

Attachment D

**Concept Approval – Land and Environment
Court Judgement**



Land and Environment Court

New South Wales

Case Name: Vision Land Glebe Pty Ltd v The Council of the City of Sydney

Medium Neutral Citation: [2018] NSWLEC 1593

Hearing Date(s): 26 – 28 February 2018; 12 April 2018

Date of Orders: 7 December 2018

Decision Date: 16 November 2018

Jurisdiction: Class 1

Before: Dixon SC

Decision: Directions: see [108] below

Final Orders: see Addendum at [110] below

Catchwords: DEVELOPMENT APPLICATION: Concept Development application – demolition of MRC – approval of building envelopes for residential use and basement parking – impact on heritage item Bidura House and heritage conservation area – distribution of floor space and height on the site – building separation

Legislation Cited: Environmental Planning and Assessment Act 1979
Heritage Act 1977
Sydney Local Environmental Plan 2012

Cases Cited: BGP Properties Pty Ltd v Lake Macquarie [2004] NSWLEC 399
Trinvas v Council of the City of Sydney [2015] NSWLEC 151
Vision Land Glebe Pty Ltd v Council of the City of Sydney [2016] NSWLEC 1488
Zhang v Canterbury City Council [2001] NSWCA 167

Texts Cited: Apartment Design Guide

City of Sydney Competitive Design Policy
Sydney Development Control Plan 2012

Category: Principal judgment

Parties: Vision Land Glebe Pty Ltd (Applicant)
The Council of the City of Sydney (Respondent)

Representation: Counsel:
A Galasso SC (Applicant)
P Clay SC (Respondent)

Solicitors:
Landerer & Company (Applicant)
Sydney City Council (Respondent)

File Number(s): 2017/184221

Publication Restriction: No

JUDGMENT

Introduction

- 1 This judgment concerns the redevelopment of a site at 357 Glebe Point Road, Glebe (the site). The site comprises the former Children's Court and Metropolitan Remand Centre (MRC) and the State heritage listed buildings known as the Bidura House Group. The applicant, Vision Land Glebe Pty Ltd, is the landowner having purchased the site from the State government, after a public tender process in December 2014.
- 2 The proceedings are commenced under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act). They arise following the Council's deemed refusal of the applicant's application (D/2017/582) - lodged pursuant to Div 4.4 of Pt 4 of the EPA Act, comprising a Concept Development Application for the demolition of the MRC and an approval for the envelope for a replacement residential flat building. Noting, that the replacement residential flat building is part 7 storeys and contains two levels of basement parking and nine two-storey (plus attic) dwellings together with associated site works including tree removal.
- 3 Relevantly, this concept plan does not grant consent to the carrying out of work. Detailed proposals for the actual development of the site will be the

subject of further development applications and after a design competition process in accordance with the LEP and as mandated by s 4.22 of the EPA Act.

Issues

- 4 There are two principal issues, although each has subcategories.
 - First, whether or not the MRC should be demolished. The Council contends that it should not be demolished and the appeal be dismissed.
 - Secondly, if I determine to approve the demolition of the MRC, then whether the form of the building relative to the Bidura House Group and the surrounding heritage conservation areas should be approved as proposed. This second issue also involves heritage and urban design and planning considerations.
- 5 In the event of an approval, the Council contends that the Concept Plan as presently proposed should not be approved, but invites me to make the appropriate findings and allow the applicant the opportunity to amend its plans to accommodate those findings before upholding the appeal and granting a conditional approval.

Conclusion

- 6 For the reasons that follow, it is my considered opinion that the Concept Development application in a modified form should be approved.
- 7 Although the demolition of the MRC is controversial, it is clear to me from the evidence that the building should be demolished to provide for a replacement building that will enable the orderly and economic redevelopment of the site consistent with the planning controls and compatible with the local area.

Background

- 8 The site is located on the eastern side of Glebe Point Road. It comprises Lot 1 DP 64069 and has a total site area of 5,556m². The photograph below taken from Exhibit 19 shows the site in the locality.

