



Land and Environment Court  
New South Wales

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Case Name: Collaroy Living Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2024] NSWLEC 1352

Hearing Date(s): 1 May 2024

Date of Orders: 25 June 2024

Decision Date: 25 June 2024

Jurisdiction: Class 1

Before: Targett AC

Decision: The Court orders that:  
(1) The cl 4.6 request to vary the floor space ratio development standard under cl 108(2) of the State Environmental Planning Policy (Housing) 2021 is upheld.  
(2) The appeal is upheld.  
(3) Development Application No. DA2023/0868, as amended, seeking consent for the demolition of existing structures and construction of a seniors housing development comprising 10 independent living units at 37, 39, 41 and 43 Hay Street Collaroy (being Lots 43-46 Section 12 in Deposited Plan 10648) is granted, subject to the agreed conditions of consent at Annexure A.  
(4) Exhibits are returned, except for Ex 4, 5, B and E.

Catchwords: DEVELOPMENT APPLICATION – SENIORS HOUSING – contentions resolved – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 1.3, 4.15, 4.16, 8.7, 8.10, 8.11, 8.14  
Land and Environment Court Act 1979, ss 17, 34, 39  
  
Environmental Planning and Assessment Regulations 2021, s 27

State Environmental Planning Policy (Building Sustainability Index) 2004, s 4.2  
State Environmental Planning Policy (Housing) 2021, Pt 5, Div 6, Sch 4, ss 8, 79, 81, 84, 85, 88, 91, 93, 95, 97, 98, 99, 100, 101, 102, 105, 108  
State Environmental Planning Policy Amendment (Housing) 2023 (Amending Policy), Sch 7a, cl 8  
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6  
Warringah Local Environmental Plan 2011, cl 4.4, 4.6, 6.2, 6.4

Cases Cited: CK Design Pty Ltd v Penrith City Council (No 2) [2022] NSWLEC 97  
Initial Action Pty Ltd v Woollahra Municipal Council 236 LGERA 256; [2018] NSWLEC 118  
Kolin v Sydney City Council [2006] NSWLEC 552  
Tenacity Consulting v Warringah Council (2004) 134 LGERA 23; [2004] NSWLEC 140  
Winten Property Group Limited v North Sydney Council (2001) 130 LGERA 79; [2001] NSWLEC 46  
Zenere v Canterbury City Council [2006] NSWLEC 263

Category: Principal judgment

Parties: Collaroy Living Pty Ltd (Applicant)  
Northern Beaches Council (Respondent)

Representation: Counsel:  
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File Number(s): 2023/266128

Publication Restriction: No

## **JUDGMENT**

### **COMMISSIONER:**

- 1 This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the respondent's deemed refusal of the applicant's development application (DA2023/0868) (Development Application) seeking consent for the demolition of existing structures and construction of a seniors housing development comprising 11 independent living units with basement parking and landscaping works at Lots 43-46 Section 12 Deposited Plan 10648, known as 37, 39, 41 and 43 Hay Street, Collaroy (Subject Land).
- 2 The Court has power to dispose of these proceedings under its Class 1 jurisdiction pursuant to s 17(d) of the *Land and Environment Court Act 1979* (LEC Act).

### **Background**

- 3 The Development Application was lodged with the respondent by DMPS Planning on behalf of the applicant on 6 July 2023. The Development Application was accompanied by letters of consent from the owners of the four properties comprising the Subject Land (see Ex A, tab 1). However, see [12]-[14] for further consideration of this issue.
- 4 On 21 August 2023, the applicant commenced these proceedings against the deemed refusal of the Development Application, being within the appeal period prescribed by ss 8.10 and 8.11 of the EPA Act. The Development Application was subsequently refused by the respondent on 13 December 2023.
- 5 The matter was listed for a conciliation conference under s 34 of the LEC Act before me on 6 December 2023. The conciliation was unsuccessful and the conciliation conference terminated on 5 March 2024. At the request of the parties, the matter was then subsequently listed for hearing before me on 1 May 2024.

### **The Subject Land and its context**

- 6 As set out in the Statement of Facts and Contentions filed by the respondent on 6 October 2023 (SOFAC) (Ex 1):

- (1) The Subject Land is located on the south-eastern corner of Hay Street and Anzac Avenue, Collaroy. The Subject Land has a combined area of 2,839.1m<sup>2</sup> and comprises four detached dwelling houses of differing sizes.
- (2) The Subject Land is zoned R2 Low Density Residential under the Warringah Local Environmental Plan 2011 (WLEP).
- (3) The Subject Land has a relatively gentle grade with a fall of approximately 2 metres from west to east.
- (4) The Subject Land contains approximately 30 trees across the four lots, most of which are in the rear yard of 41 Hay Street.
- (5) The land adjoining and surrounding the Subject Land is characterised by low-density detached dwelling houses.
- (6) To the east of the Subject Land, across Pittwater Road, are Griffith Park, Long Reef Golf Club, and Long Reef Surf Life Saving Club.
- (7) To the north-east of the Subject Land, across Pittwater Road, is a strip of land zoned E1 Local Centre, containing commercial premises and shop top housing.

### **The proposal**

- 7 On 22 March 2024, the Court granted leave for the applicant to amend its Development Application to rely on amended plans and documents (March Amendments). The March Amendments are contained in Ex B in these proceedings and primarily relate to:
  - (1) reducing the number of independent living units from 11 to 10;
  - (2) amending the architectural presentation of the development to read as five distinct pavilions;
  - (3) increasing the setbacks so that the Hay Street facing pavilions are separated by 4m setbacks and the Anzac Avenue setback is increased to 6.5m;
  - (4) reducing the gross floor area (GFA) from 2,053.2m<sup>2</sup> (floor space ratio (FSR) 0.72:1) to 1,570.43m<sup>2</sup> (FSR 0.55:1);
  - (5) moving the vehicular access ramp from Hay Street to Anzac Avenue; and
  - (6) other associated amendments to reconfigure apartments, retain trees, lower building height, increase setbacks and landscaping and improve accessibility.
- 8 On 26 April 2024, the Court granted leave for the applicant to further amend the Development Application to rely on additional and/or updated plans and

documents (April Amendments). The April Amendments are contained in Ex C in these proceedings and primarily relate to:

- (1) reducing the excavation to the basement; and
- (2) amending the cl 4.6 request in respect of the non-compliance with the FSR control in the State Environmental Planning Policy (Housing) 2021 (Housing SEPP).

9 Prior to the hearing, the parties advised the Court that they had reached agreement as to the matters which would resolve the contentious raised by the respondent in its SOFAC (Ex 1). However, notwithstanding this agreement, the respondent wanted to proceed to a hearing so that the submissions of objectors could be considered.

10 Accordingly, as set out in the applicant's written submissions (at [4]):

“...the Court is required to carry out a merit assessment under s 4.15 of the EP&A Act to determine if it is appropriate to grant development consent to the DA.”

11 The matter therefore proceeded to hearing on 1 May 2024.

12 During the course of the hearing, the applicant sought leave to further amend its proposal to substitute a new demolition plan (Amended Demolition Plan). The effect of the Amended Demolition Plan was to remove from the proposal, the demolition of the structures on the corner lot of Anzac Avenue and Hay Street, being 43 Hay Street Collaroy (43 Hay St).

13 The reason for this amendment was the identification of an encroachment of the existing garage structure on 43 Hay St on to land at 993 Pittwater Road (being Lot 1 in Deposited Plan 10519) (993 Pittwater Rd). As the existing garage structure on 43 Hay St was proposed to be demolished as part of the proposal and owners consent had not been obtained from 993 Pittwater Rd, the applicant indicated that it intended to utilise a separate planning approval pathway (namely a complying development certificate) for the demolition of these structures.

14 The respondent consented to the amendment and a deferred commencement condition was agreed between the parties to address the issue (see Condition A1 of the Agreed Conditions). The Court granted leave to the applicant to

amend the Development Application. The Amended Demolition Plan is Ex D in the proceedings.

- 15 For the purposes of these proceedings, the documents in the March Amendments (subject to specified exclusions) and April Amendments in conjunction with the Amended Demolition Plan, supersede those in the applicant's Class 1 Application (Ex A) and collectively comprise the Amended Development Application.

