



Land and Environment Court
New South Wales

Case Name: Sun Property Northbridge Pty Ltd v Northern Beaches Council

Medium Neutral Citation: [2021] NSWLEC 1631

Hearing Date(s): 12-13 August, 13 September 2021

Date of Orders: 26 October 2021

Decision Date: 26 October 2021

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders that:
(1) The Applicant is to pay the Respondent's costs thrown away in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979, as agreed or assessed.
(2) The written request seeking to justify the contravention of the height of buildings development standard at cl 4.3 of Manly Local Environmental Plan 2013, prepared by Boston Blyth Flemming and dated 27 August 2021, is upheld.
(3) The appeal is upheld.
(4) Development consent is granted to Development Application No. DA2019/0081 for certain demolition works and the construction of residential accommodation at 12 Boyle Street and 307 Sydney Road Balgowlah, subject to the conditions of consent in Annexure A.
(5) The following exhibits are returned B, K, M, N, 1, 3-7, 9 and 10.

Catchwords: DEVELOPMENT APPLICATION – multi dwelling housing – heritage impact – building height contravention – view loss – visual privacy – landscape

– amenity – construction stage treatments

Legislation Cited: Environmental Planning and Assessment Act 1979
Land and Environment Court Act 1979
Manly Local Environmental Plan 2013

Cases Cited: Tenacity Consulting v Warringah Council (2004) 134
LGERA 23; [2004] NSWLEC 140

Texts Cited: Land and Environment Court, COVID-19 Pandemic
Arrangements Policy
Manly Development Control Plan 2013

Category: Principal judgment

Parties: Sun Property Northbridge Pty Ltd (Applicant)
Northern Beaches Council (Respondent)

Representation: Counsel:
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Solicitors:
Bartier Perry (Applicant)
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File Number(s): 2020/53946

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings are an appeal under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against Northern Beaches Council's refusal of Development Application DA2019/0081 (DA).
- 2 The DA seeks consent for certain demolition works and construction of residential accommodation at 12 Boyle Street and 307 Sydney Road Balgowlah, legally described as Lot 1 in DP 115705 and Lot D in DP 335027, respectively (site).

Site and setting

- 3 I rely on the Further Amended Statement of Facts and Contentions (Ex 8) prepared by Northern Beaches Council (Council) for much of the factual material in this and the following two descriptive sections.

- 4 The site encompasses two lots which sit perpendicular to one another. 12 Boyle Street is occupied by a single storey detached dwelling house with a detached carport. 307 Sydney Road is a battle-axe lot, with an access “handle” to Sydney Road. It currently contains a single storey detached dwelling house and detached garage. This lot forms part of a locally listed heritage item which also includes 303 and 305 Sydney Road.
- 5 The site has a surveyed area of 1,755.9m², including the area of the battle-axe handle. The site is reasonably level with the exception of the southern-most area of 307 Sydney Road which falls away to a considerable extent to the south.
- 6 Adjoining and surrounding development comprises one and two-storey detached dwellings, and multi-storey residential flat buildings. The corner of Sydney Road and Boyle Street, nearest the site, is occupied by a church and its grounds.

Proposal

- 7 There was considerable amendment to the application in the lead-up to the hearing, as well as during the course of the hearing itself, in response to certain agreed recommendations by the experts. I note here that:
 - Under cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation), Council, as the relevant consent authority, agreed to the applicant amending DA2019/0081 as filed with the Court on 19 February 2020.
 - Again, in accord with cl 55(1) of the EPA Regulation, Council also uploaded the amended application onto the NSW planning portal on 1 September 2021.
 - The applicant subsequently tendered the amended application into evidence as Exhibits F-N in the proceedings.
- 8 As such, the proposal involves:
 - Demolition of the existing improvements at 12 Boyle Street;
 - Construction of a new building comprising two attached dwellings at 12 Boyle Street (described in the plans as Building 3). The dwelling units are in townhouse form over two storeys (parking under) and described in plans as TH1 (nearest Boyle Street) and TH2 (nearer to the rest of the site development);
 - Construction of a new building comprising three dwelling units and located towards the rear of 307 Sydney Road (adjacent to the rear boundary of the unit

block at 10 Boyle Street). The building (Building 4) in part accommodates the sloping site with the lowest level dwelling (U01) in part excavated and at grade with the (otherwise basement) car parking. U02 occupies the middle level of the Building 4 and U03 the top level;

