

Item 3.**Development Application: 21C Billyard Avenue, Elizabeth Bay - D/2023/727****File Number:** D/2023/727**Summary**

Date of Submission: 14 August 2023, amended plans received on 27 October 2023 and 22 July, 3 September and 24 October 2024

Applicant: The Trustees for Billyard Ave Development Trust

Architect: Smart Design Studio

Developer: Fortis

Owner: The Owners - Strata Plan No 9561

Planning Consultant: Urbis Pty Ltd

DAPRS: 7 November 2023

Cost of Works: \$23,245,000

Zoning: R1 - General Residential

The proposed development is for a residential flat building and is permissible with consent in the zone.

Proposal Summary: The application seeks consent for demolition of 2 existing buildings containing 28 apartments and construction of 2 new residential flat buildings containing 20 apartments, with 4 levels of basement carparking and associated landscaping.

The proposal is referred to the Local Planning Panel for determination as:

- the development contravenes the 'height of building' development standard imposed by the Sydney Local Environmental Plan 2012 (SLEP 2012) by more than 10%

- the proposal is classified as 'sensitive development' as it is development to which Chapter 4 of the Housing SEPP (previously SEPP 65) applies
- the proposal is classified as contentious development as it is the subject of 25 or more unique submissions by way of objection

The application is Integrated Development for the purposes of the Water Management Act 2000.

On 7 December 2023, the applicant lodged a Class 1 appeal with the Land and Environment Court against the deemed refusal of the subject application. The application was the subject of a Consent Orders Hearing on the 5 and 6 November 2024. Following the Consent Orders Hearing, the application was determined by Commissioner Walsh, who dismissed the appeal, refusing the application. Commissioner Walsh's decision was subsequently overturned by Chief Judge Preston due to matters of legal error. The application remains under appeal and is currently undetermined.

The proposal has been amended during the Class 1 appeal proceedings to address issues identified by Council officers and experts in relation to building setbacks and visual privacy, overshadowing, view sharing, provision of communal open space and provision of adequate deep soil and canopy cover.

The amended development has been the subject of a detailed assessment by town planning, architecture, urban design and view sharing expert witnesses during the Land and Environment Class 1 appeal proceedings. In their assessment, the experts agreed that as a result of amended plans and additional information provided, there are no outstanding points of disagreement between the experts. The proposal has not been amended since the experts provided their written and verbal evidence.

This report undertakes an assessment of the proposal against the applicable planning controls to supplement the matters that were addressed by the experts. This report also addresses matters that were raised during the Consent Orders Hearing and subsequent Court judgments.

The originally submitted application was notified for a period of 28 days from 22 August 2023 to 20 September 2023. 116 individual submissions were received.

During the LEC proceedings, amended plans submitted on a without prejudice basis were re-notified for 14 days between 24 July and 8 August 2024. This period was

further extended to 27 August 2024. 77 individual submissions were received.

Summary Recommendation: The development application is recommended for approval, subject to conditions.

Development Controls:

- (i) Sydney Local Environmental Plan 2012
- (ii) Sydney Development Control Plan 2012
- (iii) SEPP (Resilience and Hazards) 2021
- (iv) SEPP (Transport and Infrastructure) 2021
- (v) SEPP (Biodiversity and Conservation) 2021
- (vi) SEPP (Building Sustainability Index: BASIX) 2004
- (vii) SEPP (Housing) 2021
- (viii) SEPP 65 - Design Quality of Residential Apartment Development
- (ix) Apartment Design Guide
- (x) City of Sydney Development Contributions Plan 2015
- (xi) City of Sydney Affordable Housing Program 2020

Attachments:

- A. Recommended Conditions of Consent
- B. Selected Drawings
- C. Clause 4.6 Variation Request - Height of Buildings
- D. View Sharing Report and Addendum
- E. Commissioner Walsh Judgement - 19 Dec 2024
- F. Chief Judge Preston Judgement - 20 Mar 2025
- G. Expert's Joint Report
- H. Clause 6.21C Design Excellence Assessment
- I. Class 1 Appeal Hearing Transcript
- J. Submissions

Recommendation

It is resolved that:

- (A) the variation requested to the 'height of buildings' development standard in accordance with Clause 4.6 'Exceptions to development standards' of the Sydney Local Environmental Plan 2012 be upheld and
- (B) consent be granted to Development Application Number D/2023/727 subject to the conditions set out in Attachment A to the subject report.

Reasons for Recommendation

The application is recommended for approval for the following reasons:

- (A) the development complies with the objectives of the R1 General Residential zone pursuant to the Sydney Local Environmental Plan 2012.
- (B) Based upon the material available to the Panel at the time of determining this application, the Panel is satisfied that:
 - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by clause 4.6(3) of the Sydney LEP 2012, that compliance with the 'height of buildings' development standard is unreasonable or unnecessary and that there are sufficient planning grounds to justify contravening clause 4.3 of the Sydney Local Environmental Plan 2012; and
 - (ii) the proposal is in the public interest because it is consistent with the objectives of the R1 General Residential zone and the 'height of buildings' development standard.
- (C) Having considered the matters in Clause 6.21C(2) of the Sydney Local Environmental Plan 2012, the building displays design excellence because the proposed development:
 - (i) provides a high standard of architectural design, materials and detailing appropriate to the building type and its location
 - (ii) will have a positive impact on the subject site, the heritage conservation area and the streetscape
 - (iii) is compatible with the built form and density of surrounding developments
 - (iv) will not result in any detrimental visual privacy, acoustic privacy, overshadowing or view loss impacts
 - (v) will result in appropriate interfaces at ground level between the buildings and the public domain, and suitable integration of landscaping.
- (D) The development is generally consistent with the objectives of the relevant planning controls.

