Land and Environment Court

New South Wales

Case Name:	Manly Developments 2016 Pty Ltd v Northern Beaches Council
Medium Neutral Citation:	[2021] NSWLEC 1008
Hearing Date(s):	28 and 29 October, written submissions 9 and 27 November, 1 December 2020
Date of Orders:	8 January 2021
Decision Date:	8 January 2021
Jurisdiction:	Class 1
Before:	Clay AC
Decision:	See direction at [99]
Catchwords:	DEVELOPMENT APPLICATION – residential flat building – existing use rights – bulk and scale – stormwater – privacy – excavation - contentions largely resolved – resident submissions – conditions in dispute
Legislation Cited:	Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000 Warringah Local Environmental Plan 2011
Cases Cited:	Council of the City of Parramatta v Brickworks Limited (1972) 128 CLR 1 Ingham Enterprises Pty Ltd v Kira Holdings Pty Ltd (1996) 90 LGERA 68 Saffioti v Kiama Municipal Council [2019] NSWLEC 57
Texts Cited:	Warringah Development Control Plan 2011 Water Management for Development Policy
Category:	Principal judgment

Parties:	Manly Developments 2016 Pty Ltd (Applicant) Northern Beaches Council (Respondent)
Representation:	Counsel: P Tomasetti SC (Applicant) S Patterson (Solicitor) (Respondent) Solicitors: BCP Lawyers and Consultants (Applicant) Wilshire Webb Staunton Beattie (Respondent)
File Number(s):	2019/229458
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JUDGMENT

1 This is an appeal pursuant to s 8.7 *Environmental Planning and Assessment Act 1979* (EP&A Act) against the refusal by the Council of development application DA2018/1761 for the demolition of the existing residential flat building containing three (3) apartments and construction of a new residential flat building containing four (4) apartments, basement parking and strata subdivision on the land being Lot CP in Strata Plan 30021 and known as 24 Aitken Avenue, Queenscliff (the Site).

2 The issues have largely been resolved by the amendment of the development application through the course of the proceedings and the conferring of the experts. Prior to the number of units was reduced from four to three. The two principal issues which remain relate to a condition requiring certain extensive drainage works, and a condition requiring particular screens to be provided to balconies to achieve privacy for neighbours.

3 Notwithstanding the general agreement between the Applicant and the Council, I must be satisfied that I have power to grant development consent and, taking into account the matters relevant under s 4.15 EP&A Act including submissions from the public, that it is appropriate so to do.

4 For the reasons which follow I have decided to grant development consent subject to conditions.

Site and surrounds

5 The site consists of a single allotment located on the northern (higher) side of Aitken Avenue. It is regular in shape with a street frontage of 13.005m to Aitken Avenue and an average depth of 40.44m. The site has an approximate total area of 525.8sqm. The site slopes down toward Aitken Avenue from the rear and has a total fall of about 15m.

6 Presently on the Site is an existing post war three (3) storey residential flat building. There is no onsite parking provided.

7 Surrounding development consists of two (2) and three (3) storey dwelling houses along the northern side of Aitken Avenue and larger residential flat buildings further to the north with some similarly sized residential flat buildings to the north fronting Queenscliff Road. When looking at the Site from its south in a northerly direction, the existing residential flat buildings provide the backdrop to the outlook in that direction.

8 To the south across Aitken Avenue is Queensland lagoon and public reserve. Views of the ocean to the south east are also available depending upon the elevation of the viewing location.

Planning context

9 The site is zoned R2 Low Density Residential zone pursuant to Warringah Local Environmental Plan 2011 (WLEP) which generally allows low density residential housing and other land uses that provide facilities or services to meet the needs of residents. The proposed residential flat building is prohibited.

10 The Applicant relies upon existing use rights and the Council does not dispute that existing use rights exist to permit development consent to be granted. There were some submissions from the public which suggested that existing use rights may have been abandoned. I deal in detail with existing use rights below.

11 Development standards in WLEP 2011 apply to the development application notwithstanding the reliance on existing use rights (see eg *Saffioti v Kiama Municipal Council [2019] NSWLEC 57*). The proposed development does not

breach the height control (cl 4.3) or the floor space ratio control (cl 4.4) in WLEP 2011.

12 Warringah Development Control Plan 2011 (WDCP 2011) applies to the Site. It is unnecessary to set out any provisions of WDCP 2011 at this stage.