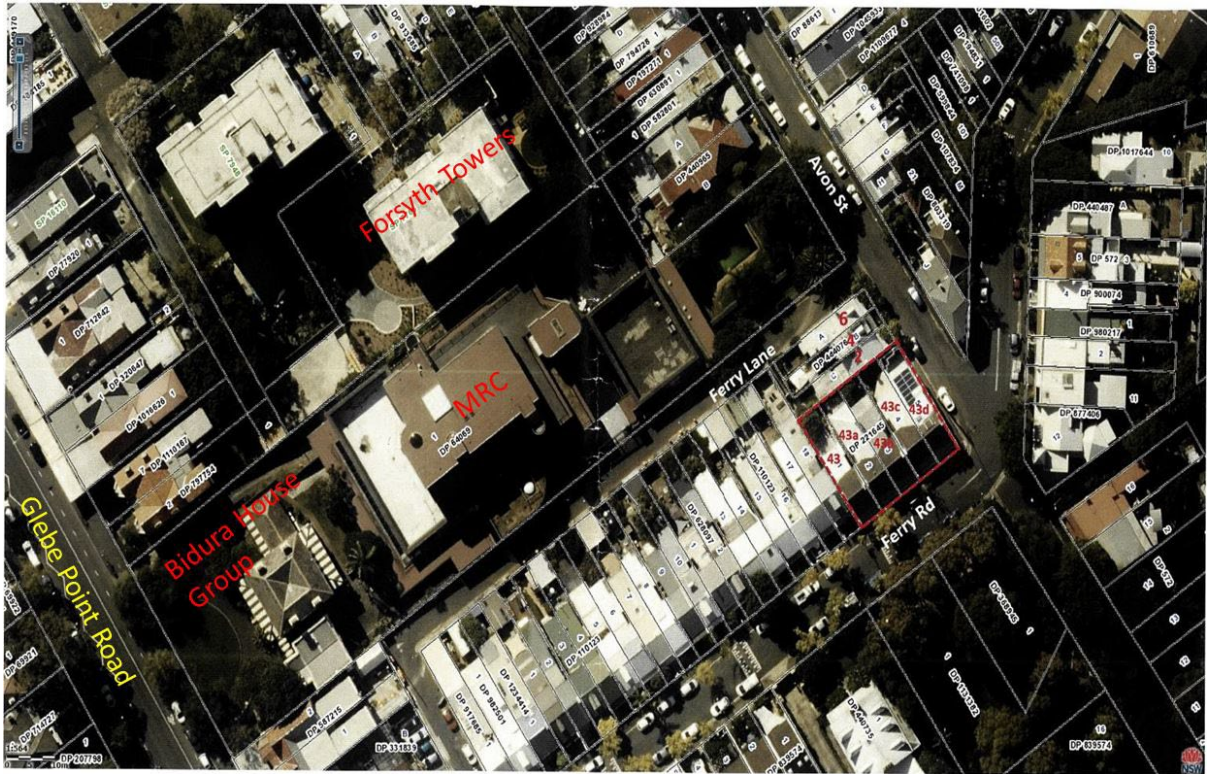


Exhibit 19: Aerial photograph of the site in the locality

- 9 The front part of the site, facing Glebe Point Road contains a two-storey Victorian house, C1857-60; with basement level known as Bidura House designed by prominent architect, Mr Edmund Blacket, as a family residence. It reads as three storeys from the rear. There is an attached annexe to the north and a detached Italianate former ballroom to the south. The buildings are well set back from the street and there is a large formally landscaped garden.
- 10 Behind the Bidura House is the MRC. It opened in 1983 and was the design of the New South Wales Department of public works under Mr JW Thompson, government architect, and Mr Andrew Mills, project architect. It is, at its maximum, a five-storey stepped late 20th century Brutalist style building with two levels of basement parking. It is accessed via pedestrian and vehicular entries from both Glebe Point Road and Ferry Lane. There is a small pocket park at the corner of Ferry Lane and Avon Street.
- 11 The MRC is currently identified as "contributory" within the Sydney Development Control Plan 2012 Buildings Contributions Map.

- 12 Apart from a small portion of land subdivided off the north eastern corner of the site for a pair of late Victorian semis at 8 and 10 Avon Street, the majority of the lot survives intact as purchased by Mr Edmund Blacket in 1857. And, according to the Council's senior Heritage Specialist, Mr John Poulton, the MRC is part of the legacy of the Government Architect's Branch of how they retained and conserved historic buildings and designed new institutional facilities responsive to the brief, site and context (Statement of Evidence - John Poulton (Exhibit 4, p1). In this case, the MRC was a purpose built Children's Court and Remand Centre.
- 13 On 28 August 2017, Bidura House was listed on the NSW State Heritage Register. The listing applies to the curtilage of Bidura House, the ballroom and gardens (the Bidura Group). The Bidura Group is also a local heritage item (ITEM 1763) in the LEP located within the Glebe Point Road Heritage Conservation Area (C29).
- 14 To the north of the site is the Glebe Point Conservation Area (C28).
- 15 As stated, the applicant purchased the site in 2014. It was subsequently leased back to the State Government for the continued use of the Children's Court but this arrangement finished in 2017. The site is now vacant and the MRC is observably in need of significant maintenance and repairs. Relevantly, the historical use of the MRC building, earlier put forward as part of a reason for its significance, has ceased and will not return. Also relevant, for present purposes is the fact that the MRC is not heritage listed at State or local level and, despite being located on a site noted as contributory, the building is not nominated as a contributory building within the Glebe Point Road Conservation Area, being the only area that it could contribute to.
- 16 And, while the parties' heritage experts agree that the MRC is a purpose built Courthouse in a Brutalist style and an example of the work of the NSW Government Architect's Branch, they disagree about its heritage significance and the acceptability of its demolition to make way for a residential flat development. A number of local residents also share the view that the building should not be demolished. They told me this when they gave oral evidence at

the commencement of the hearing at the Court view. Their written submissions were also tabled in the Council's bundle and have been read.

- 17 As already indicated, the demolition of the MRC is a primary issue in this appeal. It was also an issue in the earlier appeal brought by the applicant in 2016 which sought the Concept approval for a not dissimilar residential development in its place: *Vision Land Glebe Pty Ltd v Council of the City of Sydney* [2016] NSWLEC 1488 (Tuor C's Judgment).
- 18 A history of the evolution of planning controls for the site is set out in the Amended Statement of Facts and Contentions filed by the Council. In short, the Council adopted a maximum height of 9m for the entire site and a floor space ratio (FSR) of 1:1 to be incorporated in a Draft Sydney Local Environmental Plan (Draft LEP). The controls were based on an urban design study undertaken in 2006. However, the NSW Department of Planning issued a Certificate pursuant to s 65 of the EPA Act subject to a condition requiring the Draft LEP be exhibited with a height control of 27m and 9m and a FSR of 1.5:1 for the site. The amendments were supported by a planning review prepared for the previous owners of the site by Grech Planners. Further, s65 certificates were issued by the Department keeping the proposed controls.
- 19 On 6 March 2012, the Council reviewed the Grech report and requested the Department amend the building height controls to 18m for a central portion of the site and 9m for the remainder, and a FSR of 1:1. The Department determined that the controls as exhibited should remain and the LEP was made on 14 December 2012 together with a DCP that included a 2 and 5 storeys control for the site. It was after this that the site went to public tender and the applicant purchased the site.
- 20 The above comments in relation to the background to the statutory framework for the site give a context to the current appeal but no more. I do not accept as submitted by the applicant that this background is relevant to my assessment of the DA under the EPA Act. Nor am I concerned as to whether it supports the applicant's assertion that there is a disconnect between the Council's case and its made planning controls - or the motivation for the applicant's purchase of the site - (that these controls were prescribed by the State Government with a

view to selling the site - and invite a fundamental redevelopment of the MRC which recognises a shift in the approach to the legislative vision for the precinct (Applicant's written submissions (AWS) at pars [12]-[13]).

21 My role, at the risk of stating the obvious, is to assess and weigh the evidence in accordance with the applicable law - no more and no less. And, as articulated by the Court in *BGP Properties Pty Ltd v Lake Macquarie* [2004] NSWLEC 399 (*BGP Properties*) at [117]-[119] in respect of zoning controls (and just as applicable to maximum FSR and Height controls in an LEP) in placing significant weight on the permissibility of the development acknowledge that this is subject to the design resulting in acceptable environmental impacts. The acceptability of the distribution of the height and FSR over this site was a critical matter for the Council and a number of local objectors. It was the subject of detailed discussion by the experts in their written and oral evidence to the Court.