- (E) The development will not adversely affect the character of The Bays locality or the Elizabeth Bay and Rushcutters Bay heritage conservation Area.
- (F) The development will not unreasonably compromise the amenity of nearby properties.
- (G) Suitable conditions of consent are recommended and the development is in the public interest.

Background

The Site and Surrounding Development

1. The property is legally described as Lots 1-28 in SP9561 and CP/SP9561 and is commonly known as 21C Billyard Avenue and 10 Onslow Avenue, Elizabeth Bay NSW.
2. The site is regular in shape and has an area of approximately 1,464 square metres. It has a primary street frontage of 21.48 metres to Billyard Avenue and a secondary street frontage of 21.43 metres to Onslow Avenue. The site has a substantial slope of approximately 15m from Onslow Avenue to Billyard Avenue.
3. The site is currently occupied by two flat-roofed brick residential flat buildings (one fronting each street) comprising 28 apartments. The existing buildings are separated by approximately 4.5m. Vehicular access is currently from Billyard Avenue, while pedestrian access is available from both street frontages.
4. The site contains 16 trees, mainly located along the boundary interfaces of the Billyard Avenue portion of the site. The site currently contains no landscaping at the Onslow Avenue frontage, however, there are three existing street trees in the public domain on the Onslow Avenue frontage.
5. The site is not a heritage item but is identified as a neutral building within the Elizabeth and Rushcutters Bay heritage conservation area (HCA). The site is located within 'The Bays' locality and is subject to flooding.
6. The surrounding area is characterised by a mixture of land uses, primarily being residential accommodation comprising residential flat buildings.
7. Immediately to the north, at 6-8 Onslow Avenue and 21A-B Billyard Avenue, are residential flat buildings. These buildings present as three storeys to each street frontage and are identified as detracting buildings within the HCA. The locally listed heritage item 'Arthur McElhone Reserve' and State listed heritage item 'Elizabeth Bay House' are located further to the north.
8. Immediately to the west, on the opposite side of Onslow Avenue, is an eight-storey residential flat building at 13 Onslow Avenue. The building is locally listed heritage item described as flat building 'Meudon'.
9. To the southwest at 15-19 Onslow Avenue is a 16-storey contemporary residential flat building known as Elizabeth Bay Gardens, which is a detracting building within the HCA.
10. Immediately to the south, at 12 Onslow Avenue and 23 Billyard Avenue, are residential flat buildings. The building fronting Onslow Avenue is known as 'Darnley Hall' and presents as five storeys to the street. The building fronting Billyard Avenue is known as 'Somerset' and presents as four storeys to the street. These buildings are not heritage items but are identified as contributory buildings within the HCA.
11. Further to the south, on the rear portion of 14-16 Onslow Avenue, is a heritage item of State significance described as the grotto site of Elizabeth Bay House.
12. Immediately to the east, on the opposite side of Billyard Avenue are several lower scaled residential buildings which have a frontage to the harbour (Elizabeth Bay).

These include locally listed heritage items 'Berthong' at 36 Billyard Avenue and 'Boomerang' at 42 Billyard Avenue.

13. There is an existing covenant on title (restricting building height on a portion of the site) which was registered in 1957.
14. Inspections of the site and locality, including various objector's properties, were undertaken on 29 October 2023, and 17, 21 and 24 November 2023. Additional inspections, including of objectors properties were also undertaken during the Court appeal process on the 12 June and 6 November 2024.
15. Photos of the site and surrounds are provided below.



Figure 1: Aerial view of site and surrounds



Figure 2: Site viewed from Onslow Avenue looking east



Figure 3: Adjoining residential flat building to the south at 12 Onslow Avenue (known as Darney Hall)



Figure 4: Adjoining residential flat building to the north at 8 Onslow Avenue (left) and subject site (right)



Figure 5: Residential flat building opposite the site to the west at 13 Onslow Avenue (known as Meudon, right) and 15-19 Onslow Avenue (known as Elizabeth Bay Gadens, left)



Figure 6: Subject site as viewed from Billyard Avenue looking west



Figure 7: Adjoining residential flat building to the north at 21B Billyard Avenue



Figure 8: Adjoining residential flat building to the south at 23 Billyard Avenue (known as Somerset)

History Relevant to the Development Application

History of the Subject Development Application

Preliminary Assessment

16. The subject DA was lodged with Council on 14 August 2023.
17. Following the lodgement of the DA and prior to the commencement of Class 1 appeal proceedings the following was undertaken:
 - August 2023 - internal referrals to Council's Surveyor, Heritage and Urban Design, Environmental Health, Public Domain, Transport and Access, Tree Management and Waste Management Units
 - August 2023 - external referrals for comment and concurrence to Ausgrid and Water NSW
 - 22 August to 20 September - the application was notified to adjoining properties
 - 30 August and 8 September 2023 - Council sent a request requiring the submissions of information relating to solar access, flooding, stormwater, acid sulphate soils, noise and vibration, excavation and public art

- 27 October 2023 - the Applicant submitted a response to additional information, including amended plans
- 7 November 2023 - the application was presented to the Design Advisory Panel residential sub-committee