- Ground level internal alterations and additions to the existing dwelling house at 307 Sydney Road (Building 2) principally by way of a new multi-purpose room to the north of the established form, and a subfloor laundry on the southern side; and
- Various associated works including excavation associated with basement carparking which is accessed from Boyle Street and extends under the space between Buildings 2 and 4, privacy treatments, certain works associated with the, for the most part, retention of an existing stone wall which runs along or near the common boundary between the rear of the properties fronting Boyle Street and the site, privacy treatments, hard and soft landscaping and pedestrian access to Boyle Street.

Planning controls

- 9 The site and the nearby residential lands are zoned R1 General Residential under Manly Local Environmental Plan 2013 (MLEP). There is no dispute that the proposed development is permissible with development consent in the zone. I accept the Applicant's characterisation of the proposal as multi dwelling housing.
- 10 The proposal contravenes the maximum building height standard under cl 4.3 of MLEP. The height control is 8.5m and the south-eastern corner of Building 4 breaches this control by up to 840mm according to the written request prepared in accordance with cl 4.6 of MLEP, by Boston Blyth Flemming and dated 27 August 2021 (Ex J), which I will turn to later.
- 11 Clause 5.10 of MLEP is concerned with heritage conservation and is relevant given the site includes an area identified as a heritage item.
- 12 Manly Development Control Plan 2013 (MDCP) applies to the site and is a consideration in evidence.

Proceedings

- 13 Proceedings were conducted under the guidance of the Court's COVID-19 Pandemic Arrangements Policy, issued 1 April 2021.
- 14 In this instance the opportunity was taken to conduct a restricted inspection of the site and context, accompanied by the legal advisors to the parties, only.

Proceedings otherwise were conducted on the Microsoft Teams platform. Submissions were heard from a number of objectors using this means.

15 I also note the experts involved in the proceedings were as follows:

	Expertise	For
G Boston	Town planning	Applicant
D Laidlaw	Town planning	Council
J Hill	Heritage	Applicant
P Davies	Heritage	Council
A Lamb	View impact	Applicant

Issues

16 With the amendments to the application, Council nominated the following contentions as remaining outstanding (Ex 8):

- Heritage and design – principally centred on heritage conservation impact
- Landscaping and open space
- External amenity impact
- Public interest – having regard to the extent and content of public submissions objecting to the proposal

17 I will also note here that there were a significant number of public submissions, principally from neighbours. The concerns included matters raised in Council's contentions, and I deal with the objecting submissions relevantly under the headlines listed above. For example, when considering external amenity impacts, I will examine the following matters raised in objecting submissions, but no longer pressed by Council: view loss, loss of solar access, privacy

impacts, parking, headlight annoyance, the integrity of the dry stone wall along common boundaries and concerns in regard to excavation and earthworks.

Heritage conservation and design

Context

18 307 Sydney Road forms a part of a joint heritage-listed place identified as Item 24 at Sch 5 to MLEP. The item is named "Group of Houses". The other parts of the jointly listed item are 303 and 305 Sydney Road. There was agreement from the experts that the grouping into a single item reflected the built and spatial relationships among the buildings. This might be seen to include their related forms and their overall setting which includes a largely open landscape space, particularly around 305 and 307 Sydney Road.

Policy setting

19 Under cl 5.10(4) of MLEP, a consent authority: "must, before granting consent under this clause in respect of a heritage item ..., consider the effect of the proposed development on the heritage significance of the item".

Evidence

20 The status of the dispute between the heritage experts after plan amendments was outlined in the further supplementary joint report filed 10 September 2021 (Ex 7). I understood the essence of the (remaining) disagreement to be whether, or to what extent, Building 4 would overwhelm the heritage item, unreasonably impacting upon on the setting of the buildings within their landscape.