22 The experts in this case were:

Applicant's Experts	Council's Experts
<i>Paul Davies</i> <i>Heritage</i>	<i>Glenn Harper</i> <i>Heritage</i>
<i>Ken Hollyoak</i> <i>Traffic</i>	<i>John Poulton</i> <i>Heritage</i>
<i>Brett Newbold</i> <i>Urban Design</i>	<i>Julie Pressick</i> <i>Urban Design</i>
<i>Martin Hill</i> <i>Land Economic Valuation</i>	<i>Sandra Robinson</i> <i>Urban Design/ Planning</i>
<i>Kate Bartlett</i> <i>Planning</i>	

Statutory Framework

- 23 As indicated at the outset, this concept development application is to be assessed in accordance with the EPA Act and in particular, s 4.22:

4.22 Concept development applications

- (1) For the purposes of this Act, a concept development application is a development application that sets out concept proposals for the development of a site, and for which detailed proposals for the site or for separate parts of the site are to be the subject of a subsequent development application or applications.
- (2) In the case of a staged development, the application may set out detailed proposals for the first stage of development.
- (3) A development application is not to be treated as a concept development application unless the applicant requests it to be treated as a concept development application.
- (4) If consent is granted on the determination of a concept development application, the consent does not authorise the carrying out of development on any part of the site concerned unless:
- (a) consent is subsequently granted to carry out development on that part of the site following a further development application in respect of that part of the site, or
 - (b) the concept development application also provided the requisite details of the development on that part of the site and consent is granted for that first stage of development without the need for further consent.

The terms of a consent granted on the determination of a concept development application are to reflect the operation of this subsection.

- (5) The consent authority, when considering under section 4.15 the likely impact of the development the subject of a concept development application, need only consider the likely impact of the concept proposals (and any first stage of development included in the application) and does not need to consider the likely impact of the carrying out of development that may be the subject of subsequent development applications.

Note. The proposals for detailed development of the site will require further consideration under section 4.15 when a subsequent development application is lodged (subject to subsection (2)).

- 24 That said, under the provision, the Court is not prohibited from considering the impacts of the carrying out of the development but it is not required to consider that impact. The Council submits that this is relevant in this case because the Council has not raised an issue of traffic impacts related to demolition and construction of the future development although some of the residents do.

- 25 The principal environmental planning instrument relevant to this application is the LEP. Pursuant to the LEP, the site is located within the B2 Local Centre zone (Exhibit 1, Vol 1, p9). The development is permissible with consent.
- 26 Particularly relevant for present purposes are the development standards in the LEP with respect to the height of buildings and the FSR.

Height

- 27 The height of buildings control is in cl 4.3 of the LEP. It provides:

4.3 Height of buildings

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

(a) to ensure the height of development is appropriate to the condition of the site and its context,

(b) to ensure appropriate height transitions between new development and heritage items and buildings in heritage conservation areas or special character areas,

(c) to promote the sharing of views,

(d) to ensure appropriate height transitions from Central Sydney and Green Square Town Centre to adjoining areas,

(e) in respect of Green Square:

(i) to ensure the amenity of the public domain by restricting taller buildings to only part of a site, and

(ii) to ensure the built form contributes to the physical definition of the street network and public spaces.

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

Note. No maximum height is shown for land in Area 3 on the Height of Buildings Map. The maximum height for buildings on this land are determined by the sun access planes that are taken to extend over the land by clause 6.17.

(2A) Despite any other provision of this Plan, the maximum height of a building on land shown as Area 1 or Area 2 on the Height of Buildings Map is the height of the building on the land as at the commencement of this Plan.

- 28 Relevant to the height of the building issue is a consideration of the Height of Buildings Map, to which cl 4.3 relates. At Glebe Point Road, the height is 9m (Item J), centrally within the site, the height is 27m (Item T2), and to the east of the site, the height returns to 9m (Item J).
- 29 The applicant invites me to appreciate the specificity of the height control to the site. It submits that the site at 27m forms the epicentre of the sub-precinct. The

Ferry Road properties have a height limit of 6m (Item E). The balance of the precinct bounded by Forsyth Street to the north and Avon Street to the east is of a 9m height control (Item J), except for the Forsyth Towers which are nominated as having a height of 12m (Item M).

- 30 Taken alone, I accept that the Height of Buildings Map gives a fundamental and important prescription of an intended desired future character. As the applicant submits that character would have the Forsyth Towers reduced in height by approximately half; the site developed in its central part to a height of 27m; and the balance of the sub-precinct remaining at an overall height of 9m together with new built form on Avon Street of 9m.
- 31 The applicant invites me to place significant weight on this relatively recent planning control. Mindful that the more specific the controls, the greater the weight which must be attributed to achieving the objects of the planning instrument which the controls reflect. This avoids the integrity of the planning process being seriously threatened: *BGP Properties* at [117]-[119].
- 32 Relevantly, the proposal before me complies with the height controls, and for a large part of the central part of the site is below them - principally as a function of the shadow impact of the height control at its maximum to the properties to the south.

FSR

- 33 The second principle development standard is the FSR control in cl 4.4 of the LEP.

4.4 Floor space ratio

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

(a) to provide sufficient floor space to meet anticipated development needs for the foreseeable future,

(b) to regulate the density of development, built form and land use intensity and to control the generation of vehicle and pedestrian traffic,

(c) to provide for an intensity of development that is commensurate with the capacity of existing and planned infrastructure,

(d) to ensure that new development reflects the desired character of the locality in which it is located and minimises adverse impacts on the amenity of that locality.

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

- 34 Similar to the height control, there is a corresponding FSR map which is relevant. The FSR map indicates a legislative intent for the site of 1.5:1 and the sites fronting Glebe Point Road; and an FSR in the main of 1:1 for the Forsyth Towers and the other properties in the sub-precinct.
- 35 The planners agree in their joint report (Exhibit 6 at par [25]) that the subject development (as identified in the indicative scheme Exhibit E) has an FSR under the control at 1.31:1.

