3:06:38 PM  
**To:** Council Northernbeaches Mailbox; Alexander Keller  
**Cc:** James Lloyd  
**Subject:** TRIMMED: Objection to Amended DA 2022-1164 on behalf of  
Apartment 633 Peninsula Building  
**Attachments:** KN59006 Objection to Amended DA2022-1164 34-35 South Steyne  
Manly 1.03.23 (Unit 633)..pdf;

# KN PLANNING PTY LIMITED

Ref: KN590/06

1 March 2023

General Manager  
Northern Beaches Council  
PO Box 82  
MANLY NSW 1655

**Attention: Alexander Keller**

Dear Mr Keller

**Re: Development Application No DA2022/1164  
34-35 South Steyne Manly  
Objection to amended proposal**

Further to my objection dated 17 August 2022 on behalf of the owner of Apartment 633 in the Peninsula - Beachside building at 17-23 Wentworth Street Manly, Ms Rosemary Dawson, the following commentary is provided in respect to the amended proposal embodied in Development Application DA2022/1164 on land at 34-35 South Steyne Manly.

The amended proposal does not address the primary concern relating to impacts on Apartment 633 namely view loss.

## **1. Unacceptable view impacts**

The view impact assessment, prepared by Urbaine Design Group, provided by the Applicant with the amended proposal confirms the extent of loss of land/water interface of South Steyne Beach from 633 as demonstrated in Photographs 1-5 inclusive in my objection of 17 August 2023. A copy of the Urbaine Design Group view impact assessment is attached.

The View Loss Assessment, in particular Viewpoints 01, 02 and 05 confirm the view loss assessment undertaken in accordance with the planning principle in *Tenacity Consulting v. Warringah Council [2004] NSWLEC 140*, embodied in my objection of 17 August 2022, namely:-

*"The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (e.g. of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, e.g. a water view in which the interface between land and water is visible is more valuable than one in which it is obscured."*

### Response:

The proposal impacts on views east over the subject site of the land/water interface with South Steyne/Manly Beach, Norfolk Island Pines and Tasman Sea – this view is a whole view and an iconic view. Broader views of the Tasman Sea and north-east towards Queenscliff Beach/Freshwater are not impacted significantly by the proposed development.

*"The second step is to consider from what part of the property the views are obtained. For example, the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic."*

Response:

The views are enjoyed over the subject site (from Rialto Lane to South Steyne frontage) from a sitting and standing position in the living room and on the adjoining balcony as indicated on *Photographs 1, 2 and 3* in the 17 August 2022 submission. The photographs were taken from a standing position.

*"The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating."*

Response:

The impact of the proposed development on the views currently enjoyed by the owner of Apartment 633 are assessed in the following terms:

*Balcony* – loss of land and water interface with South Steyne/Manly Beach at high and low tide and the lower portions of Norfolk Island Pines along South Steyne (*Photograph 4*). The Central Stair and elevated lap pool on the roof at RL17.00 also impacts on this view as evident in View 01 and 02.

The view loss impact in qualitative terms is severe, as whilst the distant Tasman Sea and Queenscliff Beach /Freshwater views are retained the land/water interface with Manly Beach and its interaction with swimmers, boardriders and the ocean waves will be lost.

*Living Room* – 100% loss of land and water interface of Manly Beach as detailed in Viewpoints 01, 02 and 05. Distant views of Tasman Sea retained - impact severe for the reasons detailed above.

*"The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skillful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable."*

Response:

The view loss impacts detailed above are directly related to the proposal's non-compliance with the 12-metre building height development standard under Clause 4.3 of the Manly LEP 2013.

The extent of non-compliance is substantial – the 12-metre height standard at the rear portion of the site is at RL17.00; the proposed building height for the rear portion of the development is RL19.00 with the lift overrun height above the upper roof level at RL19.50 – a variation of 16.7% and 20.8% respectively.

Furthermore, for the reasons detailed in (2) below it is considered that the justification for the non-compliance with the building height development standard in the Amended Clause 4.6 is not well founded and should be refused by Council.

Given the view loss impacts detailed above, it is considered that the non-compliance with the building height development standard would be considered unreasonable in the context of the *Tenacity principles*, as a development, compliant with the building height standard, would significantly reduce the adverse view impacts on Apartment 633.

Also relevant to any view loss/maintenance of views considerations are the objectives and controls under Part 3.4.3 of the Manly DCP 2013, namely:

*Objective 1: To provide for view sharing for both existing and proposed development and existing and future Manly residents.*

*Objective 2: To minimize disruption to views from adjacent and nearby development and views to and from public spaces including views to the city, harbour, **ocean**, bushland, open space and recognized landmarks or buildings from both private property and public places (including roads and footpaths).*

*Objective 3: To minimize loss of views, including accumulated view loss 'view creep' whilst recognizing development may take place in accordance with the other provisions of this Plan".*

The proposal fails to satisfy Objectives 1, 2 and 3 above for the reasons detailed above.

## **2. Amended Clause 4.6 Building height standard non-compliance**

The proposed development does not comply with the 10 and 12 metre height standards applying to the site under Clause 4.3 of the Manly LEP 2013. The extent of non-compliance is significant as follows:

Standard 10.00 metres (RL15.00) - front façade RL16.30 -13%;

- central staircase and lap pool RL17.00 - 20%
- small awning adjacent to lift (RL18.6) – 36%;

Standard 12.00 metres (RL17.00) – Level 4 commercial area RL19.00 – 16.7%; and

- lift overrun RL19.50 - 20.8%.

The non-compliance with the 12-metre height control is the factor in the significant impact on views from Apartment 633.

The Amended Clause 4.6 submission lodged by the Applicant clearly fails to satisfy the objectives of the building height standard, in particular objective 4.3(1)(c)(ii) which states:

*(c) to minimize disruption to the following:*

*(ii) views from nearby residential development to public spaces (including the harbour and foreshores)*

For the reasons detailed in (1) above, view loss impacts on Apartment 633 do not achieve the outcomes sought under objective 4.3(1)(c)(ii) of the Manly LEP 2013 and accordingly the amended clause 4.6 submission fails to satisfy clause 4.6(3)(a) in the context of *Wehbe's "first way"* and therefore fails to satisfy the requirements under clause 4.6 consistent with the decision of Moore SC in *Chidiac v Mosman Council [2015] NSWLEC 1044*. A copy of the *Chidiac* judgement is attached.

Other matters raised in my 17 August 2022 objection remain relevant with the amended proposal.



**Summary**

The proposed development will have a devastating impact on the views currently enjoyed from Apartment 633 of South Steyne/Manly Beach.

The substantial non-compliance of the building height standard directly contributes to the view loss and is clearly contrary to the building height objectives under clause 4.3(1)(c)(ii) of the Manly LEP 2013, thereby failing the requirements under clause 4.6(3)(a). In the circumstances, the Clause 4.6 submission fails.

Accordingly, the development application, as amended, should be refused by Council.

Yours faithfully



**Kerry Nash**  
**Director**

cc Ms Rosemary Dawson

Attachments: Urbaine Design Group View Impact Assessment  
Chidiac v Mosman Council judgement

# Urbaine

D E S I G N G R O U P

Urbaine Design Group Pty Ltd, 19c / 74, The Corso, Manly, NSW 2095

## Appendix A

---

34-35 South Steyne Manly NSW

Viewpoint 01



Site image

01AA.JPG



Existing view with permitted building envelope overlaid

01DD.JPG



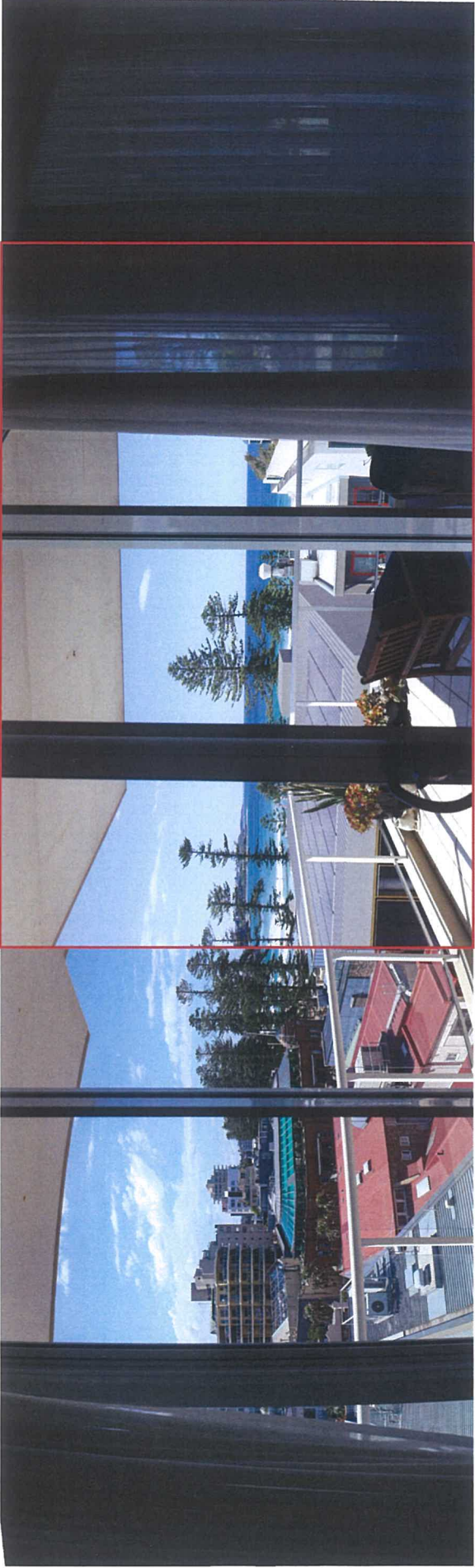
Extent of visual impact in cyan with red outline