21 Ms Hill was satisfied with the arrangements now proposed. While acknowledging certain positive points in regard to recent plan changes (reduction in Building 4's height, improvements to Building 4's facade detailing, increased setbacks, improved side boundary fencing treatment and relevant landscaping), Mr Davies believed the impact was unacceptable due to the scale of Building 4 (Ex 7 p 7).

22 I can go further, in defining what I understand to be the difference between the parties, based on closing submissions. It is in regard to the weight that might go to the rear or southern aspects of the heritage site. At present this area, rear

open space to 305 and 307 Sydney Road, is terraced down the slope to the southern boundary with lawn and gardens. Were it to be given weight as an important part of the “Group of Houses”, as listed, then there is little doubt the proposal would bring a serious adverse effect on the heritage significance of this item.

- 23 However, it seems to me clear that the most significant element of the item is the built form of these grouped “houses” in context. That is, both as a three building (single designer) architectural composite of what is described as the “streamline modern” residential form (sourced from Statement of Significance contained in Heritage Impact Statement Ex D p 2), which was “flourishing in the interwar period” (Ex D p 12), and also in terms of the spatial relationships between the houses as a group. This necessarily, for me, places more weight on the points where the three houses can be perceived together, and less weight on individual component parts. I further note that the terracing and stone walls to the rear of 305 and 307 Sydney Road were constructed at an earlier period, according to the evidence (Ex 4 par 2.13), and thus would not be seen as contributing much of themselves to the item as listed.
- 24 Overall, I prefer the evidence of Ms Hill in regard to the effect of the proposal on the heritage significance of this heritage item. Ms Hill notes that Building 4 sits well below the height plane and believes the proposed setback to Building 3 is reasonable given the intended landscape treatment in between.
- 25 In my conclusion I need to acknowledge the point made by Mr Davies (Ex p 5):
- “The revised proposal achieves an improved response to the place but there remain impacts of the scale of development that cannot be dealt with without a significant change of design and reduction in scale. The applicant has amended the proposal to a point where based on 3 units (*within Building 4*) there is not much more that could be achieved. Consequently, the issue becomes a judgement on whether 3 units is too great in relation to heritage impacts.”
- 26 From a heritage viewpoint, Mr Davies would prefer the massing of Building 4 be scaled back considerably further. While I am not at all bound by some warrant that Building 4 achieve a yield of “3 units”, I do need to recognise that heritage conservation is not the only objective of MLEP. The R2 General Residential zone objectives of course include that of “(providing) for the

housing needs of the community” and this objective of providing housing sits within the other objectives of MLEP such as that relating to heritage conservation. In this instance, and having regard to where the weight might fall between heritage conservation and housing, I am satisfied that the proposal as amended brings appropriate sensitivity to the heritage item.

Landscaping and open space

- 27 Again, I would say here that the amended plans would appear to fully address the suggested responses to Council’s landscape contention as arising in the joint expert conferencing. While I note that the development does not comply with MDCP’s total open space requirement, I accept the position of the experts that it does comfortably comply with the landscaped area requirement. I have earlier indicated that proposed landscaping detailing, with proposed conditions, is seen to appropriately respond to privacy concerns and providing for a visual softening of the presentation of the development.
- 28 I can note here that neighbour objections included concerns in regard to impacts on the natural setting and ecology and in particular tree removal. I note the advice of the planning experts, provided at Ex 6 pp 12-13, which gave weight to the observed quality of the proposed landscaping (including aspirations in regard to the relocation of a large Canary Island Date Palm to a position north of Building 2). Given the planning controls applying to the site and the intended landscape treatment, the proposal provides a satisfactory response to these concerns.

External amenity impact

View loss

- 29 The properties of concern, with regard to view loss, were 16 and 14 Boyle Street (each concerning single dwelling houses) and 10 Boyle Street (in particular regard to windows and balconies of eastern dwellings within the block of residential units). Building 4 was the key causal element, located as it was between the properties of concern and south and easterly views towards.
- 30 Clause 3.4.3 of MDCP is concerned with view loss. The objectives are concerned with “view sharing” and seeking to “minimise disruption to views from adjacent (development)” including harbour and ocean views. For

assessment purposes, MDCP calls up the Court's "view sharing" planning principle under *Tenacity Consulting v Waringah* (2004) 134 LGERA 23; [2004] NSWLEC 140 (*Tenacity*).