Heritage Conservation

- 36 Clause 5.10 of the LEP deals with heritage conservation. Subclause (2) provides that development consent is required for the demolition or alterations to a heritage item, or building work, relic or tree within a heritage conservation area. The subsection provides:

(2) Requirement for consent

Development consent is required for any of the following:

(a) demolishing or moving any of the following or altering the exterior of any of the following (including, in the case of a building, making changes to its detail, fabric, finish or appearance):

(i) a heritage item,

(ii) an Aboriginal object,

(iii) a building, work, relic or tree within a heritage conservation area,

(b) altering a heritage item that is a building by making structural changes to its interior or by making changes to anything inside the item that is specified in Schedule 5 in relation to the item,

(c) disturbing or excavating an archaeological site while knowing, or having reasonable cause to suspect, that the disturbance or excavation will or is likely to result in a relic being discovered, exposed, moved, damaged or destroyed,

(d) disturbing or excavating an Aboriginal place of heritage significance,

(e) erecting a building on land:

(i) on which a heritage item is located or that is within a heritage conservation area, or

(ii) on which an Aboriginal object is located or that is within an Aboriginal place of heritage significance,

(f) subdividing land:

(i) on which a heritage item is located or that is within a heritage conservation area, or

(ii) on which an Aboriginal object is located or that is within an Aboriginal place of heritage significance.

- 37 As already noted, the MRC is not an item of local heritage, but is a building within a heritage conservation area, and therefore its demolition is covered by cl 5.10. The relevant conservation area is the Glebe Point Road Heritage Conservation Area (Exhibit 14) as it includes buildings fronting Glebe Point Road and the whole of the site; noting that the building to the north east and south east are within the Glebe Point Heritage Conservation Area.
- 38 The heritage item is House “Bidura” including its interiors, the former ballroom and front garden” as identified in Sch 5, Pt 1 of the LEP, p115.
- 39 Clause 5.10(1) requires me to consider the effect of the proposed development on the heritage significance of the item or the area concerned.
- 40 (I will deal with heritage issues in this appeal and in particular the demolition of the MRC shortly but after I finish setting out the other relevant planning controls).

Design Excellence

- 41 Clause 6.21 of the LEP (Design excellence) is relevant as the clause is engaged for any new building (cl 6.21(2)).
- 42 The matters enumerated in cl 6.21(4) are relevant to the Court's consideration of whether the development exhibits design excellence. And, while as the applicant submits the matters raised by the clause are addressed more generally by the expert evidence, the joint report of the planners (Exhibit 6) reproduces the clause and addresses its requirements at par [212], p43.
- 43 In addition to this requirement, cl 6.21(5) requires a competitive design process to be undertaken in circumstances where either the proposed building has a height greater than 25m (cl 6.21(5)(a)(ii)), or a development control plan is required to be prepared under cl 7.20.
- 44 Either or both of these causes are engaged in this case. I am told that a competitive design process will be undertaken in accord with cl 6.21 as part of the subsequent stage of the redevelopment of the residential flat building in the

primary site. Exhibit F is the design excellence strategy for the competitive brief to be issued to competing architects as part of the competitive design. Whilst this is not a matter of evidence before me, I am told that the competition will be in accord with a published policy known as the "City of Sydney Competitive Design Policy", as specifically defined in the Dictionary to the LEP at p201.

Development Control Plan - cl 7.20

- 45 Although initially raising a contention about the absence of a development control plan covering the matter in cl 7.20(4), the Council ultimately did not press this issue. It seems that the Council accepts that the matters that might conventionally be regarded as relevant to a development control plan were in terms addressed by the urban design experts (Exhibit K). In that regard, the report identifies the relevant matters in cl 7.20(4) and addresses them in terms of the contextual circumstances in which the proposal sought to be introduced. And, while strictly speaking there is no development control plan at this stage to answer cl 7.20, the applicant submits that notwithstanding the prescription in cl 7.20(2), it is not fatal to the application. That is because the legislation contemplates an alternative. Pursuant to s 4.23 of the EPA Act, if the environmental planning instrument requires the preparation of a development control plan before any particular or kind of development is carried out on the land, that obligation is met by making and approving a Concept Development application in respect of that land: s 4.23(2).
- 46 In short, the prescription in cl 7.20(2) is relaxed by the making of and approval of a concept development application (see Council's written submissions (RWS) at par [30]).
- 47 It is submitted by the applicant that what is before the Court is a concept involving envelopes within which the specific building design will be included. There is an overlap between the matters enumerated in cl 7.20(4) as are relevant to the preparation of a DCP as they are relevant to the considerations in this appeal. The applicant further submits that it also needs to be recognised that there is interplay between a cl 7.20 circumstance and the Council's broader development control plan (Exhibit 1). Put simply, the proposition is that in the absence of concept development application there would need to be a

site specific development control plan in existence to satisfy cl 7.20. And, it follows that upon the adoption of a site specific development control plan, the Council's broader development control plan ceases to apply because of the operation of s 3.43(2) of the EPA Act which requires that there be only one DCP applying to the same land.

48 Put simply, the applicant contends that the adoption of a cl 7.20 site specific DCP or the approval of concept development application means that the terms of broader DCP thereafter become simply irrelevant or supplanted by the process engaged in the circumstances of this case. The applicant labours this point for obvious reasons. First, to overcome the requirement for the site specific DCP now, and secondly, to argue that I should be conscious of this when considering any issue raised about non-compliance with the broader DCP as the LEP (by its terms) in requiring the substitution of a site specific DCP or approved concept development application means that the terms of broader DCP are not sacrosanct in my assessment. The applicant further submits that the approach it invites me to adopt is not inconsistent with the Court's application of the provisions of DCPs as stated in *Trinvass v Council of the City of Sydney* [2015] NSWLEC 151 at [60]-[69] "...a component of flexibility".

49 In appreciating the point that the applicant is trying to make, I also well appreciate that my wide ranging discretion in their application is not at large or unfettered – therefore it is my considered opinion that the broader DCP necessarily remains a focal point of the decision making process in this case: *Zhang v Canterbury City Council* [2001] NSWCA 167 at [75] (Spigleman CJ).

Storeys

50 Council's expert, Ms Robinson, quite sensibly during cross examination accepted, with respect to storeys, that the five-storey control in cl 4.2.1.1 of the DCP is inconsistent with the 27m height standard in the LEP because a greater number of storeys can be achieved within that height. The evidence being that the eastern component of the residential flat building in this proposal is some 7 storeys and within the height limit.

51 This inconsistency between the LEP and DCP is resolved because to the extent of inconsistency or incompatibility the EPA Act provides that the DCP is of no effect: s 3.43(5)(b).

52 As earlier stated cl 7.20 of the LEP prescribes the adoption of a site specific DCP, which this requirement is substituted for in the concept development application process. Pursuant to s 4.23(3), the matters required to be addressed in the site specific DCP as contained in cl 7.20(4) are required to be addressed in the concept development application and that is why the applicant has filed an Urban Design report (Exhibit K).