The course of the development application

13 The DA was lodged with Council on 30 October 2018 and was notified to nearby and adjoining residents and land owners from 17 November 2018 to 1 December 2018. Additionally, the application was advertised in the Manly Daily on 17 November 2018 and a notice was placed on the site. Twelve (12) individual submissions were received objecting to the proposed development.

14 The DA was considered by the Northern Beaches Local Planning Panel (Panel) on 17 July 2019. The Panel resolved to refuse the proposal. On 30 July 2019, Council issued a notice of determination refusing the DA in accordance with the resolution of the Panel.

15 The principal reason for refusal was that the proposed development is inconsistent with the prevailing bulk, scale, density and height of development in Aitken Avenue, in particular, a depth of excavation and a building mass and scale uncharacteristic of the existing and future desired character of Aitken Avenue with unacceptable visual impacts upon the public domain.

16 On 21 October 2020 the Court granted leave to the Applicant to amend the plans the subject of the DA in order to address the Council's contentions.

17 At the commencement of the hearing the Court granted leave to further amend the plans in accordance with the agreement reached between the planning experts to which reference is made below.

Existing use rights

18 The DA relies on the Environmental Planning and Assessment Regulation 2000 (EPA Regulations) relating to *"existing use"* which are incorporated into WLEP 2011 by the EP&A Act.

19 Section 4.65 of the EP&A Act defines "existing use" relevantly:

> existing use means—

> (a) the use of a building, work or land for a lawful purpose immediately before the coming into force of an environmental planning instrument which would, but for this Division, have the effect of prohibiting that use,

20 The land was used for lawful purpose immediately before the commencement of WLEP 2011 because the land was being used in accordance with a development consent to erect the residential flat building granted in the 1940s and still in force.

21 WLEP 2011 had the effect, but for Division 4.11 of the EP&A Act, of prohibiting the use of the land for a residential flat building. Section 4.70 of the EP&A Act saved the existing consent. Section 4.67 incorporated clauses 41 and 44 EPA Regulations into WLEP 2011 which permit the Court to give consent to the demolition and rebuilding of the building used for the existing use and for its alteration and enlargement.

22 Section 4.67 of the EP&A Act provides:

> **4.67 Regulations respecting existing use**
>
> (1) The regulations may make provision for or with respect to existing use and, in particular, for or with respect to—
>
> (a) the carrying out of alterations or extensions to or the rebuilding of a building or work being used for an existing use, and
>
> (b) the change of an existing use to another use, and
>
> (c) the enlargement or expansion or intensification of an existing use….
>
> (2) The provisions (in this section referred to as ***the incorporated provisions***) of any regulations in force for the purposes of subsection (1) are taken to be incorporated in every environmental planning instrument.
>
> (3) An environmental planning instrument may, in accordance with this Act, contain provisions extending, expanding or supplementing the incorporated provisions, but any provisions (other than incorporated provisions) in such an instrument that, but for this subsection, would derogate or have the effect of derogating from the incorporated provisions have no force or effect while the incorporated provisions remain in force.
>
> (4) Any right or authority granted by the incorporated provisions or any provisions of an environmental planning instrument extending, expanding or supplementing the incorporated provisions do not apply to or in respect of an existing use which commenced pursuant to a consent of the Minister under section 4.33 to a development application for consent to carry out prohibited development.

23 Clauses 41 and 44 of the EP&A Regulation provide:

> 41 Certain development allowed
>
> (cf clause 39 of EP&A Regulation 1994)

(1) An existing use may, subject to this Division—

(a) be enlarged, expanded or intensified, or

(b) be altered or extended, or

(c) be rebuilt, or

…

44 Development consent required for rebuilding of buildings and works

(cf clause 42 of EP&A Regulation 1994)

(1) Development consent is required for any rebuilding of a building or work used for an existing use.

(2) The rebuilding—

(a) must be for the existing use of the building or work and for no other use, and

(b) must be carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.

24 The land to which the existing use relates is identified from a *"practical point of view" (Council of the City of Parramatta v. Brickworks Limited* (1972) 128 CLR 1 at 23). The only land that can be so identified in this case is the whole of the lot known as 24 Aitken Avenue, Queenscliff, being the Site. The Council does not suggest otherwise and neither does any objector.

25 The Site was developed with development consent for the purposes of a residential flat building in the early 1940's. The building covers most of the land. Access to it is from the street. There is a small garden in the street setback. There is no doubt that the use when it began, extended over the whole of the existing lot and that that use continues to exist.

26 In support of its submission that the Site enjoys existing use rights, the Applicant relies on:

(1) A Heritage Summary dated 13 February 2019 prepared by GBA Heritage at Tab 15 of the Applicant's Bundle of Documents (GBA report).