01CC.JPG



Photomontage of new

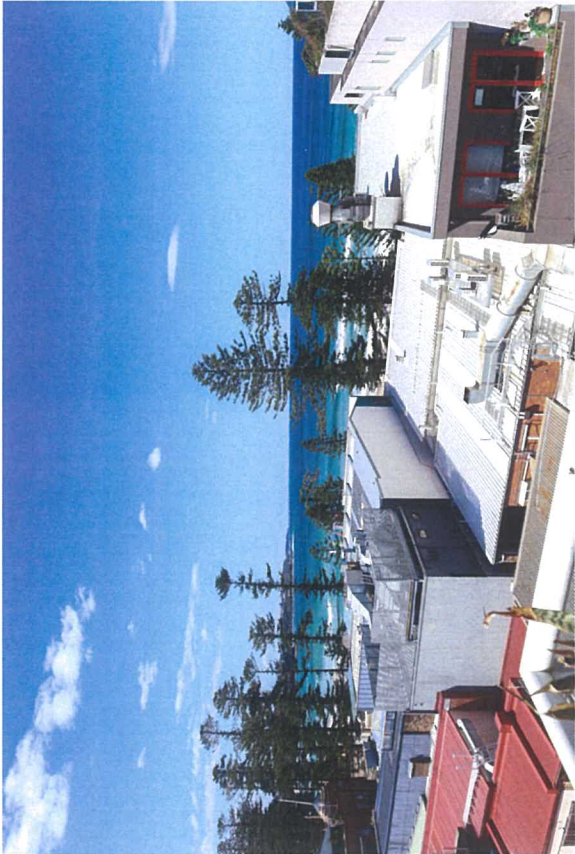
01BB.JPG



24mm panorama with nested montage frame in red

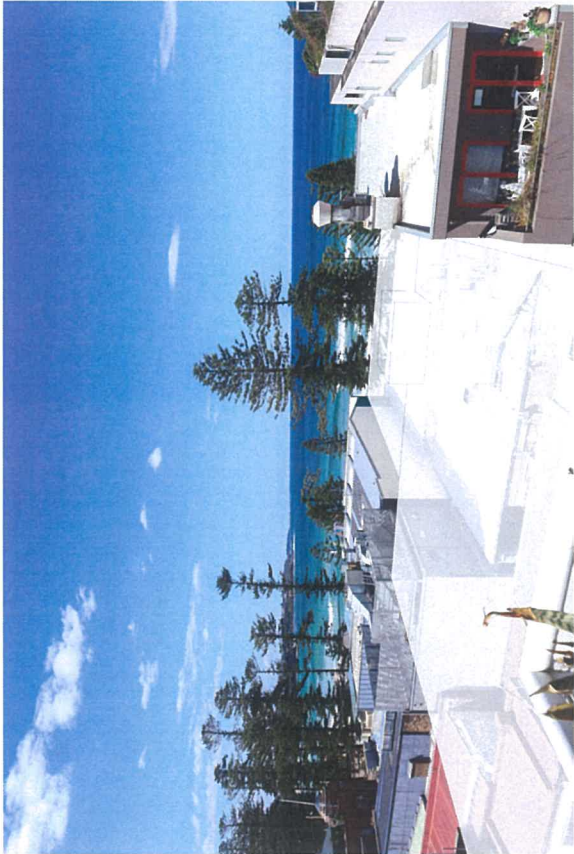


Viewpoint 02



Site image

02AA.JPG



Existing view with permitted building envelope overlaid

02DD.JPG



Extent of visual impact in cyan with red outline

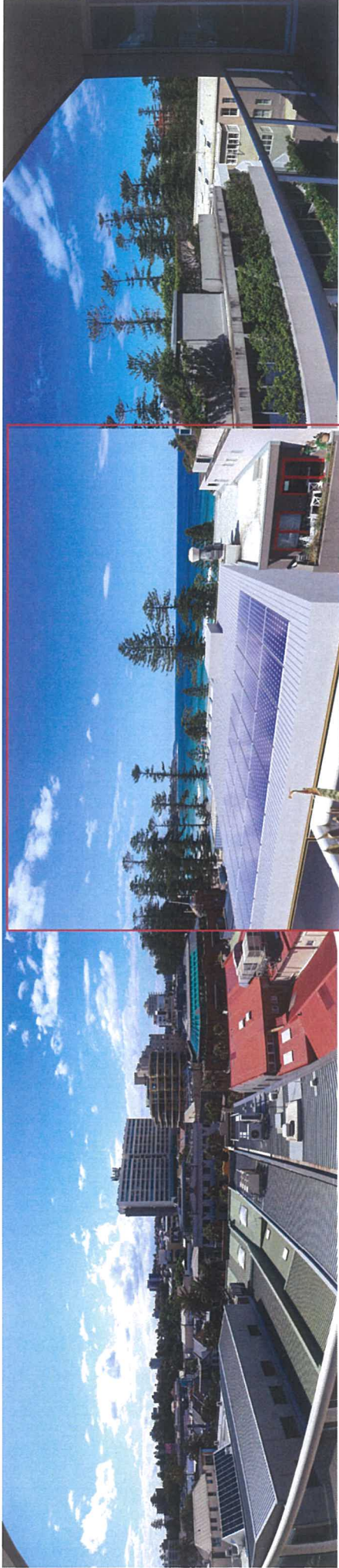
02CC.JPG



Photomontage of new

02BB.JPG





24mm panorama with nested montage frame in red



Viewpoint 05



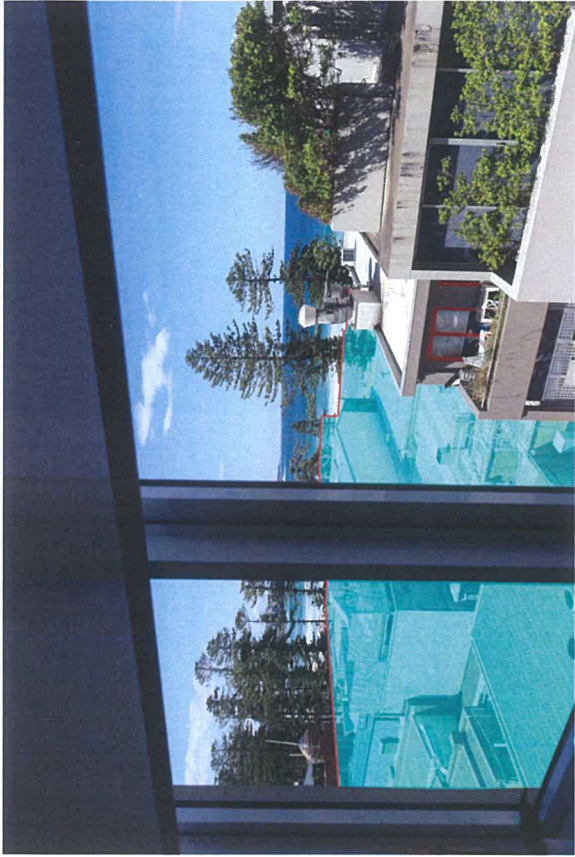
Site image

05AA.JPG



Existing view with permitted building envelope overlaid

05DD.JPG



Extent of visual impact in cyan with red outline

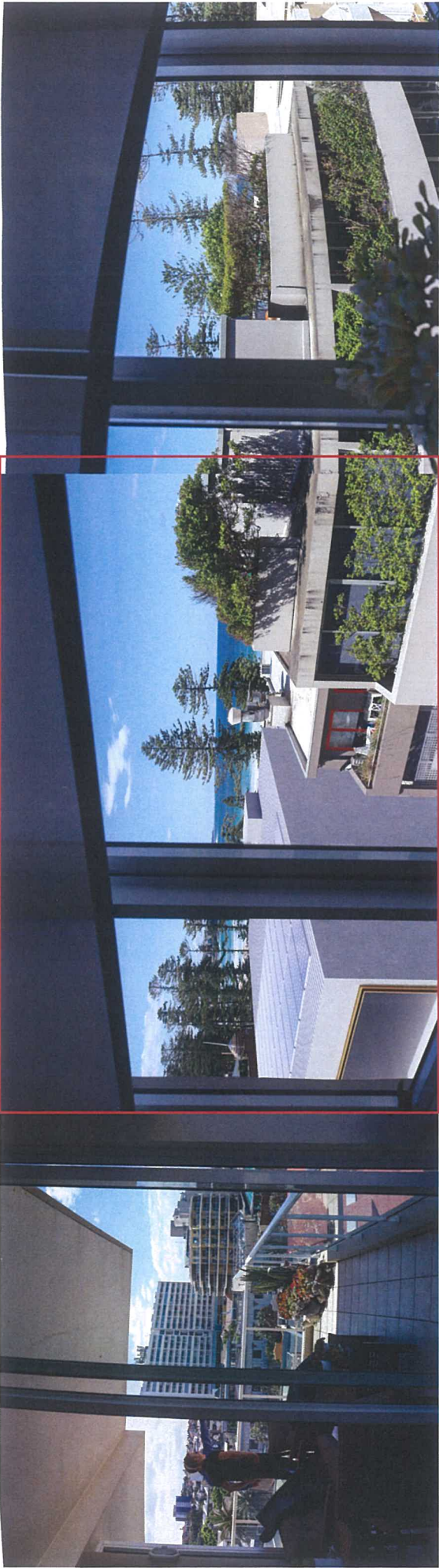
05CC.JPG



Photomontage of new

05BB.JPG





24mm panorama with nested montage frame in red

Viewpoint 07



Site image

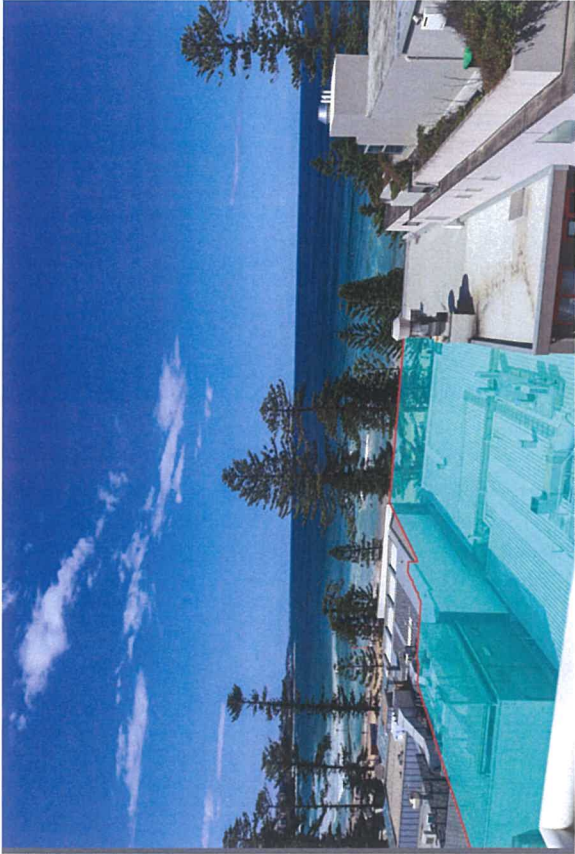
07AA.JPG



Existing view with permitted building envelope overlaid

07DD.JPG





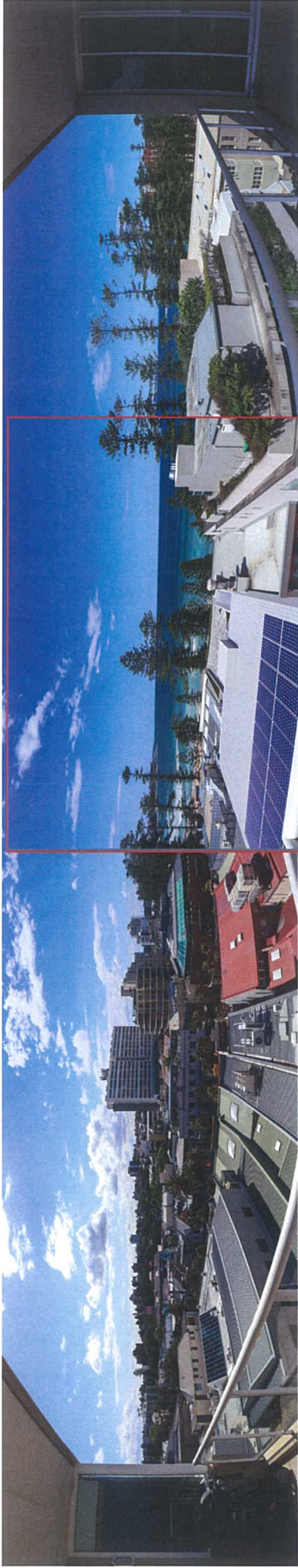
Extent of visual impact in cyan with red outline