### **Issues**

- 16 The issues raised in the respondent's SOFAC (Ex 1) are as follows:
- (1) building bulk and scale;
  - (2) front setback;
  - (3) rear setback;
  - (4) character;
  - (5) objectives of R2 zone;
  - (6) view sharing;
  - (7) visual privacy;
  - (8) waste;
  - (9) landscaping;
  - (10) car parking and traffic safety.
- 17 The following issues of insufficient information were also raised in the SOFAC:
- (1) height of buildings;
  - (2) stormwater drainage; and
  - (3) water management.
- 18 As set out above at [9], the parties agree that all issues raised in the SOFAC were resolved through the Amended Development Application and agreed conditions of consent. However, it is necessary for me to carry out a merit assessment under s 4.15 of the EPA Act, in addition to being satisfied of relevant jurisdictional matters, to determine whether it is appropriate to grant development consent to the Amended Development Application.

## **Public Submissions**

19 The Development Application, as lodged, was notified from 11 to 28 July 2023. As a result of this notification, 152 submissions were received objecting to the Development Application. The views expressed by these submitters are summarised in the SOFAC (Ex 1) at [22] and included in the respondent's bundle (Ex 2, tab 13), but primarily include:

- (1) increased traffic congestion and safety concerns;
- (2) inconsistency with the character of the street, R2 low density zone and undesirable precedent;
- (3) amenity concerns including visual and acoustic privacy, overshadowing, view loss and impacts from construction;
- (4) excessive excavation and bulk and scale including non-compliance with design requirements and built form controls;
- (5) geotechnical and stormwater concerns; and
- (6) concern that the development is prohibited.

20 Additional without prejudice documents were notified to residents on 25 January 2024. Over 60 written objections were received in relation to this without prejudice material (see Ex 2, tab 14).

21 The Development Application, as amended by the March Amendments and April Amendments, was notified to residents on 26 April 2024 where a further 24 written submissions were received objecting to the amended application (included at Ex 3, tab 6). The objections primarily related to FSR exceedances, inappropriate bulk and scale, traffic congestion and safety issues, insufficient setbacks, and privacy, landscaping, stormwater, engineering and view sharing concerns.

22 There is significant overlap between the objectors' submissions and the contentions originally raised by the respondent in its SOFAC. The issues have therefore been consolidated as appropriate and considered accordingly.

## **The site view**

23 The Court attended a site view on the morning of the hearing accompanied by the parties. The Court also heard evidence from seven objectors which largely supplemented their written objections in relation to the Development Application as lodged, the without prejudice documents notified in January

2024 and the March and April Amendments. The Court also attended the front of 25 Anzac Avenue, Collaroy, to hear oral evidence from its owner in relation to a lack of visual assessment of the Amended Development Application from that property.

- 24 As I had inspected, in conjunction with the parties, a number of properties at the site view associated with the conciliation conference on 6 December 2023, the parties agreed that a further inspection of those properties was not necessary.

### **Expert evidence**

- 25 The applicant relied on the evidence of Mr Daniel McNamara (town planning) and Mr Josh Milston (traffic).
- 26 The respondent relied on the evidence of Ms Claire Ryan (town planning) and Mr Paul Corbett (traffic).
- 27 The following joint reports were filed and subsequently tendered at the hearing:
- (1) Joint Expert Report of Town Planners prepared by Mr McNamara and Ms Ryan filed 10 April 2024 (Joint Town Planning Report) (Ex 4); and
  - (2) Joint Expert Report of Traffic Engineers prepared by Mr Milston and Mr Corbett filed 10 April 2024 (Joint Traffic Report) (Ex 5).

### **The role of the Court on appeal**

- 28 In hearing the appeal, the Court re-exercises the functions of the Council in determining whether consent should be granted to the proposed development. Section 39 of the LEC Act provides as follows:

#### **39 Powers of Court on appeals**

...

(2) In addition to any other functions and discretions that the Court has apart from this subsection, the Court shall, for the purposes of hearing and disposing of an appeal, have all the functions and discretions which the person or body whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

(3) An appeal in respect of such a decision shall be by way of rehearing, and fresh evidence or evidence in addition to, or in substitution for, the evidence given on the making of the decision may be given on the appeal.

- 29 Section 8.14(1) of the EPA Act gives the Court broad powers on an appeal against the refusal or deemed refusal of a development application, as follows:

(1) In addition to any other functions and discretions that the Court has apart from this subsection, the Court has, for the purposes of hearing and disposing of an appeal under this Division, all the functions and discretions which the consent authority whose decision is the subject of the appeal had in respect of the matter the subject of the appeal.

30 Section 4.16 of the EPA Act relevantly provides that:

(1) **General** A consent authority is to determine a development application by –

(a) granting consent to the application, either unconditionally or subject to conditions, or

(b) refusing consent to the application.

31 Section 4.15(1) of the EPA Act relevantly sets out the matters that must be taken into consideration as are of relevance by a consent authority in determining a development application.

### **Housing SEPP**

32 The Subject Land is zoned R2 Low Density Residential under the WLEP. The Amended Development Application, being a seniors housing proposal, is prohibited in the R2 zone under the WLEP. The Amended Development Application therefore relies on the provisions of the Housing SEPP, and in particular, ss 8, 79 and 81, such that seniors housing development is permissible with consent in a R2 low density residential zone and to the extent of inconsistency between the Housing SEPP and another environmental planning instrument (for example, the WLEP), the Housing SEPP prevails to the extent of the inconsistency.

33 For completeness, it was not disputed that the State Environmental Planning Policy Amendment (Housing) 2023 (Amending Policy) which was passed on 14 December 2023, did not apply to the Amended Development Application. This was because of the savings and transitional provisions contained within cl 8 of Sch 7a of the Amending Policy which relevantly provided that “an amendment made to this policy by the amending policy does not apply to the following – (a) a development application made, but not determined, on or before 14 December 2023”.

34 It was not disputed that the Development Application was:

- (1) “made” on 6 July 2023 when it was lodged with the respondent – being a date before 14 December 2023; and
  - (2) “not determined” on or before 14 December 2023 (despite being refused by the respondent on 13 December 2023) due to the role of the Court on appeal determining the Development Application “de novo” (see *CK Design Pty Ltd v Penrith City Council (No 2)* [2022] NSWLEC 97 at [34]-[51]).
- 35 Therefore, the Housing SEPP as at 13 December 2023 is the correct version of the Housing SEPP which must be considered in the determination of the Amended Development Application and all further references to the Housing SEPP will reflect this version.

## CONTENTIONS

### *Bulk, scale and floor space ratio*

- 36 A key issue raised in the SOFAC and by objectors in relation to the Development Application, was that the proposal:
- (1) presented excessive bulk and scale;
  - (2) failed to comply with the floor space ratio (FSR) development standard in s 108(2)(c) of the Housing SEPP with a proposed variation of 44.6%; and
  - (3) did not comply with relevant provisions of Section D9 “Building Bulk” in the Warringah Development Control Plan 2011 (WDCP) in that the Development Application:
    - (a) does not step down with the topography of the Subject Land and relies on unreasonable excavation to the extent that it breaches the primary front boundary and rear boundary setback controls, thereby breaching requirement 3;
    - (b) orientates five independent living units to the east towards other residential properties, thereby failing to comply with requirement 5;
    - (c) does not allow for enough landscaping to suitably reduce the bulk and scale of the development including the proposed removal of two large native trees at the southern end of the Subject Land, thereby failing to comply with requirement 7;
    - (d) does not provide adequate articulation of the built form to reduce its massing (in breach of requirement 8); and
    - (e) is inconsistent with the following objectives of Section D9:
      - (i) to encourage good design and innovative architecture to improve the urban environment; and

- (ii) to minimise the visual impact of development when viewed from adjoining properties, streets, waterways and land zoned for public recreation purposes.

37 In addition, at the site view at the commencement of the hearing, residents made submissions in respect of the Amended Development Application regarding unacceptable bulk and scale including breach of the FSR control and overdevelopment of the site, the presentation of a “block form”, and lack of articulation.

*Legislative and planning framework*

38 As set out at [32], the Subject Land is zoned R2 Low Density Residential under the WLEP. The R2 zone objectives to which I have had regard in the assessment of the Amended Development Application, are extracted below:

- 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.

39 Section 108 of the Housing SEPP relevantly provides as follows:

(1) The object of this section is to identify development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.

(2) The following are non-discretionary development standards in relation to development for the purposes of independent living units –

...