(2) An Existing Use Rights Submission dated 22 March 2019 prepared by BBF Town Planners.

(3) An affidavit of Leigh Smith dated 30 September 2020.

(4) An affidavit of Gabrielle Stephen dated 30 September 2020.

(5) An affidavit of Campbell James Shepherd dated 30 September 2020.

(6) A letter from Ken Hird to the Respondent.

27 In summary, this evidence establishes that:

(1) The existing building was designed and constructed between 1940 to 1943 as a residential flat building - it cannot be seen in photography in 1937 (GSA Report p 2) but is visible in photography of 1943 (GBA Report Fig 4 p 3).

(2) The Site was categorised residential and rated by the then Warringah Council as '3 flats' in 1949 rates valuation card (GBA Report page 4 Fig 5) noting that the site was then known as number 18.

(3) The existing building was converted to strata title on 20 August 1985 creating 3 strata title units and common property, with the consent of Warringah Council on the basis that Warringah Council staff accepted the flat building had existing use rights (GBA Report p 4).

(4) Each flat/unit has a separate entrance and is divided into rooms that render each flat capable of being used as a separate domicile with kitchen, bathroom, utility, and bedrooms and living areas.

(5) There has been continuous use of the Site as a residential flat building since its construction (between 1940 to 1943) and is still observable in 2020.

28 In her written submission, and in her oral evidence, a neighbor Ms Nichols said that between 2003 and 2010 the Site was owned by a single family and was used as a single family residence. If that be the case, she said, then existing use rights may have been abandoned.

29 It should be said that even if members of the same family occupied the three flats/units this does not necessarily mean that the use of the building for a residential flat building was ever abandoned. If different members of the same family occupied different apartments the building was still used as residential apartments, provided there was no physical connection created between the apartments. There was no evidence that any physical change had occurred.

30 In response to this evidence, the Applicant tendered a Sales History of the Site for the period 2000 to 2018 and a copy of the relevant GlobalX Title Searches (Title Searches). The title searches show that during the period 2000 to 2018:

(a) Unit 1 was sold on 11 January 2001, 7 January 2004, 1 September 2009, 1 August 2013, and 14 June 2018.

(b) Unit 2 was sold on 21 January 2003, 9 December 2005, 1 September 2010, 1 August 2013, and 14 June 2018; and

(c) Unit 3 was sold on 23 August 2002, 1 September 2010, 1 August 2013, and 14 June 2018.

31 Even if the flats/units were occupied by members of the one family during a period of time, the flats/units remained subdivided into strata units and were sold and occupied separately over those years.

32 For the foregoing reasons I agree with the Applicant and the Council and accept that the Site has the benefit of existing use rights for the purpose of a residential flat building.

Objector evidence

33 The immediately adjoining neighbours gave oral evidence, and there were a number of written objections by those neighbours and others. In summary the matters raised were:

(a) The "existing use" of the Site was abandoned.

(b) Excessive bulk and scale and out of character.

(c) Loss of Privacy.

(d) Excessive excavation.

(e) Construction traffic.

(f) Storm water runoff.

(g) Exposure to sandstone dust during excavation and the risk of silicosis.

34 The objectors' evidence largely reflected the matters which the Council had raised as contentions prior to the amendment of the plans at the commencement of the hearing (but for the existing use rights issue and the sandstone dust issue). I have already dealt with existing use rights and will deal with the remaining issues as part of consideration of the expert evidence.

35 It is appropriate, however, that I record that the submissions made were done so honestly with a genuine concern as to the potential impact on the neighbourhood of the proposed development. Quite apart from submissions from the public being a mandatory relevant consideration pursuant to s 4.15(1)(d) of the EP&A Act, the matters raised by the objectors here assists both the Council and the Court to assess the issues raised and determine if the DA warrants approval. I have taken into account the objectors' written and oral evidence in the analysis which follows.

Expert Evidence and the Contentions

36 There had been five principal issues joined between the parties prior to the amendment of the plans at the commencement of the hearing. Those issues were:

- The unacceptability of the bulk and scale of the proposed building;
- The impact on privacy of neighbours was unreasonable;
- The extent of excavation and its consequences for the development and its neighbours;
- Whether the impact of construction traffic will be unacceptable.
- Whether storm water runoff should be piped directly to a Council pit some 150m away prior to its entry into Queenscliff lagoon.

37 Written and oral evidence was given by planners retained by the parties – Mr M Haynes retained by the Applicant and Mr S McDonald retained by the Council. I will summarise their evidence on each of the contentions which had been in issue.