Land and Environment Court Proceedings

18. On 7 December 2023, the Applicant lodged Class 1 appeal proceedings with the Land and Environment Court (the Court) against the deemed refusal of the DA.
19. A Statement of Facts and Contentions (SOFAC) was filed by the Respondent (Council) on 30 January 2024.
20. A Section 34 Conciliation Conference was held between the parties on 12 June 2024 overseen by Commissioner Walsh. The proceedings commenced with a site inspection, where the Court and parties undertook inspection of numerous surrounding properties. A number of verbal and written submissions from objectors were also submitted to the Court. The Conciliation Conference was subsequently terminated on the 9 August 2024.
21. Amended plans to address issues raised by Council during the Section 34 Conference were provided by the applicant on a without prejudice basis on 22 July 2024.
22. The amended without prejudice proposal was re-notified to adjoining properties between 24 July and 27 August 2024.
23. On 3 September 2024, the Applicant sought leave to rely on amended plans which was granted by the Court.
24. An amended Statement of Facts and Contentions (ASOFAC) was filed by the Respondent on 11 September 2024.
25. On 24 October 2024, the Applicant again sought leave to rely on amended plans which was granted by the Court.
26. On 28 October 2024 Consent Orders were filed with the Court. The Orders outlined that the Applicant and the Respondent agreed that parties had settled all matters in dispute and that the appeal against the deemed refusal should be upheld and the amended proposal should be approved. The Consent Orders were supported by written expert evidence from the Applicant's town planner, architect and view sharing expert and the Respondent's town planner and urban designer. Relevant extracts of the written expert evidence are provided at Attachments G and H.
27. A 2-day Consent Orders hearing was heard by Commissioner Walsh in the Land and Environment Court on the 5 and 6 November 2024. Written and verbal evidence was heard from expert witnesses, in addition to numerous verbal objector submissions. A transcript of these submissions can be found at Attachment I.
28. On 19 December 2024, Commissioner Walsh determined the matter dismissing the appeal and refusing the application. In his judgement, Commissioner Walsh stated that the power to grant consent was not available under Clause 4.6 as he is not satisfied that the proposal is in the public interest, citing inconsistency with the objectives of the R1 General Residential zone as the proposal would not provide for the housing needs of the community. Commissioner Walsh also found the proposal failed on merit due to

the reduction in housing supply from 28 to 20 dwellings. The judgment can be found at Attachment E.

29. On 20 December, 2024 the Applicant filed a Section 56A appeal with the Court against the decision of Commissioner Walsh to refuse consent for the proposal. The matter was heard before Chief Judge Preston on 10 March 2025. On the 20 March 2025, Chief Judge Preston upheld the appeal and remitted the matter for determination by a different Commissioner. The Chief Judge found that the Commissioner had misconstrued the zone objectives and denied procedural fairness by raising and deciding issues that were not raised by the parties. The judgment can be found at Attachment F.
30. A second Consent Orders hearing has been set down for the 13 May 2025. At present, the application remains undetermined.
31. As the application has not yet been determined by the Court and as the original Class 1 Appeal proceedings lodged by the Applicant was against the deemed refusal of the DA, the application is still able to be determined by the Local Planning Panel.
32. In his judgement Chief Judge Preston noted that the granting of consent by Council is the first alternative course of action to resolving this appeal. Chief Judge Preston noted that as there are no remaining contested issues it is within Council's power to determine the DA in the terms the Council had already agreed to in the Consent Orders. Chief Judge Preston specifically noted that this option was preferable to a second Court hearing, and if action was not taken by Council to determine the application outside of the Court, it would be fair and reasonable for both the Applicant and the Court to make a costs order against Council.

Other Relevant Development Applications

33. The following applications are relevant to the current proposal:
 - **PDA/2023/57** – Pre-DA was issued on 6 April 2023 on a preliminary scheme for the subject proposal. Council provided advice in relation to demolition, building separation, materiality, building height, waste, common open space, and solar access.
 - **D/2019/665** – Development consent was granted by the Local Planning Panel on 12 August 2020 for alterations and additions to the existing residential flat building comprising an additional storey to the Onslow Avenue building containing a new living space and outdoor terrace to Unit No. 11.

Compliance Action

34. The site is not subject to current compliance action.

Amendments

35. The proposal has been the subject of numerous amendments during the Court appeal process. The primary amendments, as they relate to the building design, are summarised below:
 - Increased front setback to Onslow Avenue by 1.8m
 - Increased front setback to Billyard Avenue by 1m

- Addition of communal open space to Onslow building rooftop with shared facilities and shade structures
- New basement level to Onslow building containing internal communal spaces
- Extension of rooftop communal open space on Billyard building and addition of shade structures
- Solar panels relocated to Onslow building
- Billyard building bin store relocated to basement, temporary bin holding remaining along west setback
- Communal gardens introduced on Billyard building ground floor within side setbacks
- Permeable stone introduced in deep soil areas
- Introduction of new retaining walls within the site along east and west property boundaries
- Splayed balconies and building cutbacks introduced to both buildings to increase solar access to adjoining properties
- Horizontal privacy screens added to building indents to both buildings
- Internal layout changes including a reduction in units from 22 to 20
- Removal of gas metres to a fully electric building

Proposed Development

36. The amended application seeks consent for the following:

- (a) Site preparation works including:
 - (i) demolition of the existing residential flat buildings
 - (ii) removal of 16 on-site trees
 - (iii) excavation and earthworks
- (b) Construction and use of two residential flat buildings comprising a total of 20 apartments including:

Eight storey building fronting Onslow Avenue

 - (i) Lower ground 2 - 2 x three-bedroom apartments, common lift and lobby, fire stairs
 - (ii) Lower ground 1 - 2 x three-bedroom apartments, common lift and lobby, fire stairs