(c) the density and scale of the buildings when expressed as a floor space ratio is 0.5:1 or less,

40 Section 4.15(3) of the EPA Act relevantly provides that:

If an environmental planning instrument... contains non-discretionary development standards and development the subject of a development application does not comply with those standards –

(a) subsection (2) does not apply and the discretion of the consent authority under this section and section 4.16 is not limited as referred to in that subsection, and

(b) a provision of an environmental planning instrument that allows flexibility in the application of a development standard may be applied to the non-discretionary development standard.

- 41 Section 4.6 of the WLEP (being the version of s 4.6 that applied at the date the Development Application was lodged) relevantly provides as follows:

**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 Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary 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 Planning Secretary before granting concurrence.

## *Evidence*

42 As set out in the Joint Town Planning Report, the town planning experts agreed that:

- (1) The Amended Development Application demonstrated a FSR of 0.553:1, being a variation to the development standard under s 108(2)(c) of the Housing SEPP of 10.6% (as opposed to the FSR of 0.72:1 comprising a 44.6% variation proposed by the Development Application as lodged).
- (2) The Amended Development Application included an updated written request under cl 4.6 of the WLEP, which satisfactorily demonstrated both:
  - (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case because it is consistent with the objectives of the R2 zone and the objectives of the equivalent development standard contained within cl 4.4 of the WLEP (in the absence of objectives for s 108 of the Housing SEPP); and
  - (b) that there are sufficient environmental planning grounds to justify contravening the development standard because the justification provided is sufficient and agreed with.
- (3) The amended plans demonstrate a development that is of acceptable bulk and scale, representative of the type of development anticipated by the R2 zone and the applicable controls.
- (4) The amended plans demonstrate a development that complies with requirement 3 set out in Section D9 Building Bulk of the WDCP, as it steps down with the topography of the Subject Land and does not rely on excessive excavation.
- (5) The amended plans demonstrate a development that complies with requirement 5 set out in Section D9 Building Bulk of the WDCP, as it provides suitable building separation, architectural design, and landscaping so as not to unreasonably impact upon the privacy of the adjoining properties to the east (Nos. 987, 989, 991 and 993 Pittwater Road).
- (6) The amended plans demonstrate a development that complies with requirement 7 set out in Section D9 Building Bulk of the WDCP, as it provides suitable landscaping to reduce the bulk and scale of the development and does not rely on unreasonable removal of vegetation.
- (7) The amended plans demonstrate a development that complies with requirement 9 set out in Section D9 Building Bulk of the WDCP, as it provides adequate articulation of the built form to reduce its massing.
- (8) The amended plans demonstrate a development that is consistent with all objectives of Section D9 Building Bulk of the WDCP.

43 During oral evidence, the town planners agreed that they had listened to the submissions made by residents at the site view at the commencement of the hearing in relation to issues of bulk and scale, and confirmed that their views as expressed in the Joint Town Planning Report were unchanged. Mr McNamara and Ms Ryan agreed that, in their view:

- (1) the Amended Development Application complies with all Housing SEPP, WLEP and WDCP controls (with the exception of FSR), including height and setbacks;
- (2) the cl 4.6 written request was adequate to justify the exceedance of the FSR 0.5:1 control by 10.6%;
- (3) the Amended Development Application will present as four dwellings of two to three storeys which is consistent with the typology of dwellings in the locality;
- (4) the ground floor level will be appropriately articulated to break up the perceived bulk of the development and the upper level will have pavilion elements below the height limit with pitched roofs to maintain the character of the locality and promote view sharing;
- (5) the Amended Development Application proposes significant landscaping; and
- (6) if the four lots comprising the Subject Land were developed individually, it is likely that lesser setbacks would be achieved.

*4.6 request – FSR standard*

44 As set out at [39], the FSR standard applicable to the Subject Land is 0.5:1 pursuant to s 108 of the Housing SEPP (FSR Standard). The parties agree that the Amended Development Application seeks consent for a FSR of 0.553:1, thereby exceeding the FSR Standard for the Subject Land.

45 The applicant has prepared a written request (Ex E), pursuant to cl 4.6 of the WLEP, which seeks to justify the variation to the FSR Standard (FSR Request).

46 By way of background, the FSR Request relevantly states:

- (1) The Subject Land is not subject to a maximum FSR development standard as might otherwise be prescribed at cl 4.4 of the WLEP.
- (2) The “density” of the development in the locality is managed by Pt 5 of the Housing SEPP (including s 108) and built form controls established by the WDCP, to determine a development’s permitted building envelope.

- (3) Section 108(1) of the Housing SEPP establishes the object of the non-discretionary development standards for independent living units:
    - (i) The object of this section is to identify development standards for particular matters relating to development for the purposes of independent living units that, if complied with, prevent the consent authority from requiring more onerous standards for the matters.
  - (4) Section 4.15(3) of the EPA Act confirms that cl 4.6 of the WLEP may be applied to a non-compliance with s 108(2) of the Housing SEPP.
- 47 The parties agree that the FSR Request adequately addresses the matters set out in cl 4.6 of the WLEP. That is, the FSR Request demonstrates that:
  - (1) compliance with the FSR Standard is unreasonable or unnecessary in the circumstances of the case (pursuant to cl 4.6(3)(a) of the WLEP);
  - (2) there are sufficient environmental planning grounds to justify contravening the FSR Standard (pursuant to cl 4.6(3)(b) of the WLEP);
  - (3) the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3) (pursuant to cl 4.6(4)(a)(i) of the WLEP); and
  - (4) the proposed development will be in the public interest because it is consistent with the inferred objectives of the FSR Standard and the objectives of the R2 zone in which the development is proposed to be carried out (pursuant to cl 4.6(4)(a)(ii) of the WLEP).
- 48 In relation to cl 4.6(3)(a) of the WLEP, the FSR Request asserts that strict application of the FSR Standard is unnecessary and unreasonable on the basis that the inferred objectives of the FSR Standard are achieved notwithstanding non-compliance with the standard (as per *Winten Property Group Limited v North Sydney Council* [2001] NSWLEC 46; *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118).
- 49 The FSR Request relevantly states:
  - (1) It is commonly accepted that a standard for FSR is a planning tool used by consent authorities to ensure the bulk and scale of development is compatible with the existing and desired streetscape and to minimise adverse impacts on adjoining land. This approach is consistent with previous decisions where the Court did not have express objectives to consider in relation to FSR and the Court had to infer these objectives – see *Zenere v Canterbury City Council* [2006] NSWLEC 263; *Kolin v Sydney City Council* [2006] NSWLEC 552.
  - (2) “Compliance” with the non-discretionary FSR Standard in s 108(2)(c) of the Housing SEPP is considered unreasonable and unnecessary in the circumstances of this case, given the numerical non-compliance is with

a non-discretionary development standard, the objective of which is to identify development standards for independent living units that, if complied with, prevent the consent authority from requiring a more onerous standard. It is not intended as an upper limit to development, and there is otherwise no maximum FSR standard for development in this locality.

- (3) From a streetscape perspective, the proposed bulk and scale is appropriate because:
  - (a) it appropriately responds to the Subject Land's topography and "steps down" with the slight fall of the land;
  - (b) the height of the development at 8.69m is commensurate with the two storey form in the locality;
  - (c) the form of the proposed development has been articulated to reflect the prevailing low-density streetscape, which is sympathetic to the character of the existing buildings on the Subject Land, being x4 adjoining lots that presently have 2 storey dwellings; and
  - (d) the proposed landscaping seeks to retain and embellish the existing landscape treatment to the streetscape to provide sufficient screening and softening of the proposed built form such that the additional FSR sought is adequately absolved within the bulk and scale and not discernible from the streetscape.
- (4) In relation to the minimisation of adverse impacts on the surrounding land, the additional FSR has been integrated into the overall design and will not cause adverse:
  - (a) overshadowing to neighbouring properties;
  - (b) impacts on privacy of surrounding properties; or
  - (c) impacts upon views from adjoining properties (see Visual Impact Study prepared by CMS Surveyors dated 5 March 2024 in relation to how the amended design has ensured key neighbouring views are retained for surrounding properties).