Bulk and scale

38 In their joint report, the planners agree:

(1) The proposed development complies with all relevant development standards in WLEP.

(2) The proposed development complies with all relevant controls in WDCP 2011 except for:

(a) The nil front setback to the ground level garage and other services.

(b) the 2 metre setback to the edge of the front balcony of Apartment 1 at first floor level above the garage.

(c) the 2.9 metre setback to the front balcony of Apartment 2 at the second floor level.

(d) the 5.32 metre setback to the front edge of non-trafficable roof garden of the third floor.

(e) ground level side setbacks.

(f) rear setback.

(g) area of landscaped open space.

(3) In considering the application of the planning controls, relating to what is permissible on surrounding sites such as height, floor space ratio and setbacks it is relevant to consider the proposal in the context of what

now exists on adjoining and surrounding sites, and the built form and scale of existing development.

(4) The proposal provides an acceptable level of solar access to the adjacent properties as compared to the existing relationship between the existing building and the adjoining properties.

(5) The proposal provides an acceptable level of privacy to the adjacent properties (subject to additional screening in Mr McDonald's opinion).

(6) The proposal provides an acceptable bulk and scale when viewed with the properties in the Aitken Ave streetscape and when viewed from the public open space area across the road.

39 I agree with the conclusions of the planners for the reasons they give. The built form in Aitken Avenue is varied, but its principal features are driven by the significant slope of the land from the street front to the rear. There is generally a very limited setback to the front boundary and some properties have garages on the front boundary. The dwellings are multi-level, some stepping back up the hill, some less so. They are generally of an appearance of two to three storeys above garage level on the street. There are invariably balconies to the street front to enable enjoyment of the pleasant view to the south.

40 The proposed development shares these typical characteristics. Further, the proposed development and its neighbours are perceived with the backdrop of larger buildings higher up the slope of adjacent land to the north.

41 Landscaping is generally modest in the surrounding development as there is little front setback, and any large trees in the front would impact on the attractive view to the south. Landscaping in rear yards is limited by the steepness of the slope and construction of secondary dwellings or pools in some instances. The relationship of built form to the boundary of the lot of the proposed development is typical of its immediate and nearby neighbours.

42 I agree with the experts that the bulk and scale of the proposed development is not a reason for refusal and is acceptable.

Privacy

43 The experts differ on the question of whether the proposal provides a reasonable level of privacy for neighbouring properties. I will deal with that issue when dealing with the conditions in dispute.

Excavation

44 The extent of excavation had been in issue between the parties. Earthworks is defined in the Dictionary to WLEP 2011 as:

> ***earthworks*** means excavation or filling.

45 Part C7 of WDCP 2011 *Excavation and Landfill* apples and provides relevantly:

> "Objectives
>
> To ensure any land excavation or fill work will not have an adverse effect upon the visual and natural environment or adjoining and adjacent properties.
>
> To require that excavation and landfill does not create airborne pollution.
>
> To preserve the integrity of the physical environment.
>
> To maintain and enhance visual and scenic quality.
>
> Requirements
>
> All landfill must be clean and not contain any materials that are contaminated and must comply with the relevant legislation.
>
> Excavation and landfill works must not result in any adverse impact on adjoining land.
>
> Excavated and landfill areas shall be constructed to ensure the geological stability of the work.
>
> Excavation and landfill shall not create siltation or pollution of waterways and drainage lines, or degrade or destroy the natural environment.
>
> Rehabilitation and revegetation techniques shall be applied to the fill.
>
> Where landfill is necessary, it is to be minimal and shall have no adverse effect on the visual and natural environment or adjoining and surrounding properties."

46 The provisions of the WDCP 2011 largely reflect the mandatory consideration in cl 6.2 WLEP 2011 which provides:

> 6.2 Earthworks
>
> (1) The objectives of this clause are as follows—
>
> (a) to ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land,
>
> (b) to allow earthworks of a minor nature without requiring separate development consent.
>
> (2) …..
>
> (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.

47 In the joint report Mr McDonald said:

> "The extent of excavation has been reduced in comparison to the proposal originally filed with the Court and the Applicant has responded to this Contention by way of design changes and as well as additional information regarding the anticipated level of amenity for habitable rooms at the rear of the 3 apartments. Given the steep topography, particularly at the rear of the site, the extent that the natural landscape has been modified to accommodate residential development along Aitken Ave and the provision of additional information I am satisfied that the extent of excavation per se is not of such weight as to warrant refusal."