53 Clause 3.3.8 of the broader DCP addresses the common items contained in cl 6.21 (Design Excellence) and cl 7.20 (Development Control Plan). Generally, it repeats the provisions of those two clauses, with one exception. The exception is within cl 3.3.8(2) which states that there is to be a "site, context and development options analysis" (cl 3.3.8(1)(a)), and that the analysis "...is to document at least three different and realistic sit development options and is to provide an analysis of each option": cl 3.3.8(2).

Options Analysis

54 The applicant has satisfied this requirement in the broader DCP (being the relevant control before the adoption of the site specific DCP pursuant to cl 7.20 or substituted by the concept development application) by tabling in Court an Options Analysis report (Exhibit G).

55 The Options Analysis report identifies three options in par [1.2] at p2 including:

- The Bates Smart Scheme, which was considered by Commissioner Tuor in the earlier appeal and rejected;
- The retention of the MRC and adaptive reuse in consultation with Mr Davies (heritage) and Mr Newbold (Urban Design);
- And the Grech formulation which was a single building mass, but as adopted to the scheme before the Court.

56 Following a consideration of the three options, the applicant settled upon option 3, the design before the Court formulated by Grech and adapted by the architectural firm DKO in the plans before the Court.

57 Noting that the second option was for adaptive reuse and was disregarded based on the feasibility report prepared by Mr Hill which concluded that the adaptive reuse options were not commercially viable (Exhibit H). I will deal further with these options later.

The remaining planning and urban design issues

58 Having set out the statutory framework, I will now focus on the residual planning and urban design issues in the appeal. They were tabled by the Council during the hearing in a document called “issues document” which it was accepted articulated the remaining issues in the case following amendments to the development application (Exhibit 18).

59 To be clear, Exhibit 18 collects the three issues in Exhibit 16 and adds the two heritage issues. Therefore it needs to be read with Exhibit 16 which is limited to planning and urban design changes, and was prepared by Ms Robinson, Mr Poulton and Ms Pressick.

60 Subject to me approving of the demolition of the MRC, I have been asked to make findings consistent with the amendments in Exhibits 16 and 18 and to direct appropriate amendments to the plans in Exhibit C. Noting, that I need to determine whether the height reduction proposed for two levels of the eastern element as shown on Sketch 1 of Exhibit 16 is necessary because the applicant does not believe this amendment to the building envelope is necessary.

Amendments outlined in Exhibits 16 and 18

Eastern component of the building

61 The first urban design issue is the height and bulk and relationship to the heritage conservation area.

62 The Council’s experts Ms Robinson and Ms Pressick believe that the height of the eastern component of the building at levels 5 and 6 as proposed in Exhibit C and the lift overrun should be reduced as depicted in Sketch 1 of Exhibit 16. In their assessment a lowering this portion of the building at the eastern side (by removing levels 5 and 6 or lowering the height of the building by 6.2m) will create a bulk which is more consistent with the MRC. And, importantly allow for a building lower than the Forsyth Towers – which are an anomalous built form

and a detracting element in the conservation area (TD3 Robinson p199). If adopted, Ms Pressick told the Court that the modifications illustrated in Sketch 1 of Exhibit 16 will result in a proposed building that is :

- (a) 2m lower than the main roof of the Forsyth Towers; and
- (b) 1m above the MRC.

63 And, this will allow the existing contextual relationship to be preserved and avoid a third tall and bulky building in the skyline context. Ms Robinson in concurrent evidence in Court described these modifications as a better outcome because they reduce the height and avoid another anomalous tower in the context. Furthermore, they provide for a better response to the topography which in turn improves the interface with lower terraces and semi-detached housing. (T201.49 to T202.9). Ms Pressick agreed with her and emphasised the character statements in the DCP for the two heritage conservation areas and how the proposed amendments better reflected the outcomes anticipated in the DCP (T202.13 –T203.41).

64 The applicant's expert, Mr Newbold, does not think that the changes are necessary. He believes that there is no unacceptable visual impact at this interface and that any concern about visual bulk will be viewed as a background element, which with sophisticated design could be managed at a later stage. He also relied upon the retention of the existing large tree in that area to screen the bulk from Avon Street (TD3 p206).

65 Mr Newbold believes that the relationship of this component of the proposal to the Forsyth Towers to the north, coupled with the extended setback of the proposal to the properties fronting Avon Street, is contextually responsive and therefore appropriate in relation to urban design considerations which are specified by the controls (Exhibit 9, p11 at par [15]). In his assessment, the heights of the proposed apartment envelope depicted in the plans in Exhibit C demonstrate appropriate responses to the site specific controls and therefore no further change is needed. He said , at the western end, the tallest element has a height of five storeys, and is approximately 6m to 7m below the LEP's maximum permissible building height - based upon an interpolated ground level. At the eastern end, the tallest portion has a height of seven storeys but

remains at least 1.5m below the maximum permissible height (based upon an interpolated ground level of 27.56). Along Ferry Lane, stepped forms which limit overshadowing together with proposed articulation zones create a street wall which has a two storey scale. He also believes that the extensive articulation of the proposed envelope responds directly to the controls and results in outermost walls which are scaled appropriately in relation to the public domain. For example, immediately behind Bidura House, the five-storey western elevation rises four storeys above the ground level of the house and due to progressive stepping of the upper storeys the façade's maximum width is confined to the lower storeys.

- 66 Mr Newbold and Ms Bartlett also said that any concern about this relationship issue on the eastern boundary of the site would ultimately be addressed by a future design.

Finding

- 67 As pointed out by Ms Robinson, the main objective of a Concept Plan is to provide some certainty to the developer, community and design competition participants as to the expected height and bulk of the building (TD3, p209). Therefore it follows that the height and setback of the building envelope needs to be determined now and not at some future design stage.
- 68 Mr Davies described the MRC as contextually “a different bulk, a different shape and a different relationship to the site to what surrounds it”. The present proposal is plainly bigger than MRC. And although compliant with the maximum height controls, it must be remembered that they are a maximum control, and not an entitlement. Any new development on the site needs to sensitively respond to its surrounds particularly in and proximate to conservation areas. In the joint urban design statement Ms Pressick discusses this contextual issue and suggests that the height of buildings and street frontage height in storeys should not match anomalous tall neighbouring buildings that are inconsistent with the neighbourhood. In this locality the proposed seven storey height is only consistent with the neighbouring towers at 2 and 2A Forsyth Street. It is not consistent with the general scale and form

of surrounding buildings, diverse as they may be, which characterise the heritage conservation areas and locality (Exhibit 9, p8 at par [15])

69 Having observed the site from the rear yards of two properties along Avon Street, and appreciating the overbearing potential of the proposal without amendment, I must accept the Council's experts' evidence that the design change proposed in Exhibit 16 to delete levels 5 and 6 and reduce the lift overrun is necessary on this eastern wing to preserve the remaining amenity these properties in Avon Street presently enjoy. The changes avoid another anomalous tower in this context.