- (iii) Ground - 1 x two-bedroom apartment, 1 x three-bedroom apartment, residential pedestrian entry, common lift and lobby including mailboxes, fire stairs
- (iv) Levels 1 to 3 - 2 x three-bedroom apartments, common lift and lobby, fire stairs on each level
- (v) Level 4 - lower level of three-bedroom penthouse with internal private stairs and lift, communal lift and lobby, fire stairs
- (vi) Level 5 - upper level of penthouse with private rooftop terrace, communal rooftop terrace, common lift and lobby, fire stairs
- (vii) Roof - common lift overrun, photovoltaics

Five storey building fronting Billyard Avenue

- (viii) Ground - 1 x three-bedroom apartment, residential pedestrian entry including public art wall and mailboxes, common lift and lobby, fire stairs, driveway to basement levels and waste storage area
 - (ix) Level 1 - 2 x three-bedroom apartments, common lift and lobby, fire stairs
 - (x) Level 2 - 1 x two-bedroom apartment and 1 three-bedroom apartment, common lift and lobby, fire stairs
 - (xi) Level 3 - 1 x four-bedroom apartment, common lift and lobby, fire stairs
 - (xii) Level 4 - 1 x three-bedroom apartment, common lift and lobby, fire stairs
 - (xiii) Roof - communal open space, common lift, fire stairs, plant room
- (c) Construction of a shared basement structure underneath the Onslow Avenue building, which is accessed via Billyard Avenue comprising:
- (i) Basement 8 - gymnasium, meeting room, music room, geothermal plant, hydrant plant room, fire tank, fire pump, common lift, fire stairs
 - (ii) Basement 6/7 - 11 resident car parking spaces, bicycle spaces, storage cages, common lift, fire stairs
 - (iii) Basement 4/5 - driveway entry, 3 resident car parking spaces, 1 service vehicle/car wash bay, motorbike parking, bicycle spaces, storage cages, waste storage, common lift, fire stairs
 - (iv) Basement 2/3 - 3 resident parking spaces, 3 visitor parking spaces, visitor bicycle spaces, storage cages, common lift, fire stairs
 - (v) Basement 1 - 4 resident parking spaces, motorbike parking, bicycle spaces, storage cages, common lift, fire stairs
- (d) Associated landscape works, including planter boxes and the planting of 20 new trees
- (e) Extension and augmentation of services/utilities and stormwater infrastructure as required

37. Photomontages of the proposed development are provided below. Detailed drawings of the proposal are provided in Attachment B.



Figure 9: Proposed photomontage - Billyard Avenue



Figure 10: Proposed photomontage - Onslow Avenue

Assessment

38. The proposed development has been assessed under Section 4.15 of the Environmental Planning and Assessment Act 1979 (EP&A Act).

State Environmental Planning Policies

State Environmental Planning Policy (Resilience and Hazards) 2021 – Chapter 4

Remediation of Land

32. The aim of SEPP (Resilience and Hazards) 2021 – Chapter 4 Remediation of Land is to ensure that a change of land use will not increase the risk to health, particularly in circumstances where a more sensitive land use is proposed.
33. Preliminary and detailed site investigations did not identify any contaminants on the site. The investigations conclude that further assessment/remediation is not needed, and the site is suitable for ongoing residential use.
34. The Council's Health Unit is satisfied that, subject to conditions, the site can be made suitable for the proposed use.

State Environmental Planning Policy (Housing) 2021

Chapter 4 - Design of Residential Apartment Development

35. The aim of Chapter 4 (previously SEPP 65) is to improve the design quality of residential apartment development in New South Wales.
36. When determining an application for a residential flat development of three or more floors and containing four or more apartments, the SEPP requires the consent authority take into consideration a number of matters relating to design quality, including the design quality principles as set out in Schedule 9.
37. The applicant has submitted a design verification statement and design report prepared by registered architects William Smart (6381) and Christina Markham (5569) with the application, addressing the design quality principles and the objectives of parts 3 and 4 of the Apartment Design Guide. The statement is deemed to satisfy Clause 29 of the Environmental Planning and Assessment Regulation 2021.
38. An assessment of the proposal against the design quality is provided as follows:
- (a) Principle 1: Context and Neighbourhood Character
- The site is located in the dense urban area of Elizabeth Bay. The surrounding context comprises a mix of heritage buildings and newer buildings that do not readily contribute to the conservation area. The buildings in immediate proximity to the site are of various heights, scales and architectural languages.
 - The proposal presents a contemporary and contextually fitting addition to the street streetscape and conservation area.
- (b) Principle 2: Built Form and Scale

- The development responds to the natural slope of the site, by stepping and separating the building form. It considers the urban built character of the area and immediate neighbouring properties in terms of scale, setbacks, openings, streetscape and height in storeys.
- The sites frontage faces perpendicular to the street and blank screened walls parallel to properties provide visual privacy to neighbours and development. Primary living areas are orientated to face the street, whilst secondary living areas are located behind screened walls.
- Terracing and building separation have been provided to ensure minimal solar impact to neighbouring properties.

(c) Principle 3: Density

- The proposal is located in a R1 General Residential zone with an FSR of 4.5:1.
- The proposal complies with the maximum permitted FSR that applies to the site and provides an overall density that is consistent with that envisaged under the relevant planning controls.

(d) Principle 4: Sustainability

- The submitted BASIX certificates confirm that the proposed development will meet and exceed the NSW government's requirements for sustainability.
- The development has a predominant northerly aspect, enabling apartments to receive adequate levels of solar access and natural cross ventilation.