50 In relation to cl 4.6(3)(b) of the WLEP regarding sufficient environmental planning grounds, the FSR Request relevantly relies on the following environmental planning grounds in support of the proposed variation to the FSR Standard:

- (1) The Amended Development Application presents a strong corner expression that responds to the streetscape. The proposed development seeks a built form that maintains the predominant existing built form on the street of 2 storeys with some 3 storey elements with appropriate landscaping, materials and finishes to ensure compatibility, noting the corner to the immediate north across Anzac Avenue also has a large prominent dwelling house opposite the Subject Land.

- (2) The proposed additional FSR would be imperceptible in the streetscape, noting that the proposed development is otherwise compliant with the prescribed building height, setbacks, side boundary envelope and landscaping controls prescribed by the Housing SEPP, WLEP and WDCP. Further, the proposed FSR exceedance has been distributed across the Subject Land in a highly articulated and modulated 2 storey stepped building form which appropriately addresses each of its Hay Street and Anzac Avenue frontages.
- (3) A reduction in FSR would reduce amenity for no identifiable benefit. One of the objects of the EPA Act is to promote good design and amenity of the built environment (s 1.3(g)). The Amended Development Application has been designed to provide appropriate amenity by way of solar access and a sense of openness and views towards the ocean and headland, in addition to necessary accessibility and adaptability requirements. To remove floor space would result in a compromised design for the seniors housing residents for no planning benefit, contrary to the objective set out in s 1.3(g) of the EPA Act.
- (4) The Amended Development Application is consistent with the existing and desired future character of the locality, despite the proposed variation (see (1) above)).
- (5) The proposed variation will not result in unacceptable environmental impacts in terms of solar access, views or privacy. The proposed FSR provides a built form offering compliant levels of solar access to nearby residential development and there will not be a significant impact beyond a compliant building envelope, noting that the proposed development will have similar potential effects on water views to a built form compliant with the WLEP development standards.

51 In relation to cl 4.6(4)(a)(ii) of the WLEP, the FSR Request states that the proposed development is in the public interest because it is consistent with the inferred objectives of the FSR Standard (discussed at [49(1)]) and the objectives of the R2 zone (extracted at [38] above). In relation to the objectives of the R2 zone, the FSR Request relevantly states:

- (1) Housing for seniors is a need of the community. The Amended Development Application meets this need by providing 10 independent living units in a manner that meets relevant height controls and DCP controls for low density setbacks and landscaping. The proposal creates no material adverse impacts that would warrant refusal.
- (2) A detailed landscape plan has been prepared. The proposed building setbacks and significant deep soil zones provided at the periphery of the Subject Land, combined with a high standard of landscaping will ensure the development is consistent with established 1-3 storey development evidence within the streetscape.

52 Finally, in relation to cl 4.6(4)(b) and (5) of the WLEP, the FSR Request states that the proposed FSR exceedance raises no matters of State or regional significance, and it is considered that the proposal is compatible with existing development and the desired future character of development in the locality. There is no public benefit in application of the non-discretionary standard as an upper limit to development in the circumstances given the better planning outcome achieved, including the delivery of much needed seniors housing. No other matters are required to be taken into consideration by the Planning Secretary.

### *Submissions*

- 53 It was the applicant's submission, which was not disputed by the respondent, that as a result of s 4.15(3) of the EPA Act, cl 4.6 in the standard instrument can be used to permit flexibility in relation to a non-compliance with a control in s 108(2) of the Housing SEPP.
- 54 The applicant relied on the FSR Request and agreement of the town planning experts in the Joint Town Planning Report that all contentions regarding bulk, scale and FSR had been resolved, to submit that the Court should uphold the FSR Request and find that the matters raised in the respondent's contention regarding bulk, scale and FSR are satisfactorily addressed by the Amended Development Application.
- 55 The respondent agreed that all contentions regarding bulk, scale and FSR had been adequately resolved by the Amended Development Application.

### *Consideration*

56 Having considered the written and oral evidence given by the town planners, agreement of the parties, and submissions of objectors, I am satisfied that the Amended Development Application demonstrates a development that:

- (1) is of acceptable bulk and scale and representative of the type of development anticipated by the applicable controls and consistent with the predominantly two storey (with some 3 storey elements) existing built form in the locality;
- (2) relevantly complies with Section D9 of the WDCP, including that the development steps down with the topography of the Subject Land and does not rely on excessive excavation; and

- (3) adequately addresses building separation, privacy, landscaping and articulation such that the Amended Development Application should not be refused on this basis.

57 In relation to the FSR Request, I am satisfied under cl 4.6(4) of the WLEP that the FSR Request has adequately addressed the matters required to be demonstrated by 4.6(3) and that the development proposed in the Amended Development Application will be in the public interest because it is consistent with the inferred objectives of the FSR Standard and the objectives for development in the R2 zone set out in the Land Use Table in the WLEP, for the reasons given in the FSR Request.

58 I have also considered whether the contravention of the FSR standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP. I find no grounds on which the Court should not uphold the FSR Request.

### **Front and rear setbacks**

59 The SOFAC raised front and rear setback non-compliances with Section B7 Front Boundary Setbacks and B9 Rear Boundary Setbacks of the WDCP, respectively, as reasons as why the Development Application should be refused. Non-compliance with setback controls was similarly raised as a concern by objectors in respect of the both the Development Application and Amended Development Application.

### *Planning framework*

60 Pursuant to Section B7 of the WDCP and the “DCP Map Front Boundary Setback”, the front boundary setback applying to the Subject Land is 6.5m. Relevant requirements listed in Section B7 include:

- (1) Development is to maintain a minimum setback to road frontages.
- (2) The front boundary setback area is to be landscaped and generally free of any structures, basements, carparking or site facilities other than driveways, letter boxes, garage storage areas and fences.

61 Relevant exceptions listed in Section B7 are extracted below:

Land Zoned R2 or R3

On corner allotments or sites with a double street frontage, where the minimum front building setback is 6.5 metres to both frontages, the front building setback may be reduced to a minimum of 3.5 metres for the secondary frontage, but secondary street variations must consider the character of the secondary street and the predominant setbacks existing to that street.

- 62 Pursuant to Section B9 of the WDCP and the “DCP Map Rear Boundary Setbacks”, the rear boundary setback applying to the Subject Land is 6m. Relevant requirements listed in Section B9 include:

- (1) Development is to maintain a minimum setback to rear boundaries.
- (2) The rear setback area is to be landscaped and free of any above or below ground structures.

- 63 Section B9 also includes a diagram with the following text – “Paving and exempt development may encroach within the rear setback. However, they must not exceed 50% of the rear setback area”.

- 64 Relevant exceptions listed in Section B9 are extracted below:

Corner Allotments on Land Zoned R2 or R3

On corner allotments for land zoned R2 Low Density Residential or R3 Medium Density Residential, where the minimum rear building setback is 6 metres, the rear building setback does not apply.

### *Evidence*

- 65 As set out in the Joint Town Planning Report, the town planning experts agree that the Amended Development Application:

- (1) demonstrates compliance with the front boundary setback control set out in Section B7 of the WDCP (at [24]);
- (2) includes a bin room set 5.653m from the front boundary, however, requirement 2 set out in Section B7 of the WDCP allows for “garbage storage areas” to encroach on the front boundary setback area (at [25]);
- (3) demonstrates compliance with the secondary front boundary setback exception set out in Section B7 of the WDCP (at [27]);
- (4) demonstrates a development that is consistent with all objectives of Section B7 of the WDCP (at [28]);
- (5) demonstrates compliance with the rear boundary setback control set out in Section B9 of the WDCP (at [30]); and
- (6) demonstrates a development that is consistent with all objectives of Section B9 of the WDCP (at [31]).

66 During oral evidence, the town planners agreed that they had listened to the submissions made by residents at the site view at the commencement of the hearing in relation to issues of setback compliance and confirmed that their views as expressed in the Joint Town Planning Report were unchanged.

#### *Submissions*

67 The applicant submits that the Amended Development Application complies with the relevant WDCP setback provisions and on the basis of compliance with numerical controls, the Court would find that these contentions are resolved.

68 The respondent did not refute this position.

#### *Consideration*

69 Having regard to the amended plans contained within the Amended Development Application, the agreed position of the town planners and the submissions of the objectors, I am satisfied that the front and rear setbacks proposed by the Amended Development Application are compliant with the relevant provisions of the WDCP and appropriately resolve the contentions raised in relation to setbacks.