07CC.JPG



Photomontage of new

07BB.JPG



24mm panorama with nested montage frame in red

Viewpoint 08



Site image

08AA.JPG



Existing view with permitted building envelope overlaid

08DD.JPG





Extent of visual impact in cyan with red outline

08CC.JPG



Photomontage of new

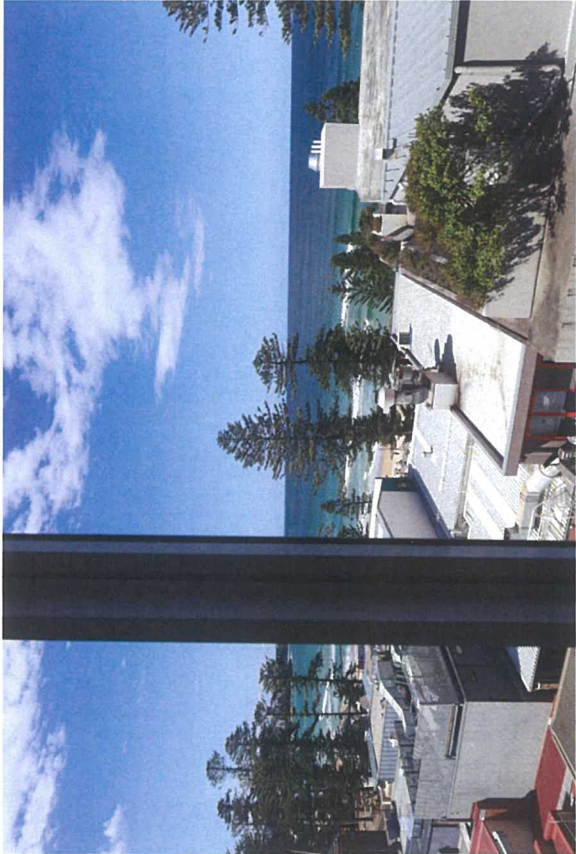
08BB.JPG





24mm panorama with nested montage frame in red

Viewpoint 10



Site image

10A.JPG



Existing view with permitted building envelope overlaid

10DD.JPG



Extent of visual impact in cyan with red outline

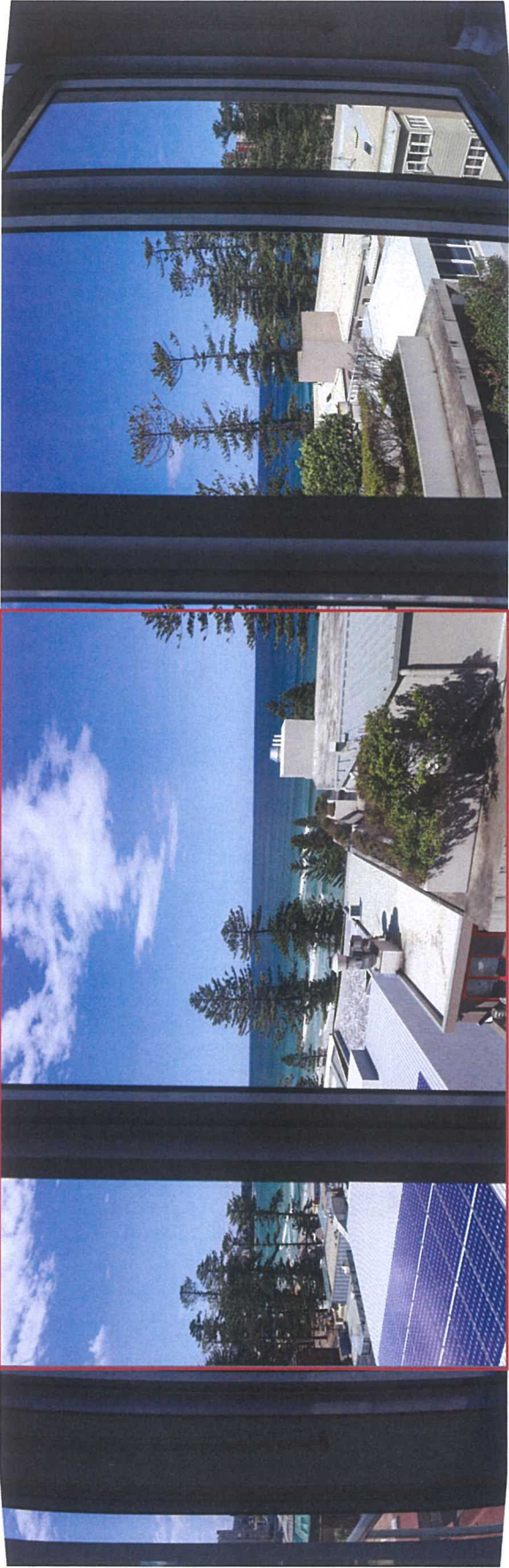
10CC.JPG



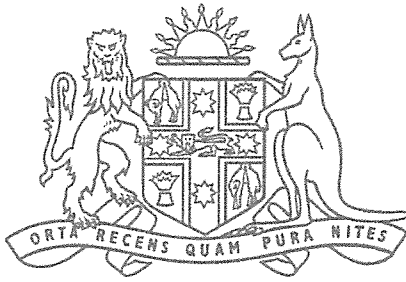
Photomontage of new

10BB.JPG





24mm panorama with nested montage frame in red



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>Chidiac v Mosman Council [2015] NSWLEC 1044</b>
<b>Hearing dates:</b>	9 and 10 March 2015
<b>Date of orders:</b>	16 March 2015
<b>Decision date:</b>	16 March 2015
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Moore SC
<b>Decision:</b>	<p>The appeal is dismissed;</p> <p>Development Application 8.2014.113.1 for the demolition of existing structures at 1 Musgrave Street, Mosman and the erection of a five level residential flat building above two levels of basement car parking is determined by the refusal of development consent; and</p> <p>The exhibits, other than Exhibit 2, are returned.</p>
<b>Catchwords:</b>	DEVELOPMENT APPLICATION: development standards for height and floor space ratio; adequacy of applications to justify contravention of standards; compatibility of proposed development with objectives of the standards and the objectives of the R3 zone; desired future character of the area; view impacts; amenity of proposed dwellings
<b>Legislation Cited:</b>	<p>Environmental Planning and Assessment Act 1979</p> <p>Mosman Residential Development Control Plan 2012</p> <p>Mosman Local Environmental Plan 2012</p> <p>State Environmental Planning Policy 1 Development Standards</p> <p>State Environmental Planning Policy Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005</p>
<b>Cases Cited:</b>	<p>Botany Bay City Council v Premier Customs Services Pty Ltd [2009] NSWCA 226 ; (2009) 172 LGERA 338</p>
<b>Category:</b>	Principal judgment
<b>Parties:</b>	<p>W Chidiac (Applicant)</p> <p>Mosman Council (Respondent)</p>
<b>Representation:</b>	

Counsel:  
Mr A Galasso SC (Applicant)  
Ms S Duggan SC (Respondent)

Solicitors:  
McKees Legal Solutions (Applicant)  
Pikes & Verekers Lawyers (Respondent)

**File Number(s):** 10712 of 2014

## JUDGMENT

### Introduction

- 1 **SENIOR COMMISSIONER:** Curraghbeenah Point is a promontory on Sydney Harbour within the Mosman local government area. At Curraghbeenah Point, on its western edge, is a small grassy public reserve with, immediately adjacent to it, a four level interwar residential flat building. Between the building and the water of the Harbour is a small flat lawn. The address of the building is 1 Musgrave Street, Mosman (the site). The site is located within the R3 Medium Density Residential zone created by *Mosman Local Environmental Plan 2012* (the LEP).
- 2 The building has six apartments within it - with these being located on the first, second and third floors. The ground level, facing the Harbour, does not incorporate a residence (although it is presently, informally, being used for this purpose). There is presently no excavated basement.
- 3 The external construction style of the building is one of rendered masonry finish for the three upper levels with the lower level comprising a sandstone plinth upon which the residential levels sit. There are limited openings in the sandstone plinth. The building has a flat roof surrounded by a low parapet with a number of minor protrusions above the line of the parapet, these being caused by two hot water services, a television aerial and several plumbing vents. The parapet is punctured, at regular intervals, by rectangular openings with decorative balusters within them.
- 4 There is, at the present time, no vehicle access to the building with pedestrian access being available from the southern end of Musgrave Street over an unmade section of that street. The South Mosman ferry wharf is nearby providing access to ferry services and there is a bus service running, from a turning head in Musgrave Street, up Musgrave Street towards the Mosman retail strip.
- 5 The north eastern corner of the building sits in a substantial excavation that has been made into the sandstone bedrock of Curraghbeenah Point with this cut tapering down toward natural ground level along each of the eastern and northern sides of the building.

## The proposal

- 6 The applicant sought approval from Mosman Council (the Council) to demolish the existing building and erect, in its place, a replacement residential flat building that, in general terms, would mimic the envelope of the present structure (although with a higher roofline and thus a lower parapet). The Council has not determined the application and this appeal is against its deemed refusal.
- 7 Erection of a residential flat building is permissible with consent within the R3 zone.
- 8 The only proposed protrusion above the existing parapet height would be an overrun for an elevator proposed for the north eastern corner of the building on its northern face. The footprint of this elevator would be outside the footprint of the existing structure.
- 9 The proposal envisages construction of a driveway from the end of Musgrave Street along the unmade portion of that street in order to provide vehicle access to the site for parking (parking that would be provided in two basement levels proposed to be excavated on the site - with those basement levels extending a little beyond the footprint of the present building). Although this access is envisaged, it does not form part of the present application and would need to be subject to a separate application to the Council for approval.