48 It is inevitable that any redevelopment of the Site will result in a significant amount of excavation given the slope of the Site. The provision of basement parking when there is none provided at present is a positive attribute of the development which in turn requires excavation. The Site is so steep that the stepping of the development up the hill involves excavation but results in a development which has a better and appropriate relationship to the street and its neighbours.

49 Further, there are a series of conditions proposed (2(e), 3(a), 3(c), 12, 14, 17, 19, 20, 28, 29, 38, 39 and 50) which specifically ameliorate any environmental harm as a consequence of excavation.

50 The extent of earthworks and excavation is not unreasonable, and I agree with the experts' conclusion having regard to cl 6.2 of WLEP 2011 and Part C7 of WDCP 2011 and the proposed conditions.

Construction traffic

51 In a narrow dead end street there are obviously legitimate concerns about how a development such as that proposed here can actually be constructed. Council had not been satisfied that adequate arrangements had been made for construction prior to the provision of a draft construction management plan and the planners' joint report.

52 In the joint report Mr McDonald said:

> "I do acknowledge that the extent of excavation and associated truck movements will result in traffic management challenges in the relatively narrow and dead-end Aitken Ave as well as amenity impacts such as noise and potentially dust generation during this period. From my experience these excavation and construction impacts are capable of being reasonably managed if adequate management practices are prescribed and followed. To this extent I would suggest that relevant conditions of development consent, including a construction traffic plan of management to be approved by the Council prior to any work commencing, will be critical in this case in the event of a development consent being given."

53 Again there are conditions proposed to deal with construction management. Conditions 16 and 36 provide for a scheme to ensure that construction traffic and other consequences of the process of construction are managed in an environmentally acceptable way. The experts are satisfied by virtue of the draft management plan that the proposed development can be safely constructed, and the proposed condition requires the Council to ensure all relevant subject matters are dealt with in the final management plan and that the Council must approve the management plan before work commences.

54 There are frequently challenging sites where development is nevertheless approved. The present DA provides those challenges, but they have been dealt with consistently with the approach to challenging sites in many other areas of New South Wales.

55 For the foregoing reasons I am satisfied for the same reasons as the experts that construction management has been dealt with appropriately.

Stormwater runoff

56 This issue was raised by the objectors but was amplified by a condition of consent proposed by the Council. It is not a reason for refusal but a question as to whether the condition should be imposed. I deal with that below.

Sandstone dust

57 Mr Cummings, an objector, said in evidence that the excavation of sandstone from the site would present a risk to the health of nearby residents because when sandstone is cut or drilled it releases silica dust which when inhaled cause Silicosis. Whilst Mr Cummings was undoubtedly genuine in his concern there are four observations to be made.

58 First, this is a matter which would ordinarily be the subject of expert evidence. Whilst there may be publicly available material which supports such a thesis, the Court makes decisions based on the evidence before it, rather than what can amount to no more than the expression of a concern.

59 Second, sandstone notoriously occurs throughout the Sydney basin and is very frequently the subject of excavation pursuant to development consents granted by Councils throughout. It is by no means unique to the present site that there is excavation of sandstone including drilling and cutting. If the impacts of cutting and drilling sandstone were such as suggested by Mr Cummings then those impacts would have become evident by now. They have not.

60 Third, the Council does not share Mr Cumming's concern. The Court is entitled to expect a consent authority to draw to its attention an issue which will bear upon the decision to grant development consent. In this case, notwithstanding that the Council must have encountered developments which also entail drilling and cutting of sandstone, it does not suggest there is an issue.

61 Fourth, as is sensible in any event, there is a condition of consent requiring the limitation of the escape of dust from the Site, including dust from cutting and drilling sandstone.

62 For those four reasons I do not accept that the environmental impacts from dust created by the cutting and sandstone is a reason for refusal.

Conclusion on contentions

63 For the preceding reasons I agree with the experts that development consent should be granted to the DA. There is power to approve the DA because of the existence of existing use rights, and I am satisfied about the other matters required to be satisfied prior to the grant of development consent. The

proposed development complies with the development standards in WLEP 2011 and is consistent with the objectives of the relevant provisions of WDCP 2011 given the physical and built form context of the Site.

Conditions

64 There are two conditions in dispute – one relating to stormwater disposal and one relating to a requirement for privacy screens.

Stormwater disposal

65 Collectively, conditions 6, 7, 10, 11 and 13 require the construction of a stormwater pipe to connect the sites proposed drainage system to the existing road drainage pit which is approximately 120m to the west of the site. The required bond relating to the construction costs of these works is $200,000. The stormwater pipe would be underground and convey all water to the pit from which it would be disposed into Queenscliff lagoon. There is no environmental protection function of the pit.