31 MDCP requires development applications to

"determine the extent of, and impact on views at eye height in a standing position (eye height is 1.6m above floor level) from within the main living areas (and associated terraces/balconies) of the proposed and existing, adjacent and nearby developments, as well as public spaces".

32 An "assessment of view sharing" was prepared by R Lamb (Ex 3 Attachment C (Lamb view assessment)), known to the Court as an expert in visual impacts and view loss, and engaged by the Applicant. Dr Lamb agreed to be bound by the Expert Witness Code (Sch 7 of the Uniform Civil Procedure Rules 2005), which emphasises the duties of the expert to the Court, rather than as an advocate for a party (Ex 3 Attachment C p 2). The Lamb view assessment provided baseline information using photo image modelling from different key vantage points. That is, the view loss was able to be gleaned through modelling of the positioning of Building 4 upon views available from the existing vantage points. Dr Lamb provided his own qualitative assessment based on this modelling.

33 Council did not engage a view impact specialist but its planning expert (Ms Laidlaw) provided her own critical input into the qualitative (ie rather than impact modelling) aspects of the view loss assessment, as did Mr Boston. I note here in regard to this issue but also for wider purposes that Ms Laidlaw and Mr Boston also confirmed they were bound by the Expert Witness Code (Ex 3 p 3).

10 Boyle Street

34 The key points of attention were the three residential units (Unit 3 at Level 1, Unit 6 at Level 2 and Unit 9 at Level 3) on the eastern side of the residential block. Two bedroom windows and a balcony on each level currently enjoy outlook to the east and south-east which were potentially affected by Building 4. For the upper floors, in particular, this includes views towards Sydney Heads and includes the harbour. The experts noted that the window views were from bedrooms and agreed that under MDCP less weight would go to bedroom

window view loss. View loss to Unit 3 was of least concern to the experts with the southern outlook available from the balcony at Unit 3 retained. At Level 2, key views would be retained except in regard to the northern bedroom window, which would lose its current appealing view towards the harbour and Sydney Heads. At Level 3, similarly, the most affected vantage point would be from the northern bedroom window, with the other key views retained.

- 35 The position of the experts was that the proposed development “will not impact Harbour views from the living areas and associated balconies and we agree therefore that there is no contravention of the view impact control under the requirements of MDCP” (Ex 3 par 2.33). The experts noted that MDCP does not require assessment view impact of bedrooms, and the impact is across a side boundary “which *Tenacity* notes, is more difficult to protect” (Ex 3 par 2.34).
- 36 I accept this evaluation by the experts that view loss to the 10 Boyle Street apartments is acceptable. The evaluation, reasonably, emphasises the most valued views towards Sydney Harbour which are to the south-east. I do note, however, that there would be a loss of the general outlook or views more directly to the east with proposed Building 4.

14 Boyle Street

- 37 There are existing views of Sydney Harbour and North Head from the eastern ground floor living area and adjoining garden which are partly filtered by existing vegetation. The view loss impact on this property would be devastating, according to the experts, in that all Harbour and North Head views currently obtained from the eastern living area and adjoining garden would be lost.
- 38 The experts see this as not unreasonable in the circumstances as Building 4, relevant to view loss impact to 14 Boyle Street, is compliant:
- “As the view is over a side boundary and arises from ‘compliant’ development, where no obvious ‘more skillful’ design appears available to improve the impact without, essentially, precluding development of the southern site area, we agree that impact upon No. 14 would not justify refusal of the application.”
- 39 I accept these conclusions, noting the practical difficulty in retaining ground floor views in settings such as this. I also note the experts’ advice in regard to

edge landscape treatment aimed at softening the outlook from these vantage points at 14 Boyle Street, with the relocation of on-site detention tanks allowing deep soil planting adjacent to the rear south western corner of No. 14 Boyle Street seeming of practical benefit here (Ex 7 par 3.4).

16 Boyle Street

- 40 The points of concern were two upper level apartments (Units 3 and 4) with both bedroom and living areas affected. It was significant that, and as recommended by the planning experts, an aspect of the amendments to the proposal, was a lowering of the overall height of Building 4. I accept the view of the experts that most of the views currently available from these apartments would be retained and that the proposal provides an appropriate view sharing outcome.