- 10 The replacement building envisaged by the application would have five levels above the basements instead of the present four levels with the additional level being made possible by a combination of the proposed raising of the roof height compared to that of the present structure and permissibly decreasing the floor to ceiling heights that exist between the levels in the present structure.
- 11 The applicant presently has a development consent from the Council for additions and alterations to the present structure with this approval incorporating a driveway along the line envisaged for this proposal; construction of parking within the existing ground level space; and the erection of a lift in generally the same (but not precisely the same) location as is envisaged in the appeal design (but with this approved lift not extending above the top of the existing parapet).

## **The site inspection**

- 12 The hearing commenced with an inspection of the site (including viewing the site and its surrounding development context during a boat trip on Sydney Harbour). I was accompanied by the legal representatives of the parties and those advising and instructing them during the course of this site inspection.
- 13 The waterborne element of the inspection included mimicking the route of the ferry that serves the South Mosman wharf as well as traversing from north to south along the Cremorne Point foreshore to look across Mosman Bay towards the site.
- 14 I also visited the properties of two of objectors to the present proposal, Mr De Bono and Mr King, hearing evidence given informally by them in support of their written objections that had been lodged with the Council.

## **The issues**

- 15 There are two distinct strands of reasoning advanced by the Council as to why proposal should not be approved (although these strands interweave to some extent).
- 16 The first of these strands concerns the satisfaction (or, in the Council's submission, non-satisfaction) of mandatory provisions in the LEP that must be met to permit approval of the necessary breaches of the building height and floor space ratio numerical controls contained in the LEP. It is convenient to note, in passing, at this point, that the present structure does not comply with these controls (controls that did not apply at the time of its construction).
- 17 The second of the strands raised by the Council as warranting refusal of the proposal arises from a range of aspects of a merit assessment of that which is proposed - with those concerns relating to internal amenity and view impact issues as well as matters relating to what would be the appearance of the proposed development (if constructed) when viewed from various locations on Sydney Harbour.

## **The planning documents**

- 18 The LEP is, as can be inferred from its nominated year, a modern one based on the Standard Instrument template. It includes, at cl 1.9(2), a provision that ousts the operation of *State Environmental Planning Policy 1 Development Standards* (the Policy) so that there is no ability to use the Policy as a mechanism to set aside either of the development standards that are engaged for consideration (by non-compliance) for this proposed development.
- 19 However, instead of the availability of the Policy, there is an internal mechanism within the LEP, contained in cl 4.6, that provides a potential path for non-compliance with development standards in the LEP. Although similar, in many respects, to the path in the Policy, it is a path set out in terms not identical to those in the Policy and, in an



aspect critical in these proceedings, is a more constrained and onerous one. The terms of cl 4.6 of the LEP will require further detailed consideration but it is sufficient, at present, to set out its terms in full:

#### **4.6 Exceptions to development standards**

(1) The objectives of this clause are as follows:

- (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
- (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.

(2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.

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

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

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

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

(5) In deciding whether to grant concurrence, the Director-General must consider:

- (a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and
- (b) the public benefit of maintaining the development standard, and
- (c) any other matters required to be taken into consideration by the Director-General before granting concurrence.

(6) Development consent must not be granted under this clause for a subdivision of land in Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E2 Environmental Conservation, Zone E3 Environmental Management or Zone E4 Environmental Living if:

- (a) the subdivision will result in 2 or more lots of less than the minimum area specified for such lots by a development standard, or
- (b) the subdivision will result in at least one lot that is less than 90% of the minimum area specified for such a lot by a development standard.

**Note.** When this Plan was made it did not include Zone RU1 Primary Production, Zone RU2 Rural Landscape, Zone RU3 Forestry, Zone RU4 Primary Production Small Lots, Zone RU6 Transition, Zone R5 Large Lot Residential, Zone E3 Environmental Management or Zone E4 Environmental Living.