70 In my assessment, the changes will better integrate the new building into the conservation area. Clearly, it is entirely inappropriate to rely upon the existing large tree into the future to shield the height of the proposal when viewed from Avon Street.

Loading dock Ferry Lane

71 The second part of this issue is the four-storey wall element to Ferry Lane above the loading dock (Item 1 in Exhibit 16 and Item 3 in Exhibit 18) (Sketches 1A and 1B). As depicted in Sketch 1A and Sketch 1B in Exhibit 16, the Council is concerned to reduce this element of the building as it fronts Ferry Lane. In particular, Ms Pressick was concerned about its location above the contemplated loading dock. She believes that the four-storey relationship at this point to the single storey buildings in Ferry Lane is inappropriate (T219.23). In her assessment the amendments proposed by the Council would have the eastern end of the Ferry lane frontage in keeping with the western end.

72 Ms Pressick was also concerned that the aperture for the loading dock would not be able to be treated in a way that would reduce the effect of the built form; whereas Mr Newbold said that it would be relatively easy to incorporate an architectural continuation of the relief maintained to the west of Ferry Lane. And , with that design feature in place there is no need for the alteration to the volume as depicted in Sketches 1A and 1B.

Finding

73 Having inspected Ferry Laneway at the site view, I recall the setback and height of the single storey properties opposite the site. It is appropriate in my

opinion for the reasons articulated by Ms Pressick that the relationship between the eastern and western end of the frontage to Ferry Lane be consistent to reduce the effect of the built form to the Lane and the properties opposite. In my assessment the amendments proposed ensure that outcome and avoid reliance on an architectural treatment which may not necessarily have the same effect. The changes proposed by the Council are reasonable and warranted and need to be incorporated into the design.

Separation between Ferry lane and Avon Street terrace houses

- 74 Item 2 in Exhibit 16 and Item 4 in Exhibit 18 concerns building separation between the Ferry Lane and Avon Street terraces houses. The Council seeks a reduction in the basement extent (Sketch 2) to allow for a building separation distance between the terraces and the proposal. Ms Pressick is of the opinion that a courtyard depth of 5m for the terraces fronting Avon Street would provide a greater amenity and opportunity to create usable space. Ms Robinson preferred 6m but said that 5m would suffice.
- 75 The applicant's expert, Ms Bartlett, said that the amendments sort by the Council were unnecessary because the dimensions proposed in the Exhibit C plans were consistent with similar relationships in the locality (the white houses in Exhibit O). Acknowledging the requirement to apply the Apartment Design Guide (AGD) to the site (including the terrace houses), Ms Bartlett sort to justify the setback in Exhibit C. She deals with this issue in the joint report (Exhibit 6 at pars [75]-[80]) and sets out her reasons as to why she believes that the proposed built form for the terraces and the numerical non-compliance with the setback is acceptable. In short, it is because the design as proposed is compatible with the surrounding area which includes rear courtyards of a depth of approximately 3-5m facing blank terrace walls on corners. She also believes that the development is scaled to support the desired future character with appropriate massing and spaces between buildings. Mr Newbold agrees. He believes a reduction in the extent of the basement levels is unnecessary as there would be scope for substantial planters to be located above the basement and thereby provide within the courtyards appropriate landscaping for their dimensions.

76 This does not however, satisfy Ms Pressick's concern. Accepting that some existing terraces in the vicinity may have smaller areas than 5m she said these were located at dwellings which are single to 1.5 storeys in scale. These examples relied upon by the applicant are quite different spatially from the 3-storey terraces proposed on Avon Street (TD3 at p240). These new terraces should provide useable out door open space consistent with the requirements in the AGD.

Finding

77 I observed the locality and the rear yards of the houses in Exhibit O at the view. They are not 3-storey terraces but as Ms Pressick sated in her evidence single to 1.5 dwellings. In my assessment the new terraces should comply with the AGD numerical setback requirements as this will ensure a courtyard depth of 5m for the terraces fronting Avon Street and as Ms Pressick suggests provide a greater amenity and opportunity to create usable space for the residents.

78 I do not accept, as Mr Newbold suggests that the amenity of these terraces can be addressed at the design stage or resolved by the use of wide planters on the rear terraces. Useable space is desired and recommended by the current AGD and for the reasons stated by Ms Pressick accommodated in the proposed new terraces along Avon Street in this concept application.

Deep soil distribution

79 There are two aspects to this urban design issue. (Item 3 in Exhibit 16 and Item 5 in Exhibit 18).

80 First, Ms Pressick and Ms Robinson seek a setback of the building by 2m from Ferry Lane for the introduction of street trees. The item is as depicted in Sketch 4 of Exhibit 16. Mr Newbold believes that the proposed landscaping on Ferry Lane is of a scale commensurate with the development as it fronts Ferry Lane (Exhibit 9, p15, par [20]) although he ultimately accepted that 1m planting would not be sufficient to provide substantial planting (TD3, p230). Despite that, as I understand the final position of the applicant it accepts this change to 2m setback for planting and therefore should be accommodated in the amended plans.

81 The second matter is with respect to the basement setback in the light court as depicted in Sketch 4A. This is also to provide for tree planting in the entry component of the light court. The applicant accepts this change and it should be accommodated in the amended plans.

Setback of proposal from Bidura House (Item 2 in Exhibit 18 – last 2 pages of Exhibit 16)

82 The final change is an alteration of the plans relating to the relationship of the proposed building and Bidura House.

83 The extent of the alteration the subject of the contention is described in Exhibit 8, p6 at pars [5(a)] and [5(b)]. It relates to the impact of the view line – the bulk when looking out from Bidura House. The Court stood on the balcony with the experts to better appreciate this issue. Mr Poulton was of the opinion that unless the building was setback as indicated in the Sketch then the proposal would be overbearing when viewed from the heritage item and would compromise its heritage significance.