Privacy

- 41 The area of principal attention relating to privacy was proposed Building 4's impact on 10 Boyle Street's eastern units. The concerns were interrelated and included the side setback of Building 4 (including some non-compliances with MDCP side setback provisions), landscaping, pathway treatment (including the particulars of dealing with the site gradient) and how privacy screening would be effected both within the units in Building 4 and for stair access to Building 4 units.
- 42 Again, I note that the amendments to the proposal responded to each of these issues. The further supplementary joint report by the planners (Ex 7) worked through the particulars of the changes. These included increases to the side boundary setback (noting there remains a numerical non-compliance, but also in part an exceedance along this western façade), lowering of the stairs and landing to Unit 1 in Building 4 and introducing a precision to the requirements for privacy treatments aimed at not unreasonably affect 10 Boyle Street units (this through the amended plans but also agreed conditions on privacy screens, stair treatment and specified hedge landscaping). I accept the agreed conclusion of the planning experts that the privacy issues in relation to 10 Boyle Street were satisfactorily resolved (with the agreed plan amendments and conditioning relating to landscaping).

43 A privacy concern also arose between proposed Building 3 and 10 Boyle Street. Amended plans and conditions provided for a widening of a planter south of a proposed terrace to Townhouse 2 and the provision of a hedge and privacy screen. The experts agreed that this satisfied the privacy issue relating to Building 3 and 10 Boyle Street (Ex 7 p 4).

44 The experts did not agree on one aspect of privacy. Ms Laidlaw proposed a condition requiring fixed privacy screens to a minimum height of 1.7m be provided along the eastern end of the southern terrace/balconies of Units, 1, 2 and 3 in Building 4. The intention was to provide protection of privacy at 305 Sydney Road (ie to the immediate east of Building 4) and to a lesser extent 8 Boyle Street. Mr Boston thought this unnecessary and unreasonable because:

“... there is well over 9 metres spatial separation between those balconies and the southern façade of No. 307 (sic). Further, all surrounding development is orientated to take advantage of available views in a south easterly direction across adjoining properties towards the harbour. In such circumstances there is a trade off between the maintenance of absolute privacy and view sharing. The Applicant’s position is that a reasonable level of privacy is maintained between the adjoining development given the imposition of condition 9(g) which protects the privacy of the rear yard of No. 307(sic) from overlooking from the internal living areas of the proposed development.”

(Sourced from “Applicant’s position” as noted in agreed conditions of consent filed 8 October 2021 – my understanding is that references to “307” in the text should be read as “305”)

45 Clause 4.1.4 of MDCP is concerned with side setbacks and there is agreement that the eastern façade of Building 4 does not comply with the relevant numerical standard. Mr Boston referred to the provisions of s 4.15(3A)(b) of the EPA Act and the need to apply such controls flexibly and allow reasonable alternative solutions that achieve the objects of the standard. While I observe the working through of the objectives by Mr Boston (Ex 3 par 2.51), I believe Objective 2, (to MDCP clause 4.1.4), and its direct concern with privacy as an amenity factor, warrants considerable weight here, among the many other objectives. I see the point of attention as impact on 305 Sydney Road (and not so much 10 Boyle Street, given the orientation of that property). The notion of view sharing also warrants considerable weight. In this instance, this can include a concern with optimising available views from the proposed balconies. On balance, I prefer the position of Ms Laidlaw, noting that the provisions of the eastern privacy screening will still allow outlook to both the south and the

south-east from much of the balcony and (relevant) indoor areas of the units. The screening would mean that the amenity impacts on 305 Sydney Road would be less in regard to the question of privacy, especially when using the backyard, than were the screens not in place.

Height, massing and visual bulk

46 I attend to the question of the height contravention of Building 4 as a jurisdictional test, below, which requires attention to massing and bulk as well. In regard to Building 3, I note here that the experts are satisfied with the streetscape presentation of the proposal with the final proposed front landscaping treatment which allows for increased planting. Mindful of the existing quite varied streetscape context and good levels of street trees, I do not see the streetscape presentation as of concern here.