#### **Character and inconsistency with R2 zone objectives**

70 A key issue raised in the SOFAC in relation to the Development Application, and by the objectors in relation to both the Development Application and Amended Development Application, is that the proposed development is incompatible with the desirable elements of the current character of the locality and is inconsistent with s 99 of the Housing SEPP and the objectives of the R2 low density zone.

#### *Planning framework*

71 The objective of the R2 low density zone are extracted above at [38].

72 Sections 98 and 99 of the Housing SEPP relevantly provide as follows:

##### **98 Design of seniors housing**

A consent authority must not consent to development for the purposes of seniors housing unless the consent authority is satisfied that the design of the seniors housing demonstrates adequate consideration has been given to the principles set out in Division 6.

## **Division 6 Design principles**

### **99 Neighbourhood amenity and streetscape**

Seniors housing should be designed to—

- (a) recognise the operational, functional and economic requirements of residential care facilities, which typically require a different building shape from other residential accommodation, and
- (b) recognise the desirable elements of—
  - (i) the location's current character, or
  - (ii) for precincts undergoing a transition—the future character of the location so new buildings contribute to the quality and identity of the area, and
- (c) complement heritage conservation areas and heritage items in the area, and
- (d) maintain reasonable neighbourhood amenity and appropriate residential character by—
  - (i) providing building setbacks to reduce bulk and overshadowing, and
  - (ii) using building form and siting that relates to the site's land form, and
  - (iii) adopting building heights at the street frontage that are compatible in scale with adjacent buildings, and
  - (iv) considering, where buildings are located on the boundary, the impact of the boundary walls on neighbours, and
- (e) set back the front building on the site generally in line with the existing building line, and
- (f) include plants reasonably similar to other plants in the street, and
- (g) retain, wherever reasonable, significant trees, and
- (h) prevent the construction of a building in a riparian zone.

#### *Evidence*

73 As set out in the Joint Town Planning Report (at [32]-[40]), the town planning experts agree that the Amended Development Application demonstrates a development:

- (1) that recognises and complements the desirable elements of the Subject Land's current character;
- (2) that is compliant with the front and rear boundary setback controls, thereby providing suitable bulk, consistent with the prevailing building line;
- (3) with a building form that relates to the landform as it steps down with the topography of the Subject Land;
- (4) that is broken up in its form such that it presents in a manner compatible with the scale of the surrounding dwelling houses;

- (5) that incorporates sufficient building articulation and landscaping to break up and visually reduce the building bulk;
- (6) that appears of a density compatible with the general built form within the Hay Street locality and the R2 Low Density Residential zone;
- (7) that presents as detached in style with distinct building separation and areas of landscaping; and
- (8) that is consistent with all objectives of the R2 Low Density Residential zone.

74 During oral evidence, the town planners agreed that they had listened to the submissions made by residents at the site view at the commencement of the hearing in relation to issues of character and confirmed that their views as expressed in the Joint Town Planning Report were unchanged. Mr McNamara and Ms Ryan agreed that in their view, the Amended Development Application proposes a design which is compatible with, and respectful of, the local character of the area due to the appropriate and compliant setbacks, pitched roof form, landscaping and selection of building materials and finishes including lighter colours and tones and the use of timber and sandstone.

#### *Submissions*

75 The applicant relied on the agreed evidence of the town planning experts that all contentions regarding character had been resolved by the Amended Development Application, such that the Court could be satisfied that adequate consideration had been given to the principles set out in s 99 of the Housing SEPP regarding character. In respect of zone objectives, the applicant stated in its written submissions that the Amended Development Application was not required to be consistent with the R2 zone objectives, rather that the consent authority must “have regard to” those objectives when determining a development application in respect of land within that zone. The applicant went on to state that having regard to the agreed evidence of the town planners, the Court would approve the Amended Development Application, having regard to the objectives of the R2 zone.

76 The respondent agreed that all contentions regarding character and zone objectives had been adequately resolved by the Amended Development Application.

### *Consideration*

- 77 Having regard to the amended plans contained within the Amended Development Application, the objectives of the R2 zone, the agreed position of the town planners and the submissions of the objectors, I am satisfied that the Amended Development Application demonstrates adequate consideration of both the R2 zone objectives and the principles set out in s 99 of the Housing SEPP for the purposes of s 98 of the Housing SEPP.
- 78 That is, the Amended Development Application recognises the desirable elements of the location's current character, being a primarily low density residential area, by presenting a development that is of an appropriate bulk and scale and compatible, or in harmony, with the general built form, landscaped settings and natural environment within the Hay Street locality for the reasons given by the town planners (as summarised at [73] and [74]) above in relation to character and [99] and [100] below in relation to landscaping).

### **External impacts including visual impacts**

- 79 A further issue raised in the SOFAC in relation to the Development Application, and by the objectors in relation to both the Development Application and Amended Development Application, is that the proposed development will result in unacceptable view sharing and does not comply with the requirements of Pt D7 "Views" of the WDCP. It was further raised by objectors that there would be substantial canopy tree planting that would diminish views from neighbouring properties and inadequate view assessments had been carried out by the applicant.

### *Planning framework*

- 80 Part D7 of the WDCP relates to views and sharing and provides as follows:

#### **Objectives**

- To allow for the reasonable sharing of views.
- To encourage innovative design solutions to improve the urban environment.
- To ensure existing canopy trees have priority over views.

#### **Requirements**

Development shall provide for the reasonable sharing of views.

## Note

- 81 Assessment of applications will refer to the Planning Principle established by the Land and Environment Court in *Tenacity Consulting v Warringah Council* (2004) NSWLEC 140.

## Evidence

- 82 The Amended Development Application contains a Visual Impact Study prepared by CMS Surveyors dated 5 March 2024 (Ex B, tab 4) (VIS). The VIS relevantly models the anticipated view impacts of the proposed development from properties at 32 to 38 Hay Street, Collaroy.
- 83 The town planning experts state in the Joint Town Planning Report (at [41]-[45]) that the amended plans comprising the Amended Development Application demonstrate:
- (1) a development that is reasonable with respect to the requirements of view sharing set out in S D7 Views of the WDCP, as guided by the planning principle established in *Tenacity Consulting v Warringah Council* [2004] NSWLEC 140 at [25]-[29] (Tenacity);
  - (2) a pavilion-style typology that provides view corridors that are comparable to existing, for the benefit of properties to the west;
  - (3) an acceptable floor space ratio which does not result in unreasonable view loss;
  - (4) a development that is of a built form and scale anticipated for the Subject Land, as it employs appropriate building articulation, compatible with low density; and
  - (5) a development that is consistent with all objectives of S D7 Views of the WDCP.
- 84 During oral evidence, the town planners agreed that they had listened to the submissions made by residents at the site view at the commencement of the hearing in relation to issues of view loss and confirmed that their views as expressed in the Joint Town Planning Report were unchanged. Mr McNamara and Ms Ryan agreed that they were satisfied that:
- (1) The landscaping proposed by the Amended Development Application had been chosen for view retention.
  - (2) The built form assessed in the VIS was the correct built form that required assessment and there was no deficiency in the assessment.

- (3) The VIS was carried out in accordance with the Court's relevant policy and they agreed with the relevant survey points used in the assessment (and were present at the time it was carried out).
- (4) Although not expressly referenced in the VIS, the methodology prescribed by *Tenacity* was taken into account and incorporated in the view analysis set out in the VIS and appropriate properties had been selected for view impact analysis.
- (5) The Amended Development Application would result in "basically like for like view impacts" when compared to the existing dwellings located on the Subject Land.

### *Submissions*

- 85 The applicant submits that as a result of the assessment in the VIS and evidence of the town planners, the Court would find that the Amended Development Application provides for the reasonable sharing of views.
- 86 The respondent agreed that all contentions regarding view sharing and external impacts had been adequately resolved by the Amended Development Application.

### *Consideration*

- 87 Having regard to the Amended Development Application (and in particular, the VIS), agreed conditions of consent, agreed expert opinions of the town planners and submissions of objectors, I am satisfied that the Amended Development Application provides for the reasonable sharing of views for the reasons provided by the town planners (summarised at [82] and [83] above). These reasons primarily include:

- (1) the siting and height of the four pavilions comprising the development;
- (2) the approximately "like for like" view impacts as between the proposed development and existing dwellings as demonstrated in the VIS; and
- (3) the selection of trees and landscaping to ensure the retention of views.