(7) After determining a development application made pursuant to this clause, the consent authority must keep a record of its assessment of the factors required to be addressed in the applicant's written request referred to in subclause (3).

(8) This clause does not allow development consent to be granted for development that would contravene any of the following:

(a) a development standard for complying development,

(b) a development standard that arises, under the regulations under the Act, in connection with a commitment set out in a BASIX certificate for a building to which State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies or for the land on which such a building is situated,

(c) clause 5.4.

20 The particular elements of cl 4.6 that require consideration in these proceedings are those contained in sub-cll (3) and (4)(a).

21 The zoning table in the LEP is in traditional form with the element for each zone setting out the objectives of that zone and then dealing with what development is or is not permitted within that zone. The objectives of the R3 zone will also require some detailed consideration and those objectives are in the following terms:

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

To provide a variety of housing types within a medium density residential environment.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

To provide for housing that is compatible with the desired future character of the area in terms of bulk, height and scale.

To encourage residential development that has regard to local amenity and, in particular, public and private views.

22 Finally, there are three further provisions of the LEP potentially engaged for consideration in these proceedings. The first of them is cl 2.3(2) that requires that I *must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone*. However, the exhortation contained in this provision does not need to be considered further given the conclusions that I have reached with respect to the three tests mandated to be satisfied by clause 4.6(4)(a)(ii) but unable so to be satisfied by this proposal.

23 The second of them is cl 4.3 dealing with the height of buildings. This provision is in the following terms:

#### **4.3 Height of buildings**

(1) The objectives of this clause are as follows:

(a) for development on land in Zone R2 Low Density Residential or Zone R3 Medium Density Residential:

(i) to share public and private views, and

(ii) to minimise the visual impact of buildings particularly when viewed from the harbour and surrounding foreshores, and

(iii) to ensure that buildings are compatible with the desired future character of the area in terms of building height and roof form, and

(iv) to minimise the adverse effects of bulk and scale of buildings,

(b) for development on land in Zone B1 Neighbourhood Centre, Zone B2 Local Centre or Zone B6 Enterprise Corridor:

(i) to ensure that buildings are compatible with the desired future character of the area in terms of building height and roof form and will produce a cohesive streetscape, and

(ii) to provide opportunities for buildings of a greater height than existing development in suitable locations to achieve the Council's residential strategy and provide opportunities for economic growth.

(2) The height of a building on any land is not to exceed the maximum height shown for the land on the Height of Buildings Map.

24 Written and oral evidence was given by the applicant's town planner, Mr Long, the applicant's urban designer, Ms Morrish, and the Council's consultant planner, Mr Nash. Their joint expert report became Exhibit 4. The maximum height shown for the site on Height of Buildings Map is 8.5 m. The maximum height of the proposed structure is 14.5 m.

25 The provision concerning floor space ratio is contained in cl 4.4 of the LEP, a cl in the following terms:

#### **4.4 Floor space ratio**

(1) The objectives of this clause are as follows:

(a) for development on land in Zone R2 Low Density Residential or Zone R3 Medium Density Residential:

(i) to ensure that buildings are compatible with the desired future character of the area in terms of building bulk and scale, and

(ii) to provide a suitable balance between landscaping and built form, and

(iii) to minimise the adverse effects of bulk and scale of buildings,

(iv) to limit excavation of sites and retain natural ground levels for the purpose of landscaping and containing urban run-off,

(b) for development on land in Zone B1 Neighbourhood Centre, Zone B2 Local Centre or Zone B6 Enterprise Corridor, to ensure that buildings are compatible with the desired future character of the area in terms of building bulk and scale,

(c) for development on land in Zone B2 Local Centre or Zone B6 Enterprise Corridor, to provide opportunities for buildings of a greater scale than existing development in suitable locations to achieve the Council's residential strategy and provide opportunities for economic growth.

(2) The maximum floor space ratio for a building on any land is not to exceed the floor space ratio shown for the land on the Floor Space Ratio Map.

26 The permitted floor space ratio shown for the site on the Floor Space Ratio Map is 0.55:1 m. The present floor space ratio of the building on the site is ~1:1 whilst that sought for the proposed structure is ~1.5:1.

27 The LEP's cl 4.6 is, clearly, from the terms of 4.6(2), beneficial and facultative and is to be approached on that basis. The requirement, contained in cl 4.6(3), to provide written requests for contraventions, in this instance, of the building height and floor space ratio

development standards have been met by the applicant through the provision of such written requests in the Statement of Environmental Effects that was lodged with the development application.

28 Separate written requests for the purposes of cl 4.6(3) have been provided, one dealing with cl 4.3 (height of buildings) and the second dealing with cl 4.4 (floor space ratio). The adequacy of each of these written requests as being in satisfaction of the requirements of cl 4.6(4)(a)(i) is contested by the Council.

29 However, separately, Ms Duggan SC, counsel for the Council, advanced the proposition that the three tests that are embodied in cl 4.6(4)(a)(ii) are incapable of satisfaction. In support of that proposition, she submitted that, if I were to conclude that any one of those tests in that provision were not satisfied (all three of them being internally cumulative within the provision as well as being cumulative with the adequacy of the written requests said to justify the contravention of the two development standards), the application must fail. I am satisfied that this is a correct interpretation of the provision.

30 This being so, I consider it appropriate to proceed on the basis of first determining the outcome with respect to each of the three elements in cl 4.6(4)(a)(ii) prior to moving (if were to have been necessary to do so – but it is not) to consideration of questions of adequacy of the requests to contravene each of the development standards and then (and only then) to the various merit issues that were raised by the Council in objection to the proposed built form.

31 Although the *Mosman Residential Development Control Plan 2012* (the DCP) contains a range of provisions at least tangentially touching on the proposed development, I do not consider that, for the purposes of interpreting the words in the LEP, it is appropriate to have regard to matters contained in the Development Control Plan. In this instance, where questions of permissibility arise from interpretation of the LEP, it is necessary, in my view, to confine consideration of those issues to the framework of the LEP, it being the instrument within which the provisions are located.

32 However, had, as discussed in my later analysis, the desired future character of the area within which the site is located not been as prescriptive as necessarily follows from the controls in the LEP, the third of the building form and design controls in the DCP at 7.17.2 Planning Controls - Mosman Bay Townscape might have provided an element of assistance to the applicant on merit consideration matters. There is, otherwise, nothing contained in the whole of Part 7.17 Mosman Bay Townscape of the DCP that would provide further assistance to the applicant, in my view.

33 The deemed *State Environmental Planning Policy Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005* also applies but, as a consequence of the conclusions that I have reached on matters arising out of the LEP, this policy does not require further consideration.

## Consideration of the cl 4.6(4)(a)(ii) issues

### General

34 For the purposes of this analysis, I extract, from clause 4.6 earlier set out, the terms of cl 4.6(4)(a)(ii). This provision is in the following terms:

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out

35 It is appropriate to observe, initially, cl 4.6(4)(a)(ii) sets three distinct tests. These tests are:

- Is the proposed development consistent with the objectives for the building height of building standards in cl 4.3 of the LEP?
- Is the proposed development consistent with the objectives for the floor space ratio standard contained in cl 4.4 of the LEP?
- Is the proposed development consistent with the objectives of the R3 zone set out in the Land Use Table of the LEP?

36 Each of these tests must, separately, be satisfied and it is only by the satisfaction of each of these tests that the public interest element invoked in this provision can be met. There is no suggestion, as I understood the Council's case, that some broad public interest test arose separately from the three specific elements set out in this portion of cl 4.6(4).

37 It is in this context that I turn to consider the of the individual tests that are set - noting that failure of any one of them precludes me from having the necessary degree of satisfaction that would permit me to conclude that this element of cl 4.6 had been met.

### The concept of compatibility

38 Clause 4.6(4)(a)(ii) invokes the concept of consistency with the three sets of objectives arising for consideration. Each of the three sets of objectives contains, amongst those objectives, an objective that requires consideration of compatibility with the *desired future character of the area* relevant to the site.

39 The relevant element of the Macquarie Dictionary definition of compatible is *capable of existing together in harmony*. Compatibility, of course, is a softer test than consistency.

40 In the context where any proposed development can only be regarded as being in the public interest because it is consistent with the three sets of objectives invoked by this clause, the coupling of consistency and compatibility means that a degree of tolerance for some departure from the *desired future character of the area* is appropriate to be considered. However, given the discussion that follows, it can be seen that even taking a modestly permissive attitude on the basis of the accumulation of these terms will not get the proposed development "over the line" for these tests.