84 Mr Davies did not agree. He said that the setback change was not necessary although conceding a slight setback would be an improvement. Put simply he did not believe that the courthouse building is not an appropriate cue to any future development of the site. In his assessment the proposed building in Exhibit C offers appropriate separation between the state heritage item and its curtilage and any future development at the rear.

85 Despite Mr Davies evidence, and in an effort to resolve the issue he ultimately agreed with Mr Poulton that removal of a portion of the building known as level 5 and shown in Exhibit 16 would improve the relationship between the proposed envelope and Bidura House and improved the transition to the east (TD2 Poulton at p87 and Davies at p92).

86 The discussion then focussed on the extent of the setback on the western elevation and how many floors which floors. To assist the Court Mr Davies and Mr Poulton marked on the Sketches in Exhibit 16 the part of the building that each believed could be deleted to reduce the bulk on the boundary. Mr Davies accepting that a portion of the fifth floor as proposed in Exhibit 16 would offer

greater separation however, did not agree to the removal of the area proposed for the sixth floor.

Finding

- 87 After a review of the Sketches and a consideration of the evidence about this interface I accept the changes proposed by Mr Poulton as explained to me on the balcony of the Bidura House and in the Court hearing. The existing courthouse is as Mr Poulton suggests an appropriate cue for the building envelope. Based on my observations at the site I accept that the built form proposed in the concept design is as Mr Poulton suggests overbearing when viewed from the balcony of the state heritage item. A 10 m setback for the lower levels is in my assessment appropriate, any levels higher than the eaves line of Bidura House of the proposed development should setback further, taking the cue from the MRC. This will result in a less overbearing visual impact on the rear of the heritage buildings on the site as well as a more acceptable visual impact on the setting of the Bidura House Group.
- 88 While these amendments are not particularly relevant when viewed from the western side of Glebe Point Road they are particularly relevant when viewed from the intersection of Ferry Road and Ferry Lane.
- 89 It was apparent at the site view that the visual relationship between the western façade of the proposed building and the rear verandha of Bidura House will be clearly visible from the intersection of Ferry Road and Ferry Lane (Figure 2, Exhibit 7). This will be in contrast to the MRC, which is barely visible at this location.
- 90 Accepting that a Concept Development application shows only building envelopes, not an actual design, and that the way that form is managed could have impacts on the setting of Bidura House and the Conservation Area it is important to specify with some particularity the setbacks from the heritage item at this stage. Put simply, no amount of detailed design resolution will adequately mitigate an oversized building envelope particularly the 4 to 6 storey western end of the proposed envelope set only 10 m from Bidura House. It is crucial, as Mr Poulton told the Court that the application sets

envelopes at appropriate parameters for the redevelopment of the site behind Bidura House Group.

- 91 Based on my observations I accept Mr Poulton expert assessment that when viewed from Ferry Lane and Ferry Road, the separation between the State heritage item and the development as proposed in Exhibit C is inappropriately overbearing unless amended in accordance with the sketches prepared by Mr Poulton in Exhibit 16 and 18. Clause 5.10 (1) requires that I consider the effect of the proposed development on the heritage significance of the item or the area concerned. Having undertaken that consideration I require the changes proposed by Mr Poulton.

Heritage - Retention of the MRC

- 92 There can be no dispute that the principal heritage issue in this case is, legislatively, the Bidura House Group. That is because the Bidura House Group are specifically listed and described as items of local heritage and as an item of State heritage (Exhibit 13). And while there is no substantive issue concerning the proposed redevelopment of Bidura House Group in this appeal it is part of the concept development application and, cl 5.10(1) of the LEP requires me to also consider the effect of the proposed development on the heritage significance of the heritage item "House "Bidura" including interiors, former ballroom and front garden" as identified in Sch 5, Pt 1 of the LEP and the relevant conservation area known as Glebe Point Road Heritage Conservation Area which incorporates buildings fronting Glebe Point Road and the entirety of the site.
- 93 Having undertaken the requisite consideration, I am prepared to grant development consent to the demolition of the MRC as required by cl 5.10(2) of the LEP. In reaching this conclusion, I am mindful that the proper characterisation of the issue concerning the MRC is the proposal for the demolition of a building in a heritage conservation area proximate to a heritage item. Insofar as the State register is concerned the MRC is not a heritage item relevant to the State heritage listing (Exhibit 1, Vol 1, p 697). Whilst the evidence discloses that the Council resolved (after the commencement of this appeal in 20 June 2017) to send to the Department of Planning a planning

proposal for the listing of the MRC (Exhibit 1, tab 20) no gateway approval has been issued. Relevantly, despite petitioning the Minister twice to impose an interim heritage order on the MRC under the Heritage Act 1977 each time the Minister has declined to act. As it stands, there are only non-statutory listings of the MRC at this time and in my assessment they are of no significance in this case. Particularly, given that the Australian Institute of Architecture Listing was undertaken by Mr Harper the Council's heritage expert witness (Exhibit 5, Appendix D) and the National Trust Listing Report was authored by Ms Jenna Reed Burns an objector to the development who resides in Avon Street.

- 94 Even if the MRC was listed as an item of environmental heritage in the LEP that fact does not prohibit consent to demolish the building. Clause 5.10(2)(a)(i) specifically contemplates development consent being required for demolishing a heritage item.
- 95 I have adopted Mr Davies approach to the question of determining the significance of the MRC. The starting point being whether there is sufficient heritage significance to warrant local listing. While the fact that it is not locally listed does not necessarily mean that it is not of significance, its status in that regard is a relevant consideration to be weighted with all other evidence.
- 96 Mr Davies has summarised his expert assessment with respect to the MRC in Exhibit Q. It is based on his primary evidence (Exhibit M) which addresses the significance of the MRC at pars [4.0]; p11-19, [4.]-[4.3]. The conclusion being that there is no foundation for the retention of the MRC. And, to the extent that Mr Harper purports to address an assessment of heritage significance, Mr Davies responds to that assessment in the joint report (Exhibit 8, Appendix A, par [3.4]). (Noting for the record that Mr Harper provided a statement of significance in his evidence where Mr Davies based his assessment on the statement of significance in the GAB Conservation Management Plan and, through the process of evidence, by applying the inclusions and exclusion criteria to the place). Despite the different approaches taken by these heritage experts as to how the significance of the building is set out, I am satisfied that all relevant matters going to this issue have been addressed.
- 97 In summary, Mr Davies final position is that :

- the MRC is not a significant example of the Brutalist style;
- it is not innovative;
- it is not exemplary;
- it failed in its purpose as a design;
- it does not fit within the context of the Glebe Point Road Heritage Conservation Area;
- it is not rare (unless one is considering the class of buildings as those within the Court and justice system (T185.35-39);
- the building is not capable of reuse in its current form – the very specific layout combined with monumental construction makes adaptation very difficult;
- the historical use of the building has ceased and will not return;
- the building is not heritage listed at State or local level and while on a site noted as contributory it is not a contributory building within the Glebe Point Road Heritage Conservation Area.