### **Privacy**

- 88 A further contention raised in the SOFAC and by objectors was that the proposed development will result in unacceptable visual privacy impacts contrary to s 100 of the Housing SEPP and S D8 "Privacy" of the WDCP.

### *Planning framework*

- 89 Section 100 of the Housing SEPP relevantly provides:

## **100 Visual and acoustic privacy**

Seniors housing should be designed to consider the visual and acoustic privacy of adjacent neighbours and residents by—

- (a) using appropriate site planning, including considering the location and design of windows and balconies, the use of screening devices and landscaping, and
- (b) ensuring acceptable noise levels in bedrooms of new dwellings by locating them away from driveways, parking areas and paths.

90 Section D8 “Privacy” of the WDCP relevantly provides:

### **Objectives**

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

### **Requirements**

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

### **Evidence**

91 The town planning experts state in the Joint Town Planning Report (at [46]-[56]) that the amended plans comprising the Amended Development Application demonstrate:

- (1) A development that results in suitable visual privacy to the dwellings to the east fronting Pittwater Road (Nos. 987, 989, 991 and 993) (Pittwater Road Properties).
- (2) Compliance with the rear boundary setback requirement, and improved configuration of the proposed units and their balconies to better relate to

the Pittwater Road Properties, including a reduction in the number of upper level units facing the east from five to four.

- (3) A development that is compliant with requirement one of S D8 Privacy of the WDCP, in that it provides compliance with the rear boundary setback requirement and improved configuration of the proposed units.
- (4) A development that suitably orientates living areas and private open spaces to limit overlooking.
- (5) A compliant rear setback and reduced floor levels, such that the development is likely to provide views over and beyond the properties to the east fronting Pittwater Road, rather than directly into the private open spaces of the Pittwater Road Properties.
- (6) A greater separation between the raised portions of private open space and the Pittwater Road Properties, such that a suitable privacy outcome is provided.
- (7) An acceptable architectural design with respect to providing privacy to adjoining properties.
- (8) Suitable landscaping to the rear.
- (9) A development that is consistent with all objectives of S D8 Privacy of the WDCP.

92 During oral evidence, the town planners agreed that they had listened to the submissions made by residents at the site view at the commencement of the hearing in relation to issues of privacy and confirmed that their views as expressed in the Joint Town Planning Report were unchanged.

### *Submissions*

93 The applicant stated in its written submissions at [99], that “in light of the mix of setbacks, building orientation, visual privacy mechanisms and landscaping, the Court would find no unacceptable privacy impact warranting refusal of the DA”.

94 The respondent agreed that all contentions regarding privacy and overlooking had been adequately resolved by the Amended Development Application.

### *Consideration*

95 Having regard to the Amended Development Application, the agreed views of the town planning experts and submissions of the objectors, I am satisfied that the Amended Development Application adequately considers the visual and acoustic privacy of adjacent neighbours and residents for the purposes of s 100 of the Housing SEPP and privacy requirements and objectives set out in S D8 Privacy of the WDCP. Therefore, I am satisfied that the amended plans

contained within the Amended Development Application adequately resolve the respondent and objectors' contentions regarding privacy and overlooking.

## **Landscaping**

- 96 A further issue raised in the SOFAC in relation to the Development Application and by objectors in relation to the Development Application and Amended Development Application was that the proposed development did not provide suitable landscaping.

### *Planning framework*

- 97 As set out in the applicant's written submissions, there are numerous controls relevant to the issue of landscaping. These provisions include ss 97 (which requires consideration of the Seniors Living Policy: Urban design Guideline for Infill Development dated March 2004 (Seniors Living Guideline) which contains detailed provisions for trees, landscaping and deep soil zones), 99(f) and (g) and 101(b) of the Housing SEPP. Further, there are non-discretionary standards regarding landscaping relevantly contained in s 108(e) and (f) of the Housing SEPP.
- 98 Section 99 of the Housing SEPP is extracted above at [72]. Section 101 is relevantly extracted below:

#### **101 Solar access and design for climate**

The design of seniors housing should—

- (a) for development involving the erection of a new building—provide residents of the building with adequate daylight in a way that does not adversely impact the amount of daylight in neighbouring buildings, and
- (b) involve site planning, dwelling design and landscaping that reduces energy use and makes the best practicable use of natural ventilation, solar heating and lighting by locating the windows of living and dining areas in a northerly direction.

- 99 Section 108(e) and (f) of the Housing SEPP are relevantly extracted below:

#### **108 Non-discretionary development standards for independent living units—the Act, s 4.15**

- (2) The following are non-discretionary development standards in relation to development for the purposes of independent living units—

....

- (e) if paragraph (d) does not apply—at least 30% of the site area is landscaped,

- (f) a deep soil zone on at least 15% of the site area, where each deep soil zone has minimum dimensions of 3m and, if practicable, at least 65% of the deep soil zone is located at the rear of the site,

### *Evidence*

100 The town planning experts state in the Joint Town Planning Report (at [60]-[76]) that the amended plans comprising the Amended Development Application demonstrate:

- (1) A suitable landscape response that is consistent with the requirements of s 97 of the Housing SEPP, with respect to site planning and design, impacts on streetscape, and landscaping.
- (2) That adequate consideration has been given to the Seniors Living Guideline.
- (3) An acceptable variety of planting species in suitable locations, and retention of existing significant trees.
- (4) An amended landscape outcome that is characteristic of the locality.
- (5) A development that is supported by the planting of trees and vegetation that enhance the desirable elements and scale of the streetscape.
- (6) A suitable palette of planting that is similar to and compatible with other plants in the street.
- (7) Retention of four existing significant trees on the Subject Land, and three existing street trees.
- (8) Good use of site planning to effectively reduce energy use.

101 During oral evidence, the town planners agreed that they had listened to the submissions made by residents at the site view at the commencement of the hearing in relation to issues of landscaping and confirmed that their views as expressed in the Joint Town Planning Report were unchanged.

### *Submissions*

102 The applicant relies on the agreed evidence of the town planners and submits in relation to the non-discretionary standards set out in s 108(2)(e) and (f) of the Housing SEPP (at [103] of its written submissions) that:

- (a) In relation to the non-discretionary development standards and control (e), plan DA117 indicates that the minimum landscaped area is 851m<sup>2</sup> and the proposal achieves 1160.24m<sup>2</sup>.
- (b) The deep soil provisions are also the subject of significant over compliances – with the deep soil area control being 425m<sup>2</sup> and the provision in the plans being 479m<sup>2</sup>.

(c) ...

(d) Accordingly, the Court would find that the DA is supported by a suitable proposal for landscaping.

103 The respondent agreed that all contentions regarding landscaping had been adequately resolved by the Amended Development Application.

#### *Consideration*

104 Having regard to the Amended Development Application, the agreed views of the town planning experts and submissions of the objectors, I am satisfied that the Amended Development Application adequately:

- (1) considers and addresses the Seniors Living Guideline with respect to landscaping for the purposes of s 97 of the Housing SEPP;
- (2) proposes planting reasonably similar to other plants in the street and reasonably retains significant trees for the purpose of s 99(f) and (g) of the Housing SEPP;
- (3) considers site planning, dwelling design and landscaping for the purposes of s 101(b) of the Housing SEPP; and
- (4) complies with the non-discretionary standards set out in s 108(2)(e) and (f) of the Housing SEPP with respect to landscaping and deep soil.

105 I am therefore satisfied that the amended plans contained within the Amended Development Application satisfactorily resolve the contentions regarding landscaping as set out in the SOFAC.

#### **Traffic**

106 A significant issue raised in the SOFAC in relation to the Development Application and by objectors in relation to the Development Application and Amended Development Application was that the proposed development should be refused because it does not provide satisfactory car parking and will result in unacceptable traffic impacts. Objectors were also particularly concerned with the safety implications of the proposed development.

#### **Planning framework**

107 Section 108(1)(k) of the Housing SEPP sets out the non-discretionary development standard for parking in respect of independent living units as follows:

**108 Non-discretionary development standards for independent living units—the Act, s 4.15**

(2) The following are non-discretionary development standards in relation to development for the purposes of independent living units—

(k) if paragraph (j) does not apply—at least 0.5 parking spaces for each bedroom.

108 Section 85(1) of the Housing SEPP relevantly provides that:

**85 Development standards for hostels and independent living units**

(1) Development consent must not be granted for development for the purposes of a hostel or an independent living unit unless the hostel or independent living unit complies with the relevant standards specified in Schedule 4.