Parking and driveway arrangement

47 Objections were raised in regard to increased on-street parking demand as a consequence of the additional housing and visitors, and both safety and amenity implications of the driveway. I note the advice in the Applicant's specialist traffic report that the proposal would comply with the total requirements of MDCCP in regard to parking (Ex N p 8). Moreover, I note that the site is well located and well serviced by public transport (Ex N p 1). It is reasonable, of course, that objectors are concerned about the lack of convenience of parking opportunity, but there can be expected to be a tension in that regard given the attractive features of this particular location, and the planning controls which apply.

48 An objector also raised concern about headlight spill from cars departing the basement carparking at Boyle Street, noting that there would be a significant increase in the number of such movements compared to now. On this point, I note the advice of the planning experts that this is a commonplace effect in relatively densely developed urban settings such as this, and can be seen as a characteristic of planning intentions, rather than as a result of a design flaw. It seems to me that this is the case. The scale of the problem does not seem to be great to me, I note that Ex N (p 5) indicates traffic generation from the proposed 6 dwellings as 4 vehicle trips per hour, a little less if the existing

dwelling at 12 Boyle Street is taken into account. I also accept the findings of Ex N in regard to the safety of the access configuration to Boyle Street noting this is not contested by Council traffic specialists.

Construction stage impacts – conditions

- 49 Conditions were proposed to minimise construction stage impacts, including requirements for a construction traffic management plans to be approved by Northern Beaches Council Traffic Team (Condition 33). A noteworthy construction-related concern was that raised by the neighbour to the immediate east (305 Sydney Road). The concern was in regard to the proposal's single level of basement excavation and its proximity to the common boundary. The plans indicate excavation to within 350mm of this boundary for a length of about 8.2m. The key concern seems to be in regard to a low masonry wall that staddles the common boundary and a nearby arched gateway. The objector was concerned about heritage conservation adverse effects were these elements to be damaged. I note the residential building itself at 305 Sydney Road was offset to the east somewhat further.
- 50 The proposed conditions would provide for both pre- and post-construction dilapidation survey work (Conditions 27 and 63) and for, pre-construction, preparation of a structural integrity report by a qualified structural engineer which gives direct consideration to protection of heritage buildings (Condition 15). I also note the conditions relating to the presence on site of a qualified heritage architect at critical times in order to support best practice conservation (eg Condition 21). I note that proposed conditions (Condition 2) include a requirement to comply with a geotechnical report prepared by JK Geotechnics (Ex M). Exhibit M includes particular commentary in regard to the excavation process in the vicinity of the boundary to 305 Sydney Road (at Section 4.5). I am satisfied with the response to this concern.

Sunlight access

- 51 There were concerns raised from residents of 10 Boyle Street in regard to sunlight loss to the windows along the northern side of the units and the northern open space which includes garden, BBQ and clothes lines. The point was made that the shadow diagrams did not correctly show the northern

windows. The missing windows were depicted photographically in Ex 5, and their position can be understood, and shadow impact readily appreciated, from the view from the sun diagrams as provided (Ex F DA 507a and 507b). The town planning experts advised that the shadow diagrams show the ground floor windows would receive sufficient partial or full sun at midwinter to meet MDCP requirements (Ex 6 p 13). It was indicated that impact to the northern garden area would be high in midwinter with the garden area shown as shaded at midwinter at 9am, noon and 3pm. The experts noted the vulnerability of this side area, noting the downward slope, and that this overshadowing would be resultant from development compliant with and anticipated from MDCP height and setback controls.

Dry stone wall

52 Local residents expressed great concern about possible impact on a dry stone wall running along or near the site's western and southern boundaries. There was a good knowledge of the background history to the wall features expressed by neighbours. While the heritage experts did not see the wall features as particularly related to the local heritage listing (with much of it located on property to the west of the site), there was agreement on the part of the experts that the wall should remain. Plan amendments were agreed to ensure considerable protection of the dry stone wall *in situ*. Conditions of consent seem to me to ensure due sensitivity during excavation and construction works. Condition 9(y) and 20 are relevant in this regard.