(e) Principle 5: Landscape

- The proposal complies with the relevant deep soil, landscaping and canopy cover requirements. Detailed landscaping plans have been submitted that show appropriate planting species both within deep soil areas as well as on-structure, that will contribute to the greening of the site.

(f) Principle 6: Amenity

- A high level of amenity is provided through the provision of larger than minimum unit areas and layouts, adequate access to sunlight and natural cross ventilation, high levels of visual and acoustic privacy, and well-designed internal common and communal open space areas. Each apartment has storage equal to, or in excess of, the ADG requirements.

(g) Principle 7: Safety

- The proposal is generally consistent with the relevant principles of Crime Prevention through Environmental Design (CPTED).
- Safety and security are promoted internally and for the public domain with clear, identifiable entry points for each building.

(h) Principle 8: Housing Diversity and Social Interaction

- The development provides 2 two-bedroom apartments, 17 three-bedroom apartments and 1 four-bedroom apartment.
- The proposal replaces an ageing building with new housing with a mix of 2, 3 and 4 bedroom apartments.
- The proposed unit mix is consistent with the mix controls in the DCP which allow for 100% 3+ bedroom apartments.

(i) Principle 9: Aesthetics

- The proposal provides high-quality buildings that provide a positive contribution to the streetscape and the broader Elizabeth Bay area.
- The architectural expression and materiality of the new building draws inspiration from the various materials textures and colours of the heritage conservation area and interprets these elements in a contemporary manner.

39. The development is acceptable when assessed against the SEPP including the above stated principles and the associated Apartment Design Guide (ADG). These controls are generally replicated within the apartment design controls under the Sydney Development Control Plan 2012. Consequently compliance with the SEPP generally implies compliance with Council's own controls. A detailed assessment of the proposal against the ADG is provided below.

| 3A Site Analysis | Compliance | Comment |
|--|------------|--|
| Site analysis illustrates that design decisions have been based on opportunities and constraints of the site conditions and their relationship to the surrounding context. | Yes | A site analysis, which includes the opportunities and constraints of the site and details of the surrounding development, accompanies the application. |

| 3B Orientation | Compliance | Comment |
|--|------------|--|
| Building types and layouts respond to the streetscape and site while optimising solar access within the development. | Yes | The layout of the apartments responds appropriately to the streetscape and orientation of the site, while optimising solar access to the internal living areas and private open space areas. |
| Overshadowing of neighbouring properties is minimised during mid-winter. | | The proposal does not result in any unreasonable overshadowing impacts to neighbouring properties. |

| 3C Public Domain Interface | Compliance | Comment |
|---|------------|---|
| <p>Transition between private and public domain is achieved without compromising safety and security.</p> <p>Amenity of the public domain is retained and enhanced.</p> | Yes | <p>Secure residential entries are proposed from both street frontages.</p> <p>The proposal responds to each streetscape through the addition of landscaping and appropriate materials that enhance the public domain interface.</p> |

| 3D Communal and Public Open Space | Compliance | Comment |
|--|------------|---|
| Communal open space has a minimum area equal to 25% of the site. | Yes | <p>178sqm of communal open space is proposed on the roof top of the Billyard building and 57sqm is proposed on the roof top of the Onslow building.</p> <p>Additional communal open space is also provided in the ground floor setback areas adjacent to the Billyard building (194sqm).</p> <p>The total area of the communal open space is equivalent to 429sqm, which is 29% of site area.</p> |
| Developments achieve a minimum of 50% direct sunlight to the principal usable part of the communal open space for a minimum of two (2) hours between 9am and 3pm on 21 June (midwinter). | Yes | Adequate solar access is provided to the primary rooftop communal open space areas. |

| 3E Deep Soil Zones | Compliance | Comment |
|--|------------|--|
| Deep soil zones are to have a minimum area equivalent to 7% of the site and have a minimum dimension of 3m | Yes | A total of 162.5sqm of deep soil area is provided which equates to 11.1% of the site area. |

| 3F Visual Privacy | Compliance | Comment |
|--|------------|--|
| <p>Up to four storeys (12 metres):</p> <ul style="list-style-type: none"> 6m between habitable rooms / balconies 3m between non-habitable rooms <p>Five to eight storeys (25 metres):</p> <ul style="list-style-type: none"> 9m between habitable rooms / balconies 4.5m between non-habitable rooms | Acceptable | <p>Side setbacks of between 3.02m to 5m are provided to the north western and south eastern property boundaries.</p> <p>While the separation distances do not meet the design guidance in Part 3F of the ADG, the proposal seeks to provide an equitable share of separation, with generally greater setbacks provided compared with neighbours.</p> <p>See further assessment under the 'Discussion' heading.</p> |
| Bedrooms, living spaces and other habitable rooms should be separated from gallery access and other open circulation space by the apartment's service areas. | Yes | Habitable rooms are appropriately separated from common circulation spaces. |

| 4A Solar and Daylight Access | Compliance | Comment |
|---|------------|--|
| 70% of units to receive a minimum of 2 hours of direct sunlight in midwinter to living rooms and private open spaces. | Yes | 19 of the 20 apartments (95%) receive a minimum of 2 hours' direct sunlight during mid-winter. |
| Maximum of 15% of apartments in a building receive no direct sunlight between 9am and 3pm at midwinter. | Yes | None of the apartments receive no direct sunlight. |

| 4B Natural Ventilation | Compliance | Comment |
|---|------------|--|
| All habitable rooms are naturally ventilated. | Yes | All habitable rooms can be naturally ventilated when doors/windows are open. |