109 Item 5 of Pt 1 of Sch 4 of the Housing SEPP relevantly provides:

**5 Private car accommodation**

If car parking (not being car parking for employees) is provided—

(a) car parking spaces must comply with the requirements for parking for persons with a disability set out in AS 2890.6, and

(b) 10% of the total number of car parking spaces (or at least one space if there are fewer than 10 spaces) must be designed to enable the width of the spaces to be increased to 3.8 metres, and

(c) any garage must have a power-operated door, or there must be a power point and an area for motor or control rods to enable a power-operated door to be installed at a later date.

*Evidence*

110 The traffic experts state in the Joint Traffic Report (at [2(a)-(k)]) that the Amended Development Application:

- (1) Provides for 10 x 3 bedroom units comprising a total of 30 bedrooms. Based on the Housing SEPP requirement of 0.5 spaces per bedroom, a minimum of 15 spaces would be required.
- (2) Includes 18 car spaces which exceeds the minimum parking requirements of the Housing SEPP and is therefore considered appropriate.
- (3) Requires a minimum of 10 accessible car parking spaces to comply with the Housing SEPP. The architectural plans indicate 10 accessible car parking spaces designed in accordance with AS2890.6.
- (4) Resolves concerns regarding vehicle ramp gradient following the relocation of the vehicle access driveway from Hay Street to Anzac Avenue, proposing a 6m long section at a 5% gradient in accordance with relevant standards.
- (5) Resolves concerns regarding sight lines following the relocation of the vehicle access driveway from Hay Street to Anzac Avenue.

- (6) Demonstrates that satisfactory two-way passing of vehicles including two B99 vehicles can be achieved.
- 111 During oral evidence, the traffic experts agreed that they had listened to the submissions made by residents at the site view at the commencement of the hearing in relation to issues of car parking, traffic congestion and safety and confirmed that their views as expressed in the Joint Traffic Report were unchanged. In addition, Mr Milston and Mr Korbett agreed that:
- (1) Construction traffic should not pose a risk to pedestrians as it would be adequately managed through compliance with a construction traffic management plan which would be required (as part of an agreed condition of consent) to be submitted to the respondent prior to commencing work.
  - (2) Operational traffic should not pose a risk to pedestrians as the access to the proposed development, including ramps and sightlines, complies with all relevant Australian Standards.
  - (3) The proposed development removes four existing driveways where residents were primarily required to reverse out of the driveways, with a single driveway where cars will exit in a forward direction. This is ultimately a safer outcome.
  - (4) Further condition of consents should be imposed requiring:
    - (a) a speedhump within the access driveway to ensure vehicles slow down prior to crossing the boundary to the footpath (now agreed condition 30A Speed Hump); and
    - (b) the pruning of the existing street tree to the east of the driveway on Anzac Avenue to ensure it does not impede sightlines (now agreed condition 34A Street tree pruning).
  - (5) The vehicle trips anticipated to occur as a result of the proposed development amount to 0.6/dwelling (6 vehicle trips per dwelling) per peak hour period. The level of traffic generated by the proposed development is acceptable and will not have an adverse effect on the local road network.

### *Submissions*

- 112 The applicant relies on the Amended Development Application and agreement of the traffic experts to submit that “the Court would find that the DA should be approved because it provides for satisfactory car parking and will not result in unacceptable traffic safety impacts” (at [111] of the applicant’s written submissions).

113 The respondent agreed that all contentions regarding traffic have been adequately resolved by the Amended Development Application.

#### *Consideration*

114 Having regard to the Amended Development Application, the agreed views of the traffic experts and submissions of the objectors, I am satisfied that the Amended Development Application:

- (1) Complies with the non-discretionary development standard in s 108(1)(k) of the Housing SEPP for the reasons provided by the traffic experts.
- (2) Complies with the private car accommodation requirements set out in item 5 of Sch 4 of the Housing SEPP for the reasons provided by the traffic experts and the conclusions of the Access Report prepared by Lindsay Perry Access dated 15 March 2024 (Ex B, tab 8).
- (3) Will not result in unacceptable traffic or safety impacts for the reasons provided by the traffic experts, noting the agreed conditions of consent relating to traffic (including in particular, conditions 11 Construction Traffic Management Plan, 30A Speed Hump and 34A Street tree pruning).

115 I am therefore satisfied that the Amended Development Application satisfactorily resolves the contentions regarding traffic as set out in the SOFAC.

#### **Stormwater and water management**

116 A further issue raised in the SOFAC was that insufficient information had been provided by the applicant to demonstrate compliance with the respondent's:

- (1) stormwater management requirements regarding the provision of onsite stormwater detention (OSD);
- (2) stormwater management requirements regarding the proposed connection to the respondent's drainage system in Anzac Avenue; and
- (3) stormwater quality and hydrology requirements with respect to Water Sensitive Urban Design (WSUD) and generally;

117 Objectors also raised concerns regarding the management of stormwater and its potential impacts on adjoining and downstream properties.

#### *Planning framework*

118 Although not raised in the SOFAC, s 102 of the Housing SEPP is relevant to stormwater and is extracted below:

## **102 Stormwater**

The design of seniors housing should aim to—

- (a) control and minimise the disturbance and impacts of stormwater runoff on adjoining properties and receiving waters by, for example, finishing driveway surfaces with semi-pervious material, minimising the width of paths and minimising paved areas, and
- (b) include, where practical, on-site stormwater detention or re-use for second quality water uses.

### *Evidence*

119 The town planning experts state in the Joint Town Planning Report (at [79]-[88]) that:

- (1) The amended stormwater management plans forming part of the Amended Development Application depict all required information with respect to the proposed pit and pipe connection to the existing Council inlet pit corner of Anzac Avenue and Pittwater Road.
- (2) A sufficient DRAINS model has been provided with the amended documentation set out in accordance with the requirements of the respondent's Water Management for Development Policy.
- (3) The amended stormwater management plans forming part of the Amended Development Application demonstrate compliance with the minimum pipe requirements.
- (4) Sufficient amended stormwater management plans forming part of the Amended Development Application have been provide in accordance with the requirements of the respondent's Water Management for Development Policy with respect to Water Sensitive Urban Design.
- (5) A sufficient MUSIC model has been provided with the amended documentation forming part of the Amended Development Application set in accordance with the requirements of the respondent's Water Management for Development Policy.

### *Submissions*

120 The applicant relies on the Amended Development Application and agreement of the town planning experts to submit that issues regarding stormwater and water management have been adequately resolved.

121 The respondent agreed that all contentions regarding stormwater and water management have been adequately resolved by the Amended Development Application.

### *Consideration*

122 Having regard to the:

- (1) the Amended Development Application, including the Addendum to the Statement of Environmental Effects prepared by DMPS dated March 2024 (ASEE) (Ex B, tab 2) and Amended Stormwater Management Plans prepared by NY Civil Engineering dated (6 March 2024) (Ex B, tab 12), which confirm compliance with s 102 of the Housing SEPP;
- (2) agreed conditions of consent, including in particular conditions 16 Erosion and Sediment Control Plan, 17 Detailed Design of Stormwater Treatment Measures and 22 On-Site Stormwater Detention Details;
- (3) agreed views of the town planning experts, and
- (4) submissions of the objectors,
- (5) I am satisfied that the Amended Development Application complies with s 102 of the Housing SEPP and satisfactorily resolves the contentions regarding stormwater and water management as set out in the SOFAC.

## **Height**

- 123 An initial contention in the SOFAC was that the proposed development was not supported by adequate architectural plans with respect to the height of the building.
- 124 The parties agree that the amended architectural plans prepared by PopovBass Architects dated 6 March 2024 (Ex B, tab 13) (Architectural Plans) resolve this contention by providing additional survey spot levels.
- 125 Having regard to the Architectural Plans and agreement of the town planners at p 17 of the Joint Town Planning Report, I am satisfied that the Amended Development Application complies with the development standard in s 84(2)(c) of the Housing SEPP, in that the proposed development does not exceed 9.5m in height.

## **REMAINING JURISDICTIONAL ISSUES**

### **Remaining matters in Housing SEPP**

#### *Restriction on occupation of seniors housing*

- 126 S 88(2) of the Housing SEPP relevantly provides that development consent must not be granted unless the consent authority is satisfied that only seniors (or the kinds of people listed in s88(1)) will occupy accommodation to which the development relates.