Building height contravention and matters otherwise related to building height

53 The proposal contravenes the maximum building height standard under cl 4.3 of MLEP. The height control is 8.5m and the south-eastern corner of Building 4 breaches this control by up to 840mm according to the written request prepared in accordance with cl 4.6 of MLEP, by Boston Blyth Flemming and dated 27 August 2021 (Ex J).

Whether compliance is unreasonable or unnecessary

54 Mindful of cl 4.6(3)(a) of MLEP, Ex J seeks to demonstrate that strict compliance with the development standard is unreasonable and unnecessary in the circumstances of the case. It does so mindful of Preston CJ's finding in

Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

(*Wehbe*). Ex J uses the first “*Wehbe way*”, seeking to show how, otherwise, the development achieves the objectives of the standard. The objectives of cl 4.3 are, relevantly, as follows.

- (a) to provide for building heights and roof forms that are consistent with the topographic landscape, prevailing building height and desired future streetscape character in the locality,
- (b) to control the bulk and scale of buildings,
- (c) to minimise disruption to the following—
 - (i) views to nearby residential development from public spaces (including the harbour and foreshores),
 - (ii) views from nearby residential development to public spaces (including the harbour and foreshores),
 - (iii) views between public spaces (including the harbour and foreshores),
- (d) to provide solar access to public and private open spaces and maintain adequate sunlight access to private open spaces and to habitable rooms of adjacent dwellings,

...

- 55 In regard to the first objective, Ex J demonstrates through a birds-eye-view the quite “minor” horizontal and vertical dimensions of the height contravention and sees the proposal overall as generally consistent with topography, prevailing building heights (noting a residential flat building to the immediate west) and the desired future streetscape character (noting the contravening element of the building would not be visible from the street).
- 56 In regard to the second objective, Ex J works through the potential bulk and scale impacts associated with the contravention. The potential impact of most concern is in relation to the property at 305 Sydney Road including perceptions from the south-facing apartment windows and the rear yard. This is satisfactory having regard to the fact that the proposal (including the contravening element) is considerably lower in height than the building at 305 Sydney Road, distance separation between the residence and the contravening element and the fact that the main orientation of the outlook (from 305 Sydney Road) is to the south-east rather than towards the proposed development. Attention is also given to 6 and 8 Boyle Street. Associated impacts are also argued to be satisfactory

due to the proposed rear setback and consequent spatial separation, which exceeds MDCP requirements, along with proposed landscaping.

57 In regard to the third objective, Ex J used the expert view analysis prepared by Dr Lamb to conclude that the building height contravening elements would not give rise to any public or private view impacts.

58 In regard to the fourth objective, Ex J referred to shadow diagrams attached to the written request to argue that the height contravention would not contribute to any unreasonable overshadowing of private open spaces or habitable rooms of adjacent dwellings. There would be no effect on public open spaces.

59 I accept the arguments put in Ex J in regard to each of the four relevant objectives to cl 4.3. In each instance, it has been demonstrated that the objectives of the building height standard have been achieved notwithstanding the contravention. Of particular note is the small three-dimensional “footprint” of the contravention, which is influential on the achievement of the first, second and fourth objectives. The third objective, relating to view loss, does not come into play given the location of the particular contravention.

60 In turn, and in accordance with the first *Wehbe* way, I find that Ex J has adequately demonstrated that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case.

Whether there are sufficient environmental planning grounds

61 Ex J argues that there are sufficient planning grounds to justify the contravention. It is noted that the site falls away steeply towards its southern boundary which makes strict compliance more difficult to achieve. Consideration is also given to the orderly development of the site given development potential under the planning controls. The reconfiguration of building height and massing, as proposed, is argued to comprise “good design”, neither providing for unacceptable amenity impacts nor raising unacceptable heritage conservation outcomes.

62 I am satisfied that these grounds, as raised in Ex J, are sufficient to justify contravening the development standard. I give particular weight to the local topography and again the small scale of the actual contravention. But accept

that a design response to the contextual considerations might reasonably lead to this contravention.

63 Together, the above findings mean Ex J has adequately addressed the matters required to be demonstrated by cl 4.6(3) of MLEP. It follows that the test of cl 4.6(4)(a)(i) is satisfied in regard to the building height contravention.