| 4B Natural Ventilation | Compliance | Comment |
|---|------------|--|
| Minimum 60% of apartments in the first nine (9) storeys of the building are naturally cross ventilated. | Yes | 100% of the apartments are naturally cross ventilated. |

| 4C Ceiling Heights | Compliance | Comment |
|--|------------|--|
| Habitable rooms: 2.7m Non-habitable rooms: 2.4m | Yes | All floor are provided with a minimum floor to floor height of 3.1m, which are capable of achieving a minimum 2.7 floor to ceiling height. |

| 4D Apartment Size and Layout | Compliance | Comment |
|--|------------|---|
| <p>Minimum unit sizes:</p> <ul style="list-style-type: none"> 2 bed: 70sqm 3 bed: 90sqm <p>The minimum internal areas include only one bathroom. Additional bathrooms increase the minimum internal area by 5sqm each.</p> <p>A fourth bedroom and further additional bedrooms increase the minimum internal area by 12sqm each.</p> | Yes | <p>The proposed apartments comply or exceed the minimum size and layout requirements, with approximate internal areas as follows:</p> <ul style="list-style-type: none"> 2 bed apartments - between 84sqm and 116sqm 3 bed apartment - between 129sqm - 217sqm 4 bed apartments - 206sqm |
| Every habitable room is to have a window in an external wall with a minimum glass area of 10% of the floor area of the room. | Yes | All habitable rooms have at least 1 window in an external wall with a minimum area of 10% of the floor area of the room. |
| Habitable room depths are to be no more than 2.5 x the ceiling height. | Yes | The depth of the habitable rooms does not exceed 2.5 x the ceiling height. |

| 4D Apartment Size and Layout | Compliance | Comment |
|--|-------------------|--|
| 8m maximum depth for open plan layouts for habitable rooms. | Yes | The maximum depth of the open plan apartment layouts does not exceed 8 metres from a window or door opening. |
| Minimum area for bedrooms (excluding wardrobes): <ul style="list-style-type: none"> • master bedroom: 10sqm • all other bedrooms: 9sqm Minimum dimension of any bedroom is 3m (excluding wardrobes). | Yes | The bedrooms achieve or exceed the minimum area and dimension requirements. |
| Living and living/dining rooms minimum widths: <ul style="list-style-type: none"> • Two-bedroom or more: 4m | Yes | The proposed apartments have living areas that exceed the minimum width requirements. |

| 4E Private Open Space and Balconies | Compliance | Comment |
|--|-------------------|---|
| Two bed apartments are to have a minimum balcony area of 10sqm with a minimum depth of 2m. Three bed apartments are to have a minimum balcony area of 12sqm with a minimum depth of 2.4m. Private open space for apartments on ground level, on a podium, or similar, must have a minimum area of 15sqm and a minimum depth of 3m. | Yes | All balconies meet or exceed the minimum area and depth requirements. |

| 4F Common Circulation and Spaces | Compliance | Comment |
|---|-------------------|---|
| The maximum number of apartments off a circulation core on a single level is 8. | Yes | A maximum of 2 apartments are accessed off a circulation core at each level. |
| Primary living room or bedroom windows should not open directly onto common circulation spaces, whether open or enclosed. Visual and acoustic privacy from common circulation spaces to any other rooms should be carefully controlled. | Yes | No windows open directly onto a common circulation space. The design and layout of the apartments have been designed to maximise the future occupants visual and acoustic privacy. |

| 4G Storage | Compliance | Comment |
|--|-------------------|--|
| <p>Minimum storage provision facilities:</p> <ul style="list-style-type: none"> • 2 bed: 8m³ • 3 bed: 10m³ <p>(Minimum 50% storage area located within unit)</p> | Yes | Storage, in compliance with the minimum requirement, has been provided within each apartment as well as within secure storage cages at the basement level. |

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

40. The State Environmental Planning Policy (Sustainable Buildings) 2022 contains savings and transitional provisions which state that the former provisions of a repealed instrument, in this case SEPP BASIX 2004, apply to DAs made, but not determined, before 1 October 2023. As the subject DA was made and not determined prior to this date, the SEPP BASIX 2004 applies to this application.
41. The aim of the SEPP BASIX is to encourage sustainable residential development. BASIX Certificates, a Nationwide House Energy Rating Scheme (NatHERS) Certificate and NatHERS stamped plans form part of the amended proposal.
42. A condition of consent is recommended ensuring the measures detailed in the BASIX certificate are implemented.

State Environmental Planning Policy (Transport and Infrastructure) 2021

43. The provisions of SEPP (Transport and Infrastructure) 2021 have been considered in the assessment of the development application.

Division 5, Subdivision 2: Development likely to affect an electricity transmission or distribution network**Clause 2.48 Determination of development applications – other development**

44. The application is subject to Clause 2.48 of the SEPP as the development involves the penetration of ground within 2m of an underground electricity power line.
45. As such, the application was referred to Ausgrid for a period of 21 days and no objection was raised.