66 The alternative, as proposed by the Applicant, is that the stormwater would be conveyed from the on-site detention system to the street surface gutter system thence to the same pit and into Queenscliff lagoon.

67 Expert evidence relating to these conditions was provided by Mr Joseph Di Cristo, Council's Senior Development Engineer. The Applicant relies on a letter from Geo-Environmental Engineering.

68 Mr Di Cristo advised the Court that these conditions are sought to be imposed having regard to the requirements of the Council's *Water Management for Development Policy.* Specifically, clause 4.2(f) provides:

> "Any concentrated groundwater or seepage flows must be discharged to the nearest Council stormwater system in accordance with Council's Design Manual. Discharge to the kerb and gutter will not be accepted."

69 Mr Di Cristo said that the excavation will alter subsurface flow of water and the collection of seepage from the site and may result in environmental and safety concerns. The only environmental concern relates to the potential growth of algae in the gutter. Mr Di Cristo also referred to the receipt of complaints relating to seepage flows in other areas but was not aware of any such complaints in Aitken Avenue. He accepted that no other property in the street

pipes its stormwater direct to a Council pit, and that to the extent there will be the potential of algae growth in the gutter, that potential remains with most other properties in the street. There will be no difference in the water quality as it enters the lagoon whatever the stormwater system.

70 The Council made no submission in support of the conditions other than setting out the evidence of Mr Di Cristo.

71 In the letter from Geo-Environmental Engineering, relied on by the Applicant, it states that:

> "As mentioned in our geotechnical investigation report (G18026QUE-R01F Revision 1 dated 1st September 2020), groundwater was not encountered during the borehole drilling for this investigation, and over the intervals where either a hand-auger or solid flight augers were used. However, water did eventually seep into the monitoring well installed within borehole BH101 which was located near the centre of the site and which extended approximately 3.0m below the proposed bulk excavation level. The stabilised level of water within this well was measured on the 20th September 2018 at a depth of 2.58m bgs and later at 2.22m bgs on the 17th October 2018. The water in the well is considered to be seepage water flowing along the interface of the soil and bedrock or water seepages from defects within the bedrock formation. Permanent groundwater is expected to be much deeper within the sandstone bedrock formation and will not be intercepted by the development.
>
> Based on a slug test completed by GEE within the well at BH101, the flow of water is expected to be relatively slow at approximately 10-7mlsec and therefore will be sufficiently managed during the earthworks phase by pumping from a sump at the base of the excavation. In the long term, conventional techniques such as strip drains behind basement walls and ag-lines will need to be incorporated into the design of the basement to ensure that any seepage is directed to a sump where it can be pumped into a detention basin and then intermittently into the regional stormwater system.
>
> The source of the seepage water is rainfall and therefore its presence will be intermittent, and the flow rate will vary with the intensity of the rainfall event. Importantly, the seepage flow is not expected to be any different to current flows that are occurring beneath the site which is a natural occurrence. GEE expects that the only difference after the development has been completed will be that the seepage water will be intercepted by the proposed excavation and managed in a more regulated fashion as described above."

72 The Applicant pointed to the objectives of the *Water Management for Development Policy* as follows:

> "a. The integration of water sensitive urban design measures in new developments to address stormwater and floodplain management issues.
>
> b. Improvement of the quality of stormwater discharged from urban development.

c. Stormwater flows that mimic natural flows by minimising impervious areas, reusing rainwater and stormwater and providing treatment measures that replicate the natural water cycle.

d. Preservation, restoration and enhancement of riparian corridors as natural systems."

73 The Applicant submitted that there was no justification for the piping of the stormwater having regard to the lack of environmental harm without such a system and the future seepage will be much the same as at present.

74 I agree. Quite simply, in the absence of a legitimate planning or environmental reason it is not appropriate to require an alternative form of stormwater disposal because the Council policy "requires" such a system. There is no unreasonable impact from the Applicant's proposed stormwater disposal system. There was also no suggestion that that system does not meet the objectives of the Policy identified in [72] above.

75 For those reasons I decline to impose conditions 6, 7, 10, 11 and 13.

Privacy

76 The determination of whether the additional privacy measures sought by the Council are necessary is more difficult. In a location where there is some degree of inevitable overlooking between neighbours from their front balconies as they focus on the view to the south, the reasonable level of privacy which residents can expect and receive can vary from other situations.