## The “area”

- 41 In each of the three desired future character objectives discussed below, the word *area* is used rather than the word *zone*. It is, therefore, necessary to consider what are the appropriate geographic boundaries that might be encompassed by this expression.
- 42 Mr Galasso SC, counsel for the applicant, tendered, on behalf the applicant, extracts from the Height of Buildings Map and from the Floor Space Ratio Map showing the geographic spread of each of these development standards in an area generally to the north or north-east of the site. He drew attention to variations – a pattern of differences - between the floor space ratio development standard applying to the site when compared to other locations within this broader coverage of the R3 zone (generally Musgrave/Raglan Streets up the ridgeline towards Military Road and Spit Junction).
- 43 He also drew my attention to the fact that the relevant height of building standard applying to the site was one which spread beyond the confines of the R3 zone to more of the portion of the Mosman local government area generally to the south of Military Road.
- 44 In essence, his submission was that the use of the word *area* in the objective in cl 4.3(1)(a)(iii) and in the objective in cl 4.4(1)(a)(i) was a more geographically confined context than the whole of the R3 zone within the Mosman local government area. I accept that this is a logically necessary conclusion to be drawn. Indeed, the use of the word *area*, by itself, makes that inevitable and non-coincidence of the mapped information to which I was taken with the boundaries of the R3 zone merely reinforces that inevitability.
- 45 For the purposes of my consideration of the proposed development on the site, it seems to me, as I indicated during the course of the hearing, that it might be appropriate to regard the *area*, in this context, as being as confined as being limited to the site and its immediately adjacent development. However, whether the appropriate contextual application of the concept of *area* for the purposes of these objectives is taken so to be confined or to be more expansive (I understood Mr Nash's position to be

that it would encompass other development on Curraghbeenah Point and along the eastern foreshore of Mosman Bay to the north of the South Mosman ferry wharf) would seem to me to be immaterial.

46 The appropriate approach, it seems to me, is to consider this concept of *area*, for the purposes of these objectives, on the basis that is most beneficial to the applicant - that is to take the applicant's case at its highest. So doing has me take it as confined to the site and its immediately contiguous development. Only if the applicant succeeds on this basis would it be necessary to consider assessment with a "higher bar".

47 The desired future character is to be drawn, in the context of each of the development standards, from the specific wording of the objective within which the word *area* is to be found.

48 On the other hand, for consideration of the test relating to the zone objectives, this requires an assessment based on the broader basis of the whole zone.

*The objectives of the height of buildings development standard*

49 That which is presently erected on the site has a wall height of 14.5 m at its highest point above the adjacent ground level. The proposed development seeks, as earlier noted, to mimic the height of the present structure (save with respect to the proposed elevator on the northern face at the north-eastern corner). The applicant has indicated, through his counsel, preparedness to accept a condition of consent that would require the uppermost point on the elevator to be no higher than the existing parapet height. The applicant also has indicated, through his counsel, that if I were to adopt an "amber light" approach to the location of this elevator and require it to be set some 900 mm or so to the west, such a requirement would also not be resisted. As a consequence, it is unnecessary to address, further, matters relating to the height or location of this elevator.

50 The building height that is applicable to the site from the Height of Buildings Map is set at a maximum of 8.5 m. In effect, compliance with the height of buildings development standard would permit, as agreed in the written and oral expert evidence, only a building with two habitable levels which could be coupled with a pitched roof form that could accommodate a "rooms in the roof" design to provide a third (somewhat limited or constrained) habitable level.

51 Such a design, within the footprint that would be able to be obtained for development on the site, would provide a significantly lesser development yield than is available from the use of the present structure (including any refurbishment opportunities to which the Council might consent).

52 There are two matters of agreement from Exhibit 4 that warrant being noted. These are:

- Agreement that the existing building and immediately adjoining buildings are far greater in terms of height and FSR and footprint than the current LEP and DCP controls allow (page 3); and

- Development in close proximity of the site and within the visual context of it and the water is not likely to change significantly given the scale of existing development and the lower height and yield available under the LEP and DCP controls (page 4)

53 Mr Long said, at paragraphs (p) to (t) on page 11 of Exhibit 4:

To be consistent with the desired future character of the area the proposed development would need to be significantly smaller and lower in height and clearly smaller and lower in height compared to the existing four storey building on the site and the surrounding development.

The site is located in an area of Mosman where the existing characters four and five storey residential flat buildings and multi storey residential flat buildings, and three storey dwelling houses and multi storey residential flat buildings along the western side of the Musgrave Street.

It is not feasible nor economically viable or prudent in terms of urban consolidation objectives to replace existing multi storey apartment buildings with spectacular harbour views, with new development of 8.5m and two storeys in height.

The majority of the surrounding buildings are strata title apartment buildings with multiple owners.

Based on the above factors, the existing character of this part of Mosman is not likely to change.

54 It was, on my understanding of it, the agreed position of Mr Long and Mr Nash that no owner of the site would voluntarily seek to undertake demolition of the existing structure and a redevelopment of the site that complied with the height of buildings development standard. Further to that agreed position, it was Mr Nash's opinion that, if, through the effluxion of time, the fabric of a building sufficiently deteriorated to make it necessary that a building be demolished, it would be appropriate for the Council to require any replacement building to satisfy this development standard.

55 It seems reasonable to me to assume that any prudent owner of a non-compliant building will, inevitably, undertake such maintenance as might be necessary to prolong the life of the building to the maximum possible extent in order to avoid the consequences of needing to comply with the height of buildings and floor space ratio constraints that would arise if demolition and redevelopment were to become necessary. This means, in my view, that the likelihood of that occurring in this area is so temporally remote as not to warrant further consideration.

56 The height of buildings provision in the LEP contains, for the R3 zone, four objectives. For the purpose of considering the question of the proposed development's consistency with those objectives, it is necessary to consider each of the objectives separately before, if there were to be some balancing required, synthesising the four outcomes to derive a single yes/no answer to the question.

57 The first objective of the clause is *to share public and private views*.

58 In the present instance, it is apparent from the outlook directly to the south from the living room and kitchen windows of Mr De Bono's apartment (in the residential flat building immediately to the north of the site) that the present structure provides a significant impediment to the viewing of Sydney Harbour from this dwelling. It is equally



clear that a building that complied with the building height development standard would significantly and expansively open up additional views to the Harbour from this apartment.

59 As Mr De Bono's apartment is on the second residential level of his building, it is also possible (but it is not necessary to be prescriptive of this possible outcome) that the views of the Harbour from the apartment on the level below would also be enhanced if a compliant structure were to be erected on the site.

60 In this context, given the absolute water frontage nature of the site and the unimpeded views of the Harbour to the south from it and to Mosman Bay to the west from it, it is self-evident, in my opinion, that a compliant building would share the views in a fashion consistent with this objective whilst one of the nature now proposed would not do so.

61 Whilst some might regard such a result as contemplating an unjustified, windfall benefit to present or future occupants of Mr De Bono's apartment, it seems to me, questions of morality being irrelevant in this context, that would be the intended outcome of this objective on this aspect of the site.

62 Whilst I do not consider that those matters that were raised by Mr King with respect to the side views toward Mosman Bay from the middle level of the three level strata unit complex that he owns (located immediately to the east of the site) are relevant, I am also of the view that a similar position to that which applies to the outlook from Mr De Bono's apartment would also apply to views that potentially exist to the west from the lowest level of Mr King's property.

63 Individually (and certainly cumulatively), the possible creation of a greater sharing of views by compliance with the height of buildings development standard (and what would be the necessary foregoing of those opportunities were this proposed development to be approved) necessarily results in the conclusion that this development proposal is not consistent with the first objective of this clause.

64 The second objective of the clause is *to minimise the visual impact of buildings particularly when viewed from the harbour and surrounding foreshores*.

65 We were able to view the existing building during the course of our waterborne inspection and, in doing so, I observed it from a variety of aspects effectively encompassing virtually all aspects of its presentation to the Harbour. No suggestion was made, by either party's representative, that there should be any inspection of other locations (for example the public walkway above the eastern shore of Cremorne Point) but there is some, limited, photographic evidence on this aspect contained in Appendix B to Exhibit 4.

66 If there were to be a building on the site that complied with the height of buildings development standard, I am satisfied that the effect of lowering the uppermost point of a such structure would be:

- When viewed from locations to the west (whether on the Harbour or public locations on Cremorne Point is immaterial, in my assessment), all that would be able to be seen would be additional built elements of the lower portion of Mr

King's building together with the concrete pathways leading down the western side of that building. It is also possible that a small element of the existing excavation into the bedrock of Curraghbeenah Point at the north-eastern corner of the site might also be revealed;

- When viewed directly from the south, all that would be likely to be revealed by the erection of a height of buildings compliant structure would be further built elements of the building within which Mr De Bono's apartment is located and, possibly, elements of the ramps and steps that provide access to portions of Mr De Bono's building, to Mr King's building and, beyond Mr King's building to the six level residential flat building further to the east on the highest point of Curraghbeenah Point; and
- Although, during our waterborne inspection, we did not view the site from the south-east, it is my assessment that, from any on water location standing well out from Curraghbeenah Point, a similar position would apply to that from directly ahead of the site (although there might be some additional glimpses of the substantial fig tree adjacent to the walkway to the site) whilst, if in close to Curraghbeenah Point to the south-east, it is likely that all that would be revealed would be elements of the lower built form of the building containing Mr De Bono's apartment and, and an enhanced view, at least to some extent, of the canopy of the fig tree. As any south-eastern viewing point moved further to the east, it would seem likely that any view to the site would be increasingly subsumed by structures on Mr King's property until a view of any structure on the site disappeared.