127 Having regard to Condition 54 of the agreed conditions, I am satisfied that only the category of people listed in s 88(1) of the Housing SEPP will occupy the proposed development.

*Location and access to facilities and services – independent living units*

128 Pursuant to s 93 of the Housing SEPP, development consent must not be granted for development for the purposes of an independent living unit unless the consent authority has considered whether residents will have adequate access to facilities and services as defined.

129 I am satisfied that the residents of the proposed development will have adequate access to facilities and services for the reasons given on p 10 of the ASEE, the Amended Access Report prepared by Lindsay Perry Access dated 15 March 2024 (Ex B, tab 8) (Access Report), and Amended Traffic Impact Assessment prepared by Auswide Consulting dated March 2024 (Ex B, tab 3) (Traffic Impact Assessment).

*Water and sewer*

130 Pursuant to s 95 of the Housing SEPP, a consent authority must not consent to development unless the consent authority is satisfied the seniors housing will be connected to reticulated water system and have adequate facilities for the removal or disposal of sewage.

131 Having regard to the Survey Plan prepared by CMS Surveyors dated 28 February 2023 (Ex A, tab 14) which demonstrates that the Subject Land is connected, or capable of connecting, to existing infrastructure, I am satisfied that residents will have adequate access to reticulated water and adequate facilities for the removal of sewage.

*Design of in-fill self-care housing*

132 Section 97 of the Housing SEPP requires a consent authority to consider the Seniors Living Guideline in determining a development application for the purposes of in-fill self-care housing.

133 In determining the Amended Development Application, I am satisfied that the Seniors Living Guideline has been considered having regard to p 13 of the ASEE.

#### *Schedule 4 Design Standards in Housing SEPP*

- 134 Pursuant to s 85(1) of the Housing SEPP, development consent must not relevantly be granted for development for the purposes of an independent living unit unless the independent living unit complies with the relevant standards specified in Sch 4.
- 135 The parties agree that the Amended Development Application complies with the accessibility and usability requirements of Sch 4 as detailed in the Access Report (Ex B, tab 8).
- 136 Having regard to the Access Report and agreement of the parties, I am satisfied that the Amended Development Application complies with the relevant standards specified in Sch 4.

#### *Div 6 of Pt 5 of the Housing SEPP*

- 137 As set out above, s 98 of the Housing SEPP relevantly provides that “a consent authority must not consent to development for the purposes of seniors housing unless the consent authority is satisfied that the design of the seniors housing demonstrates adequate consideration has been given to the principles set out in Division 6”.
- 138 The majority of matters set out in Div 6 have been considered above, with the exception of s 101(a) solar access, s 103 crime prevention, s 104 accessibility and s 105 waste management. The ASEE (p 14) directly addresses each of these provisions by reference to accompanying documents including the Architectural Plans (Ex B, tab 13), Access Report (Ex B, tab 8), Traffic Impact Assessment (Ex B, tab 3) and Amended Waste Management Plan prepared by DPMS dated 8 March 2024 (Ex 7).
- 139 Having regard to these documents, and the agreed conditions of consent, I am satisfied that ss 101(a), 103, 104 and 105 have been adequately considered in the design of the proposed seniors housing development the subject of the Amended Development Application.

## **Contamination**

140 Section 4.6(1) of State Environmental Planning Policy (Resilience and Hazards) 2021 (RH SEPP) provides that a consent authority must not consent to the carrying out of any development on land unless:

- (a) it has considered whether the land is contaminated, and
- (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
- (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

141 I have had regard to p 7 of the ASEE which relevantly provides that:

The site has been used for residential purposes since the original subdivision was registered in 1921. Due to the site and its neighbours each being established for a prolonged period for residential use, there is no reason to suspect contamination by past land use activities and the application may be processed in the usual way.

142 I am therefore satisfied that requirements of cl 4.6 of the RH SEPP have been addressed.

## **BASIX**

143 The DA is 'BASIX affected development' for the purposes of regulation 27 of the Environmental Planning and Assessment Regulation 2021.

144 The DA was lodged under the provisions of State Environmental Planning Policy (Building Sustainability Index) 2004 (BASIX SEPP). On 1 October 2023, the State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable SEPP) came into force and repealed the BASIX SEPP. The DA is captured by the savings and transitional provision set out in s 4.2(1)(a) of the Sustainable SEPP, so remains subject to the provisions of the BASIX SEPP.

145 In compliance with the relevant requirements under the BASIX SEPP, the Applicant has provided an updated BASIX Certificate for the amended application (Ex B, tab 9). The parties agree that the further updated BASIX certificates are not required in relation to the changes made to the basement level in the April Amendments.

## WLEP

146 Although not raised as a contention, cl 6.4 of the WLEP is relevant to the Amended Development Application as the Subject Land is identified on the Landslip Risk Map under the WLEP. Clause 6.4 relevantly provides as follows:

- (3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that—
  - (a) the application for development has been assessed for the risk associated with landslides in relation to both property and life, and
  - (b) the development will not cause significant detrimental impacts because of stormwater discharge from the development site, and
  - (c) the development will not impact on or affect the existing subsurface flow conditions.

147 Similarly, cl 6.2 is relevant to the assessment of the Amended Development Application as the proposed development involves earthworks and relevantly provides as follows:

- (3) Before granting development consent for earthworks, the consent authority must consider the following matters—
  - (a) the likely disruption of, or any detrimental effect on, existing drainage patterns and soil stability in the locality,
  - (b) the effect of the proposed development on the likely future use or redevelopment of the land,
  - (c) the quality of the fill or the soil to be excavated, or both,
  - (d) the effect of the proposed development on the existing and likely amenity of adjoining properties,
  - (e) the source of any fill material and the destination of any excavated material,
  - (f) the likelihood of disturbing relics,
  - (g) the proximity to and potential for adverse impacts on any watercourse, drinking water catchment or environmentally sensitive area.

148 Relevant landslip and geotechnical issues are considered in the Preliminary Geotechnical Investigation and Slope Risk Assessment prepared by Morrow dated 13 March 2024 (Ex B tab 6) forming part of the Amended Development Application (Geotechnical Assessment). The Geotechnical Assessment relevantly states:

- (1) “The qualitative risk assessment indicates the site to have a Very Low Risk of damage to property as a result of the potential hazards identified. AGS Landslide Risk Management Concepts and Guidelines

state that... as a very low risk has been established, no further investigations are required at this time” (at [4.5.4]).

- (2) “The stratigraphy at the site is characterised by topsoil/fill and sand with residual sandy clay overlying sandstone bedrock” (at [3.1]) and goes on to consider the results of four boreholes, including groundwater observations.
- (3) “Based on the geotechnical assessment of the Site, Morrow Geotechnics can conclude that the site is geotechnically suitable for the proposed development” (at [6]).
- (4) “Geotechnical risks associated with the following areas identified by Council can be appropriately managed by designing and constructing in accordance with the recommendations of this report...” (at [6]).

149 Based on the Geotechnical Assessment and agreement of the parties that all contentions regarding geotechnical suitability have been addressed and resolved by the Amended Development Application and agreed conditions of consent, in determining the Amended Development Application, I have considered the matters set out in cl 6.2(3) and am satisfied of the matters listed in cl 6.4(3) of the WLEP.

## **Conclusion**

150 I am satisfied that the Amended Development Application and agreed conditions of consent address and adequately resolve the contentions set out in the SOFAC and address the submissions raised by objectors. In determining the Amended Development Application, I have taken into consideration all of the matters as are of relevance to the proposed development as required by s 4.15(1) of the EPA Act.

151 The Court orders that:

- (1) The cl 4.6 request to vary the floor space ratio development standard under s 108(2) of the State Environmental Planning Policy (Housing) 2021 is upheld.
- (2) The appeal is upheld.
- (3) DA2023/0868, as amended, seeking consent for the demolition of existing structures and construction of a seniors housing development comprising 10 independent living units at 37, 39, 41 and 43 Hay Street Collaroy (being Lots 43-46 Section 12 in Deposited Plan 10648) is granted, subject to the agreed conditions of consent at Annexure A.
- (4) Exhibits are returned, except for Ex 4, 5, B and E.

**N Targett**

**Acting Commissioner of the Court**

Annexure A

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