77 What however must be understood is that the existing overlooking is between single dwelling houses rather than from a residential flat building. The existing building has no balconies to its front and is well set back from the street. The proposed development introduces, a new built form obviously, but importantly introduces three balconies to the front of the building, which is a multiplicity of potential overlooking opportunities. It is not relevant that this is the only residential flat building in the street, nor that its presence depends upon existing use rights (see *Ingham Enterprises Pty Ltd v Kira Holdings Pty Ltd* (1996) 90 LGERA 68) but the question of reasonableness must include consideration of the three overlooking opportunities from three different residences onto the neighbouring properties and the potential for cumulative impact.

78 It is “reasonable level of privacy” which the objective of the setback controls in Section B5 of WDCP 2011 seeks to achieve.

79 The evidence about privacy evolved somewhat over the course of the hearing. In the joint report, Mr McDonald opined that additional privacy measures were required for unit 3 (the uppermost unit). He did not identify the need for additional privacy measures for units 1 and 2. The draft plans the subject of the joint report were required to be more completely drawn and became the plans the subject of the application for development consent.

80 Shortly prior to the hearing the Council provided its draft without prejudice conditions of consent. A condition required some significant privacy measures by providing for screens for the balcony of each apartment on their eastern and western edges. In response the Applicant’s architect prepared comparison drawings showing (from a single location) the potential overlooking as presently proposed and with the imposition of the Council condition.

81 The experts gave oral evidence about the impact on privacy of neighbours and the need for any additional privacy screens. Mr Haynes maintained his opinion that privacy had been dealt with appropriately in the amended plans whilst Mt McDonald revised his opinion on further reflection and opined that privacy measures were required for units 1 and 2 as well as unit 3. It is unnecessary to set out the whole of that evidence at this stage but following the completion of the evidence in the case the Council provided a revised condition concerning privacy. The parties’ written submissions included their submissions about the revised proposed condition.

82 The condition proposed by the Council is in the following terms:

> **“Privacy Screens**
>
> Privacy screens shall be included and erected as follows:
>
> Apartment 3.
>
> Privacy screens shall be installed on the eastern and western sides of the living area balcony. The screens shall be a vertical louvred design with the louvres angled at 45 degrees inwards towards the balcony space. The screens are to be positioned on top of the inside wall of the planter box/roof garden where this wall is adjacent to the eastern and western sides of the balcony. The screens must extend for the full length of the sides of the balcony and must measure a minimum of 1.6m in height above the finished floor level of the balcony.

Apartment 2.

i Along the eastern side of the living area balcony a privacy screen shall be installed comprising a vertical louvred design and with the louvres angled at 45 degrees inwards towards the balcony space. The screen is to be positioned on top of the inside wall of the planter box/roof garden where this wall is adjacent to the eastern side of the balcony. The screen must extend for the full length of the side of the balcony to the distance where the eastern and southern side balustrades meet. The screen is to be a minimum of 1.6m in height above the finished floor level of the balcony.

ii Along the western side of the living area balcony a privacy screen in the form of 1.2m wide and 2.7m high solid panel shall be provided in the form of an extension of the western wall of the apartment.

Apartment 1

Along the eastern side of the living area balcony a privacy screen shall be installed comprising a vertical louvred design and with the louvres angled at 45 degrees inwards towards the balcony space. The screen is to be positioned on top of the inside wall of the planter box/roof garden where this wall is adjacent to the eastern side of the balcony. The screen must extend for the full length of the side of the balcony to the distance where the eastern and southern side balustrades meet. The screen is be a minimum of 1.6m in height above the finished floor level of the balcony.

Details demonstrating compliance are to be submitted to the Certifying Authority prior to the issue of the Construction Certificate.

Reason: In order to maintain privacy to the adjoining/nearby property.”

83 I will deal with each of the units separately.

Unit 3

84 This is at the upper level of the building (excluding the roof terrace). Its floor level is about 2m above the adjacent living and balcony levels. The balcony is set back 3m from the boundary, but there is a planter bed about 1m wide and then the balustrade about 0.5m inside the planter. The further the viewer is away from the edge of the building, clearly the opportunities for overlooking are reduced.

85 The Applicant proposes an additional 1m high partly open timber screen on the outer edge of the planter, to a point a little beyond the front edge of the balcony. The Council proposes a 1.6m timber angled louvre on the inside of the planter to the front edge of the balcony. Each of the experts simply says that the respective measures proposed are sufficient. The Applicant relies upon the architect’s comparison drawings and the Council points to the limitation of

the drawings as evidencing impact from only one location on the proposed balcony.