67 These hypothetical changes that would arise from a building of compliant height would not alter, in any functional sense in my assessment, the quality of views to be obtained toward the site from on the Harbour or more distant locations.

68 Finally, in this regard, it is necessary to consider what might be the position of a height compliant building when viewed from the immediately adjacent Curraghbeenah Reserve.

69 Whilst a range of viewing points toward the site are available from this public foreshore space in an arc from somewhat to the north-west through to somewhat to the east of south-west, the nature of my assessment of the view from any of these locations would be similar to the earlier outcome for the purposes of this consideration. That outcome

would merely be an observation of the further built form of the De Bono, King and other buildings beyond. There would be no impact on views to the Harbour or any more general qualitative scenic outlook impact.

70 As a consequence of the analysis against this objective, I am satisfied that, functionally, a building height compliant structure would not effect any change to the visual impact of built form located on the site. As a consequence, I conclude that the proposal is neutral in this regard and, thus, should be regarded as consistent with this objective.

71 The third of the objectives is *to ensure that buildings are compatible with the desired future character of the area in terms of building height and roof form.*

72 I have earlier set out the nature of the building height and roof form that was agreed to be the outcome that would arise on the site if the building height standard was observed in a future construction.

73 Clearly that height and form outcome has been adopted by the Council since at least the early 1980s, on Mr Long's evidence, as the desired future character for the zone.

74 In this sense, although Mr Galasso took me to other locations in the same zone where a differential building height has been adopted for the purpose of this clause (by different colouring on the height of buildings map) I do not consider that that position assists the applicant.

75 Indeed, although a much larger portion of the Musgrave/Raglan Street peninsular is R3 zone coloured, it is clear that the locality I have adopted as the relevant *area* for this provision (the site and its immediately contiguous development) has had its building height control considered by the Council and adopted as appropriate.

76 Indeed, the fact that there are different differential height controls within the same zone reinforces the position that it is reasonable to conclude that the Council, in fact, intended to adopt the 8.5 m height control as appropriate for this *area* and for that to be informative of the desired future character for building height and roof form for this site.

77 As a consequence, there is no basis upon which to reach any conclusion other than that a development proposal that exceeds the 8.5 m building height development standard (to the significant extent as is here proposed) and which, in so exceeding that standard, would have a resultant roof form that would be entirely different to that agreed to be envisaged by a compliant structure means that this development proposal is incompatible with this objective and is significantly so.

78 Indeed, the extent to which the present (and proposed) height of the building exceeds the height of buildings standard for the area is an increment above the permitted level of approximately two thirds. Although the test in this objective is compatibility, the extent of the departure is sufficiently large as to not be regarded as being "in harmony" with the desired outcome set by the standard.

79 Although, as earlier discussed in general, a test of compatibility at the first step in this process before moving to consider consistency as required by clause 4.6(4)(a)(ii), is a softer test than had consistency been required at each of the two steps, the degree of

the proposed exceedances of the height of buildings development standard is such that, for the first step, the test of compatibility with the desired future character of the area is unable to be satisfied.

80 The fourth, and final, objective of the height of buildings clause is *to minimise the adverse effects of bulk and scale of buildings*.

81 In this context, it is difficult to see any adverse impact for the purposes of this objective that is not already encompassed within my earlier observations concerning the first of these objectives. As a consequence, to consider the impacts that might arise from the bulk and scale of this non-compliant proposal, for the purposes of this objective seems to me to be inappropriate double counting. As a consequence, I consider that I should treat this objective of the clause as being neutral in my assessment at this step.

82 Overall, therefore, it is clear to me that the cumulative outcome of consideration of the proposal against all of the objectives of the height of buildings clause is that the first question earlier set out at (36) must be answered in the negative. That is, in itself, sufficient to require dismissal of the appeal.

83 However, as the three questions are also cumulative, it is appropriate, in my view, to consider all of them in order to give a complete picture of the extent of compliance/non-compliance with the mandatory precondition requirements of cl 4.6(4)(a)(ii).

*The objectives of the floor space ratio development standard*

- 84 As with the objectives in cl 4.3, cl 4.4 (the clause that calls for consideration the floor space ratio derived from the relevant map) has, for the R3 zone, four objectives. The four objectives are expressed as being cumulative (as was the case for the objectives for the height of buildings provision).
- 85 The first of the objectives is *to ensure that buildings are compatible with the desired future character of the area in terms of building bulk and scale*.
- 86 At the commencement of consideration of this objective, it is appropriate to note, again, the relevant numerical positions that are brought into play with respect to this application.
- 87 First, the floor space ratio that is prescribed for the site by the floor space ratio map is .55:1. The floor space ratio of the present structure on the site is ~1:1. As a consequence of the ability to incorporate an additional level by adopting the aspects of building design earlier discussed, the floor space ratio for the proposed structure would be ~1.5:1.
- 88 Self-evidently, in this regard, the proposed structure does not merely seek to mimic that which is already on the site but seeks to increase the floor space ratio by 50%. Rather than being nearly double the ratio in the development standard, the proposed structure would be nearly triple it.
- 89 The same matters of consideration, broadly, arise concerning the desired future character of the area in this context as arose in the context of the objectives for the height of buildings clause.
- 90 That which is proposed as the floor space ratio for this development is clearly antithetic to this aspect of the desired future character of the area. However, for this aspect, the incompatibility is more egregious because of the proposal to increase the inconsistency that the present structure has in this regard. Although this proposed increase can be regarded as compounding the extent of the incompatibility, it is the mere fact of incompatibility (and a substantial degree of incompatibility) that is the vice that causes the proposal to fail this objective.
- 91 However, in my earlier discussion of the height of buildings development standard, I explained why the building that exceeded the height standard by some two thirds was not capable of being regarded as “in harmony” with that standard despite the fact that the proposed height was the same as the height of the existing structure.
- 92 For the floor space ratio development standard, although the present floor space ratio is nearly double that which is set by the LEP, that to which the test of compatibility needs to be applied, in the first stage of the evaluation against the subjective of desired future character of the area, the application does not merely seek, in broad, to mimic that which is presently on the site but proposes a significant increase so that the resultant floor space ratio would be nearly three times that which is permitted. Even if that which was proposed had merely sought to mimic the extent of the exceedances

contained in the present building, such an exceedances could not be said to be “in harmony” with the desired future character of the area. The proposal to increase, significantly, the extent of non-compliance merely compounds the **disharmony** and incompatibility with this development standard’s relevant objective.

93 The second of the objectives of the clause is *to provide a suitable balance between the landscaping and built form*.

94 Although a compliant building on the site would inevitably have a smaller footprint than that which is presently erected and as is proposed, the positioning of such a footprint on the site, given the absolute waterfront location on its southern aspect and the extent of the excavation into the bedrock of Curraghbeenah Point along the northern and eastern boundaries of the site makes it likely, in my assessment, that any landscaping benefits to be derived by compliance with this provision would be likely to be minimal. Indeed, I am satisfied that such landscaping outcomes would be of a nature that would be so small so as not to any conclusion adverse to the proposal with respect to this objective.

95 The third objective is *to minimise the adverse effects of bulk and scale of buildings*.

96 To the extent that consideration of this objective requires a significant degree of synthesis, a practical sense, with those matters that were brought into play by consideration of the first of the objectives of the height of buildings clause, the same conclusion would follow. However, in this regard the elements that might be regarded as giving rise to the non-compliance are the upper levels in the proposed structure seeking to provide an enhanced yield over that already erected on the site. To draw an adverse conclusion against the proposed development on this basis when considering this objective would also seem to me to constitute double counting and be inappropriate (particularly given the conclusion I have reached above concerning inconsistency with the first objective of this clause).

97 The final objective of this clause is *to limit the excavation of sites and retain the natural ground levels for the purpose of landscaping and containing urban run-off*.

98 Although extensive excavation is proposed (largely being constrained within the present building’s footprint but not exclusively so), in my assessment, the proposed excavation will have negligible impact on any retained elements of natural ground level (to what would appear to be the extremely limited extent to which there are any natural ground remaining on the site given the degree of cut into the bedrock of Curraghbeenah Point and the fill behind retaining walls at the water’s edge). I do not consider that there is any inconsistency with this objective.

99 However, the extent of the inconsistency with the first of the objectives of this clause is such that it is inevitable that I must conclude that the second of the questions earlier set out must also be answered in the negative.