98 Whereas Mr Harper concluded after his analysis as explained in his expert report filed on 20 February 2018, as expanded upon in the joint report (Exhibit 8) that the MRC has heritage significance because of its historic, aesthetic and social significance and rarity. In that regard he describes the MRC as:

“...a rare and intact purpose built children’s court (and remand centre) in the Brutalist style built on a site that has been associated with juvenile and welfare since the early 20th Century. In its distinctive architectural detailing, the MRC is considered to have heritage significance and can meet the threshold”.

99 I accept Mr Davies’ expert assessment over that of Mr Harper because in my view it is more balanced and objective.

100 While Mr Harper is clearly an expert of Brutalist architecture – presently undertaking research into Brutalist architecture for the purposes of his PhD at Sydney University, and a media advocate for the retention of this form of architecture (even after the commencement of this hearing) these matters in my opinion diminish his evidence for the retention of the MRC. While there is no issue that the criteria set out in Mr Harper’s Significance Assessment at Table 6 of his statement (Exhibit 5) are appropriate I am faced with evaluating these experts’ opinions and in that circumstance it is appropriate to prefer the objective assessment provided by Mr Davies.

101 Furthermore, even if the MRC was considered to be of significance, the examples of adaptive reuse advocated by Mr Harper are based on the

evidence simply not feasible or achievable or economically viable. Mr Harper suggests gutting the internal of the building and adapting it for use as a commercial building; a school for 600 primary school children; or an integrated residential development with a community library and gym, sports facility. The figures in his statement of evidence demonstrate this would require the inclusion of addition levels on the existing play areas for the children and varying degrees of new inclusions and internal reconfigurations of the layout – and subject to a conservation management plan in an effort to retain essential elements.

- 102 In the end, Mr Harper accepted that any adaptive reuse of the building involved significant and extensive internal changes. Such modifications are clearly not financially viable having regard to Mr Hill's economic analysis of the option report (Exhibits H & F) which was not contradicted by any other expert.

Traffic

- 103 Mr Hollyoak prepared a statement marked Exhibit R dealing with the traffic impacts of the development and the residents' evidence. In his assessment, the development will generate during peak hour an increase from 16 to 18 vehicles per hour on Ferry Lane. Accepting a residential capacity of 87 dwellings, Mr Hollyoak said that he did not believe that there would be an unacceptable traffic consequence if the application is approved. And, while he suggested that at a later time consideration might be given to making Ferry Lane one way access he did not consider this change necessary to ensure appropriate traffic safety.

Conclusion

- 104 Section 4.15 of the EPA Act sets out the matters that I must consider in my evaluation of this Concept development application. Relevantly, s 4.15(1)(b) requires me to assess the likely impacts of the development and s 4.15(1)(e) mandates a consideration of the public interest. In undertaking that evaluation I have had regard to the oral evidence of the local objectors received at the site view at the commencement of the hearing and the written submissions lodged with the Council included in the Council's Bundle filed in Court. I have also taken into consideration my observations at the view at the site and from Ferry

Lane and Avon Street and the backyards of the residents in the laneway and proximate to the site.

- 105 Insofar as evidence was received from resident objectors, all of the issues raised by those that spoke at the Court view, have in my assessment, been satisfactorily addressed by the various experts during the course of the hearing particularly, in relation to heritage and urban design and planning concerns. Additionally, Mr Hollyoak has assisted the Court by addressing the residents' traffic concerns in relation to for Ferry Lane and Avon Street (Exhibit R). He concluded that there will be no unacceptable result in terms of traffic in the post – development scenario, and that construction traffic is able to be addressed satisfactorily during the construction phase.
- 106 For the reasons outlined, it is my considered opinion that the modifications, which I require, effect a distribution of height and bulk and FSR which allows for appropriate separation of the new development from the Bidura House Group whilst achieving a satisfactory level of residential amenity for the residents proximate to the site.
- 107 Accordingly, I propose to approve the Concept Development application but after providing the applicant with an opportunity to amend the plans in (Exhibit C) to incorporate and reflect the amendments and solutions outlined in Exhibits 16 and 18 in accord with my reasons for judgment.

DIRECTIONS

- 108 My directions are:
- (1) The applicant is to provide amended plans to the Council and to the Court reflecting my reasons for judgment within 7 days of this direction.
 - (2) The Council is to prepare final conditions of consent and provide a copy to the applicant and to the Court within 7 days of receipt of the amended plans.
 - (3) If I am satisfied that the amended plans and conditions accord with my reasons for judgment I will make final orders in chambers upholding the appeal and granting consent to the Concept Development application subject to the Council's final conditions of consent.
 - (4) Liberty to relist the matter before me on 48 hours' notice in the event of disagreement about the amendments or conditions of consent should the need arise.

Addendum made on 7 December 2018

109 In accordance with the directions in paragraph [108] of my judgment delivered on 16 November 2018, the parties have provided me with a copy of the agreed draft conditions of consent and amended plans. Having formed the view that they accord with my reasons for judgment I am now satisfied that a conditional consent to the Concept Development application should be granted.

110 Accordingly, the final orders of the Court are:

- (1) The appeal is upheld;
- (2) Concept Development Application No. D/2017/582 for building envelopes for a residential development to accommodate a 6-storey residential apartment building with a 2 level basement, and 8 x two-storey plus attic dwellings, including the retention of Bidura House Group, demolition of the MRC, and associated site works including tree removal is approved, in accordance with the amended plans and conditions as set out in Annexure A.
- (3) The exhibits are to be returned, with the exception of Exhibits A, 3, 16 and 18.

.....

S Dixon

Senior Commissioner of the Court

[Annexure A \(Final Conditions\) \(46.6 KB, pdf\)](#)

[Plans \(1.68 MB, pdf\)](#)

Amendments

07 December 2018 - Addendum with final orders added.

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