Public interest

64 I now turn to the test at cl 4.6(4)(a)(ii) of MLEP, and whether the proposed development would be in the public interest because it is consistent with the objectives of the building height standard and the objectives for development within the R1 zone.

65 The interpretation of the word “consistent” has been considered in many judgments of the Court. Here, briefly, I accept the interpretation that the word consistent is synonymous with compatible (*Addenbrooke Pty Ltd v Woollahra Municipal Council* [2008] NSWLEC 190 at [45]).

66 I agree with and rely on Ex J’s demonstration that the proposed development is consistent with the objectives of the building height standard as considered above.

67 The R1 zone objectives in MLEP are as follows:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.

68 The proposal provides additional housing to assist in meeting the needs of the community and as such is clearly consistent with the first zone objective. There is already a considerable mixture of housing types and densities in the site environs and this proposal with its multi unit housing form can be seen to be adding to this and is entirely consistent with the second objective. The third zone objective is not relevant. On the basis of the above, I find the development consistent with the R2 zone objectives.

69 Based on my findings above, the proposed development will be in the public interest because it is consistent with the objectives of the building height

standard and the objectives for development within the R1 General Residential zone of MLEP. On this basis, I am satisfied that the requirements of cl 4.6(4)(a)(ii) of MLEP are met in regard to the building height contravention.

Conclusion – building height contravention

70 I do not need the concurrence of the Planning Secretary under cl 4.6(4)(b) of MLEP but note that I have considered the matters in cl 4.6(5) in coming to my conclusions in regard to the contravention and find nothing of significance arises in regard to these matters.

71 With the above findings, the states of satisfaction required by cl 4.6 of MLEP have been reached and there is, therefore, power to grant development consent to the proposed development notwithstanding the breach of the building height standard.

Other matters

72 There was a disagreement between the parties in regard to two (other) of the draft conditions (provided without prejudice on Council's part). For the purposes of the adjudication, I need to make here, draft Condition 9 (a) can be read as follows:

“The stair, foyer and lift within Building 4 providing access to Unit 3 of that building shall be included on the title for Unit 3 and for its exclusive use. No connection may be made which allows the use of this foyer/lift/stair by any of the other units in this building.”

73 The overall purpose of the condition is to ensure the subject development meets its required characterisation as multi dwelling housing (with, under the Dictionary to MLEP, each individual dwelling having “access at ground level”). The Applicant's position is that the second sentence of the condition should be deleted, given the proposed floor plan layout and the first sentence in the condition, this condition has no use. Council says the second sentence should remain as it makes it clear no other unit can rely on the foyer.

74 I agree with the Applicant that the addition of the second sentence is not required, as the intention is already made clear with the first sentence of the condition and what would be the approved plans. The second sentence of Condition 9(a), as put above, should be deleted.

- 75 I note here that I prefer the position argued by Council in regard to Condition 9(k), and the appropriateness of further lowering Building 4 by 300mm. The building massing is a significant imposition in the setting and I accept Ms Laidlaw's view over Mr Boston, that the condition is appropriate and practicable in the circumstances.
- 76 The Applicant accepts the amendments to the most recent plans are not minor in nature and agrees to a costs order on an as agreed or assessed basis pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.

Conclusion

- 77 Noting the numerous amendments undertaken, the proposal, as now before the Court, adequately responds to the planning controls and concerns raised by Council and objectors. On the basis of the findings outlined above, the proposal warrants approval.
- 78 The Court orders that:
- (1) The Applicant is to pay the Respondent's costs thrown away in accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, as agreed or assessed.
 - (2) The written request seeking to justify the contravention of the height of buildings development standard at cl 4.3 of Manly Local Environmental Plan 2013, prepared by Boston Blyth Flemming and dated 27 August 2021, is upheld.
 - (3) The appeal is upheld.
 - (4) Development consent is granted to Development Application No. DA2019/0081 for certain demolition works and the construction of residential accommodation at 12 Boyle Street and 307 Sydney Road Balgowlah, subject to the conditions of consent in Annexure A.
 - (5) The following exhibits are returned B, K, M, N, 1, 3-7, 9 and 10.

.....

P Walsh

Commissioner of the Court

[Annexure A \(314696, pdf\)](#)

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