*Consistency with the objectives of the R3 Medium Density Residential zone*

- 100 The zone objectives for the R3 Medium Density Residential zone are set out in the Land Use Table forming part of the LEP. There are five objectives set out for this zone.
- 101 The first objective is *to provide for the housing needs of the community within a medium density residential environment*. There is, as I understand the Council's position, no dispute that that which is proposed is consistent with this objective.
- 102 The same position applies with respect to the second of the zone objectives, the objective being *to provide a variety of housing types within a medium density residential environment*.
- 103 The third of the zone objectives is *to enable other land uses that provide facilities or services to meet the day to day needs of residents*. This objective is not applicable to the present proposal and, thus, the present proposal is not inconsistent with it.
- 104 The fourth of the zone objectives is *to provide for housing that is compatible with the desired future character of the area in terms of bulk, height and scale*.
- 105 In effect, this objective constitutes an aggregation of the third objective in clause 4.3 and the first objective in clause 4.4. The aggregation does not necessitate any enhanced, supplementary analysis beyond that which has been earlier set out for each of the separate objectives. As the proposed development is not consistent with either of these aggregated objectives, it must, inevitably, not be consistent with their aggregation.
- 106 The fifth and final zone objective is *to encourage residential development that has regard to local amenity and, in particular, public and private views*.
- 107 There are, in my opinion, two aspects to be considered concerning this objective. They are:
- The extent to which the proposed development has regard to local amenity; and
  - The extent to which the proposed development has regard to public and private views.
- 108 With respect to the first of these elements, I am satisfied that, to the extent that it goes beyond matters of public and private views brought into play by the second element, the amenity required to be considered is the broader amenity of the locality within which the proposal is located rather than any matters of internal amenity for the proposed development itself. Matters of internal amenity arise as a consequence of other considerations (for example through assessment pursuant to s 79C of the *Environmental Planning and Assessment Act 1979* or the Residential Flat Design Code).
- 109 I am satisfied that there is no element of the proposal that has an adverse impact on local amenity and thus the proposal is not inconsistent with this limb of this objective.
- 110 With respect to the second limb of this objective, the wording that is used requires the consent authority, consistent with what is called up for consideration by clause 2.3 of the LEP is to consider the extent to which the proposed development **has regard** to

public and private views with this being a distinctly different concept to that called up by the first objective of cl4.3 (the height of buildings control) which set the objective of **sharing** public and private views.

111 The difference in the terms is, in my view, of significance. The fact that the proposed development is, effectively for this purpose, able to be confined to the present envelope of the existing structure on the site (with the taking of an “amber light” approach to the height of the elevator tower and the extent to which the elevator tower needs to be setback to the west from the north-eastern corner of the building) means that this proposed development could be said to have appropriate regard to private views - as any impact on private views could either be required to be removed or rendered *de minimus*.

112 With respect to public views, the analysis earlier set out with respect to the first and second objectives of cl 4.3 as to public views is equally applicable in this context. I am, therefore, satisfied that there is no inconsistency between the proposed development and the fifth of the zone objectives.

113 Overall, with respect to the zone objectives, however, the extent of the inconsistency of the proposed development with the fourth of the zone objectives is such that, notwithstanding my conclusions with respect to the other four of the zone objectives, consideration of the development in the context of the zone objectives necessitates the answering of the third of the earlier posed questions in the negative.

#### **Conclusion with respect to cl 4.6(4)(a)(ii)**

114 The consequence of the three analyses set out above being that none of the three tests in cl 4.6(4)(a)(ii) is satisfied (with failure of any one of them being sufficient to warrant refusal of the proposal), it follows that I am unable to grant development consent to the proposed development at 1 Musgrave Street, Mosman.

## The nature of the outcome

- 115 However, it is also appropriate to offer some observations concerning the position causes that result to that flows from the non-satisfaction of cl 4.6(4)(a)(ii).
- 116 I do so in the context of the decision of the Court of Appeal in *Botany Bay City Council v Premier Customs Services Pty Ltd* [2009] NSWCA 226 ; (2009) 172 LGERA 338. In that case, the Commissioner who heard the initial appeal reached the conclusion that the terms a particular provision contained in the relevant Development Control Plan were inappropriate.
- 117 Having expressed that conclusion, rather than accepting the provision and considering whether, on the facts and circumstances of the particular application, it was appropriate to depart from the controls that he considered inappropriate, he proceeded to propound an alternative general view and apply it to that proposed development.
- 118 It is this second step, at least as I have understood the approach of the Court of Appeal, that gave rise to the error in the decision-making process rather than the expressing the more general view. Had it been an *obiter* comment , rather than a step in the decision making chain of reasoning, error may not have been occasioned.
- 119 In these proceedings, the position of the relevant expert witnesses leads, conflating their views, to the position that the *desired future character* for the area of Curraghbeenah Point is unlikely to be achieved at any time in the foreseeable future.
- 120 Indeed, given the substantial nature of the structures in this locality observed during the site inspection (despite the somewhat rundown nature of the existing structure on the site), there was nothing to evidence the remotest possibility that, with appropriate maintenance of existing structures, there was any likelihood of the necessity to demolish and rebuild (Mr Nash's pre-requisite for triggering a proposal that the Council could require to be compliant with the two development standards relevant in these proceedings).
- 121 As a consequence, the *desired future character* is something that could be regarded as, practically, being impossible to achieve in any immediately relevant timeframe.
- 122 In the context of the relevant controls expressing the *desired future character* having been in place, on Mr Long's observation, in earlier iterations of local environmental plans since the early 1980s, it seems to me that expressing an aspiration in a planning instrument where that aspiration (particularly in light of the desirability of the location involved) might be regarded as tending towards fantasy might not be regarded as representing a purposive approach to planning in this locality.
- 123 Having, however, unburdened myself of that observation, I acknowledge that, to remain within what I understand to be the strictures of the Court of Appeal in *Botany Bay City Council*, it would be entirely inappropriate to proceed to approve the proposed development as it would not be in the public interest to do so because the proposed

development is inconsistent with the objectives of the particular standards and the objectives for development within the zone in which the development is proposed to be carried out.

- 124 Departure from that *desired future character* (if I were to conclude that the written requests furnished in satisfaction of cl 4.6(3) satisfied me for the purposes of cl 4.6(4)(a)(i) and that there were no merit issues that were incapable of being remedied by me adopting an “amber light” approach to the merit elements of the proposed development) would, I am satisfied, be to fall into error - no matter how absurd the necessary actual outcome might seem.
- 125 Although the position so derived prevents the redevelopment of this site in a fashion that would potentially provide dwellings of significantly greater amenity than that likely to be enjoyed by the occupants of the six existing dwellings in the building on the site (without causing adverse impact on other residences in the vicinity - by the imposition of modest “amber light” required changes), I am satisfied that a proper application of the tests in cl 4.6(4)(a)(ii) and the inability of the applicant to satisfy them means that this is necessarily the position that results from these proceedings.

#### Other issues

- 126 In the preparation of this decision, I have considered whether or not I should proceed on a “What if I am wrong?” basis concerning other issues raised by Ms Duggan as being said to warrant refusal.
- 127 These issues, in summary (as already noted) concern the adequacy of the two written requests to be permitted to contravene the development standards for height and floor space ratio (being matters requiring satisfaction because of cl 4.6(4)(a)(i) of the LEP) and general matters of merit consideration relating to:
- Impacts on views from neighbouring properties;
  - Bulk and scale issues of presentation when viewed from the Harbour; and
  - Adequacy of solar amenity as a consequence of the internal layout of a number of the levels in the proposed development.
- 128 In addition, to the extent that they might be relevant in a planning sense, any other issues raised in the public submissions made to the Council concerning the proposed development also required to be addressed.
- 129 I have concluded that it would not be appropriate to do so. There are two reasons for this conclusion.
- 130 First, I am satisfied that the aggregated conclusion I have reached that the application fails each of the three tests set by section 4.6(4)(a)(ii) inevitably dooms the appeal – thus mandating its dismissal.
- 131 However, second, if it were to be held that I was wrong on these matters and, separately, I was to have concluded that none of the other issues placed any insurmountable barrier to approval of the proposal, there might be a reasonably held perception by those who oppose the proposal that those findings had been infected by

the strength of my views as to what would seem to be the inherent absurdity of proposing a *desired future character* for the area encompassing the proposed development (the limited area at the southern end of Curraghbeenah Point) established by the necessary application of height and floor space ratio development standards.

132 This would arise where, as here, the controls have been developed and broad brushed across a much wider compass than the southern end of Curraghbeenah Point, a compass that may not necessarily trigger, in instances that might relate to other locations, the same specific considerations that arise in the context of a proposed development for this site.

## Orders

133 It therefore follows that the orders of the Court must be:

- (1) The appeal is dismissed;
- (2) Development Application 8.2014.113.1 for the demolition of existing structures at 1 Musgrave Street, Mosman and the erection of a five level residential flat building above two levels of basement car parking is determined by the refusal of development consent; and
- (3) The exhibits, other than Exhibit 2, are returned.

**Tim Moore**

Senior Commissioner

[10712 of 2014 - Moore orders - 16 March 2015 \(44.0 KB, doc\)](#)

## Amendments

16 March 2015 - Attached order

---

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.

Decision last updated: 16 March 2015