86 The comparison drawings are a useful tool, but the Council is correct to identify the limitation. That is not a criticism because it is unreasonable to expect such drawings to replicate every possible overlooking opportunity from a proposed development. I have taken into account the comparison drawings, together with the plans of the proposed development, the expert evidence and my observations on site to determine the measures which in my opinion are necessary.

87 I do not accept that timber louvres on the inside of the planter box are necessary. But I consider there needs to be more than the 1m timber open screen proposed. In my opinion the Applicant's proposed timber screen should be increased in height to 1.6m above finished floor level of the balcony, but in the same position as it is at present and of the same design and material. The increased height, together with the separation distance will give a reasonable level of privacy. It also ensures the architectural integrity of the proposed building, without adding apparent bulk with a more solid form of screen. The overlooking from unit 3 is downward rather than across and the increased height will ensure the screen cannot be looked over with a direct view into either neighbouring living area or balcony. The same treatment is required on each side of the unit 3 balcony.

Unit 2

88 The level of this balcony is similar to the balcony to the west and a little higher than the balcony to the east. It is set back 2.4m from the boundary and has a planter for about half its length along the side.

89 The Applicant proposes a continuation of the wall to the balcony of a height of 2.7m for a length of 1.2m on each side. The Council says that solution is adequate on the western side but that a louvred screen of 1.6m height on the inside of the planter is required on the eastern side.

90 I agree that the western side privacy is appropriate with the continuation of the wall that the parties have agreed to. On the eastern side the only available viewing with the extended wall is from the front of the balcony with a direct view

to the front of the adjacent balcony. As the viewer moves closer to the front eastern corner of the balcony, a view would be available of more of the adjacent balcony.

91 It seems to me that the Council's proposed screen is excessive and not necessary. Some measure is however required to filter the remaining overlooking opportunity. I propose that hedging plants having a height at planting of not less than 1m be planted in the planter bed between the edge of the continued wall and the corner of the balustrade and that the plants be maintained at that height. That will give adequate privacy to the neighbour and a softer appearance than an apparent solid barrier such as an angled louvre. Only two or three of such plants will be required and I will leave it to the parties to agree on the appropriate species.

Unit 1

92 This is the lowest apartment, one level above the street and at a level similar to balcony or living areas of adjacent dwellings. The balcony is setback 2.4m from the boundary and there are tiered planter beds in that setback.

93 No overlooking is available to the west because of the building to the west. To the east the Applicant relies upon existing vegetation on the adjoining property to provide privacy whilst the Council requires a 1.6m timber louvre screen on the edge of the balcony along its eastern side. The overlooking available is somewhat direct, but more an angled view.

94 It is true that the vegetation on the adjacent property appears to provide some privacy. However, self-evidently, that vegetation is not in the control of the Applicant and may or may not survive, or thrive, notwithstanding the potential incentive of the neighbour to do so. Also, if the planting fails then it should not be the responsibility of the neighbour to take measures to maintain privacy in a situation not of their making.

95 In this situation there should be a combination of open timber screen and additional vegetation in the planter box. There should be an open timber screen of the same design as on level 3, to a height of 1.6m from the finished floor level of the balcony, on top of the outside of the most westerly planter box, commencing where the solid wall ends for a distance of about 1m, intended to

be half the distance between the wall and the edge of the balcony. There should be 1m vegetation in the planter bed immediately next to the balcony on the eastern side from the end of the solid wall to the front edge of the balcony.

96 With the measures I propose there will be a reasonable level of privacy to the neighbouring properties. Privacy is rarely absolute in an urban environment, and especially in circumstances where residents wish to share open vistas. Nevertheless WDCP 2011 seeks to ensure that a reasonable level of privacy is achieved between dwellings and with the measures I propose that reasonable level of privacy has been achieved. I will give directions for the proposed conditions of consent to be amended to take account of my findings.

Conclusion

97 The proposed development merits development consent and I am satisfied that I have power to grant consent based upon the existing use rights from which the Site benefits. The conditions of consent further ameliorate the impacts of the development, including its construction. The objections of neighbours are relevant and have been taken into account in determining whether it is appropriate to grant development consent and in crafting conditions of consent.

98 Upon compliance with my direction below, orders will be made granting development consent.

99 Accordingly, the direction of the Court is:

(1) The parties shall within 21 days file an agreed draft Determination in the form suitable for lodgement on the NSW Planning Portal including conditions of consent giving effect to the findings of the Court.

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P Clay

Acting Commissioner of the Court

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