Sydney Environmental Planning Policy (Biodiversity and Conservation) 2021**Chapter 2 (Vegetation in Non Rural Areas) 2017**

46. The proposal includes the clearing of vegetation in a non-rural area and as such is subject to this SEPP.
47. The SEPP states that the Council must not grant consent for the removal of vegetation within heritage conservation areas unless Council is satisfied that the activity is minor in nature and would not impact the heritage significance of the site.
48. The proposal includes the removal of all trees within the site. This tree removal is offset through the planting of advanced size new trees in deep soil and in on-structure planters.
49. Amended landscape plans show that proposed shade resistant canopy trees are co-located with deep soil areas, which will achieve a canopy coverage of 17% of the site area.
50. An Arboricultural Impact Assessment report was submitted which recommends measures to be undertaken to protect adjoining trees. Conditions of consent are recommended to ensure that existing street trees and trees located on adjoining properties are retained and protected throughout demolition, excavation and construction in accordance with the Applicant's Arboricultural Impact Assessment.

Chapter 6 Water Catchments

51. The site is located within the designated hydrological catchment of Sydney Harbour and is subject to the provisions of the above SEPP. The SEPP requires the Sydney Harbour Catchment Planning Principles to be considered in the carrying out of development within the catchment.
52. The site is within the Sydney Harbour Catchment and eventually drains into Sydney Harbour. However, the site is not located in the Foreshores Waterways Area or adjacent to a waterway and therefore, with the exception of the objective of improved water quality, the objectives of the SEPP are not applicable to the proposed development.
53. Standard conditions of consent are recommended to ensure that appropriate stormwater controls are implemented.

Local Environmental Plans

Sydney Local Environmental Plan 2012

54. An assessment of the proposed development against the relevant provisions of the Sydney Local Environmental Plan 2012 is provided in the following sections.

Part 2 Permitted or prohibited development

| Provision | Compliance | Comment |
|--|------------|---|
| 2.3 Zone objectives and Land Use Table | Yes | <p>The site is located in the R1 General Residential zone. The proposed development is defined as a residential flat building and is permissible with consent in the zone. The proposal meets the objectives of the zone.</p> <p>See further details in the 'Discussion' section below.</p> |

Part 4 Principal development standards

| Provision | Compliance | Comment |
|---|------------|---|
| <p>4.3 Height of buildings</p> <p>4.6 Exceptions to development standards</p> | No | <p>Maximum building heights are permitted as follows:</p> <ul style="list-style-type: none"> Billyard Avenue - 15m Onslow Avenue - 22m <p>Heights are proposed as follows:</p> <ul style="list-style-type: none"> Billyard Avenue building - 18m (20% variation) Onslow Avenue building - 25.5m (15.9% variation) <p>The proposed development does not comply with the maximum height of buildings development standard.</p> <p>A request to vary the height of buildings development standard in accordance with Clause 4.6 has been submitted. See further details in the 'Discussion' section below.</p> |
| 4.4 Floor space ratio | Yes | <p>A maximum floor space ratio of 4.5:1 or 6,588sqm is permitted.</p> <p>A floor space ratio of 2.59:1 or 3,805sqm is proposed.</p> |

| Provision | Compliance | Comment |
|-----------|------------|--|
| | | The proposed development complies with the maximum floor space ratio development standard. |

Part 5 Miscellaneous provisions

| Provision | Compliance | Comment |
|----------------------------|------------|--|
| 5.10 Heritage conservation | Yes | <p>The site is located within the Elizabeth Bay and Rushcutters Bay HCA.</p> <p>A heritage impact assessment accompanies the DA. The proposed development, in its amended form, will not have detrimental impact on the significance of the heritage conservation area or nearby heritage items.</p> |

Part 6 Local provisions – height and floor space

| Provision | Compliance | Comment |
|--|------------|--|
| Division 4 Design excellence | | |
| 6.21C Design excellence | Yes | <p>The proposal is satisfactory with regard to the matters at clause 6.21C(2) of the LEP and is considered to exhibit design excellence.</p> <p>See further details in the 'Discussion' section below.</p> |
| 6.21D Design excellence 7.20 Preparation of a DCP | Acceptable | <p>Clause 6.21D states that development consent must not be granted unless a competitive design process has been held in relation to buildings greater than 25m outside Central Sydney.</p> <p>In addition, Clause 7.20 of the SLEP 2012 requires preparation of a site specific DCP where a building exceeds 25m outside Central Sydney.</p> <p>The Onslow building exceeds the 25m control by 0.5m.</p> <p>Clause 6.21D(2) states that a competitive design process is not required if the consent authority is satisfied that such a process would be</p> |

| Provision | Compliance | Comment |
|-----------|------------|---|
| | | <p>unreasonable or unnecessary in the circumstances.</p> <p>CI 7.20(3) states that a site specific DCP is not required if the consent authority is satisfied that such a process would be unreasonable or unnecessary in the circumstances.</p> <p>As the exceedance only relates to 0.5m of the top of the lift overrun on the Onslow Avenue building and as the proposed building is considered to achieve design excellence, a design competition and site specific DCP is considered unreasonable and unnecessary in the circumstances.</p> |

Part 7 Local provisions – general

| Provision | Compliance | Comment |
|---|------------|--|
| Division 1 Car parking ancillary to other development | | |
| 7.5 Residential flat buildings, dual occupancies and multi dwelling housing | Yes | <p>The proposal is in Category B land and is permitted a maximum of 24 car parking spaces.</p> <p>The proposed development includes 24 car parking spaces (21 resident and 3 visitor) and complies with the relevant development standards.</p> |
| Division 3 Affordable housing | | |
| 7.13 Contribution for purpose of affordable housing | Yes | <p>The application will result in the creation of more than 200 square metres of new residential GFA. The development is therefore subject to an affordable housing contribution.</p> <p>See further details in the 'Financial Contributions' section below.</p> |
| Division 4 Miscellaneous | | |
| 7.14 Acid Sulfate Soils | Yes | <p>The site is located on class 5 land and is within 500m of class 2 land.</p> <p>The proposed excavation for the basement will not result in the water</p> |

| Provision | Compliance | Comment |
|---------------------|------------|---|
| | | <p>table being lowered below 1 metre Australian Height Datum (AHD).</p> <p>An Acid Sulfate Soils Management Plan is therefore not required.</p> |
| 7.15 Flood planning | Yes | <p>A Site-Specific Flood Risk Management Report was prepared for the proposal in accordance with the City of Sydney Interim Floodplain Management Policy.</p> <p>The report identifies that the site is subject to upstream flows entering from Onslow Avenue. Recommended flood mitigation measures involve the inclusion of an elevated crest, habitable floor levels and a retaining wall along the Onslow Avenue frontage.</p> <p>The report also identifies that the site is subject to basement flooding with flood waters entering from Billyard Avenue. Recommended flood mitigation measures include elevated driveway crest levels, a flood gate and recommended habitable floor levels.</p> <p>The amended proposal incorporates the above recommendations including specified crest levels, habitable floor levels and a flood gate to the Billyard Avenue frontage.</p> <p>The proposal has been reviewed by Council's Public Domain Unit, who is satisfied that the flooding impacts can be managed. Appropriate conditions have been recommended in this regard.</p> |

Development Control Plans

Sydney Development Control Plan 2012

55. An assessment of the proposed development against the relevant provisions within the Sydney Development Control Plan 2012 is provided in the following sections.

Section 2 – Locality Statements

56. The site is located within The Bays locality. The proposed development is in keeping with the unique character and the design principles of The Bays locality and responds

to and compliments surrounding heritage items, contributory buildings and streetscapes as follows:

- (a) The proposed brick detailing provides subtle decoration and architectural expression to the facades. This is a contemporary interpretation of the adornment that is typical of surrounding inter-war apartment buildings.
- (b) The form and design of the proposed buildings, including the curved balconies (to Billyard Avenue) and solid to void ratio, with rectangular windows within solid walls (to Onslow Avenue) respond to characteristic architectural features.
- (c) The proposed buildings are considered to sit well in their streetscapes. The building to Onslow Avenue is perceived as 6 storeys within the streetscape. The building has a further 2 storeys below street level, which is characteristic in this location and is not perceptible in the streetscape.

Section 3 – General Provisions

| Provision | Compliance | Comment |
|--|------------|--|
| 3.1 Public Domain Elements | Yes | A Preliminary Public Art Plan has been submitted with the proposal and review by Council's Public Art Unit. Conditions have been imposed requiring submission of a detailed public art plan prior to the issue of a construction certificate. |
| 3.2. Defining the Public Domain | Yes | As outlined in the View Sharing Report in Attachment D, the buildings will not unreasonably impede views from the public domain to Sydney Harbour. |
| 3.5 Urban Ecology | Yes | A total of 16 trees are proposed to be removed and replaced with suitable shade tolerant species. Landscape plans provided show that proposed planting will exceed the 15% DCP canopy requirement at 17%. Appropriate conditions have been imposed to ensure the protection of trees located within adjoining properties and the public domain. Refer to Biodiversity and Conservation SEPP discussion. |
| 3.6 Ecologically Sustainable Development | Yes | The proposal satisfies BASIX and environmental requirements. Refer to BASIX SEPP discussion. |

| Provision | Compliance | Comment |
|---|------------|---|
| 3.7 Water and Flood Management | Yes | <p>The site is identified as being on flood prone land. See discussion under section 7.15 above.</p> <p>A Stormwater Management and WSUD report has been prepared for the proposal, which demonstrates that post-development pollutant load standards can comply with the DCP control and the proposed WSUD measures can achieve intended targets.</p> |
| 3.8 Subdivision, Strata Subdivision and Consolidation | Yes | <p>There is an existing covenant on title (restricting building height on a portion of the site) which was registered in 1957. It is proposed that this covenant will be extinguished via NSW Land Registry Services.</p> <p>The application was referred to Council's Specialist Surveyor, who supported the proposal, subject to condition of consent.</p> |
| 3.9 Heritage | Yes | <p>The site is located within the Elizabeth Bay and Rushcutters Bay HCA and is identified as a neutral building.</p> <p>The existing neutral building does not make a positive contribution to the established character, setting, or significance of the Elizabeth and Rushcutters Bays HCA. Its proposed demolition would therefore not adversely impact the established significance of the HCA.</p> <p>The proposed brick facade demonstrates a sympathetic response to traditional materials and finishes and take cues from adjoining Inter-War residential flat buildings. This will enable the new development to present as a sympathetic contemporary infill building within the setting of the HCA.</p> <p>The proposed replacement building meets the requirements of infill buildings in HCAs as outlined in the Sydney DCP 2012 (including those related to siting, external form, character, and detailing).</p> |

| Provision | Compliance | Comment |
|--|------------|--|
| | | The proposal has been reviewed by Council's Heritage Specialist, who is supports the proposal, subject to conditions. |
| 3.11 Transport and Parking | Yes | <p>In accordance with the DCP, the proposal provides:</p> <ul style="list-style-type: none"> • a consolidated 3m wide vehicle access via Billyard Avenue • 1 service vehicle/car wash space • storage area for 24 bicycle spaces (22 residential and 2 visitor) • 3 motorbike parking spaces |
| 3.12 Accessible Design | Yes | A DDA report accompanies the DA and confirms that the proposal can comply with the relevant access standards and requirements. |
| 3.13 Social and Environmental Responsibilities | Yes | The proposed development provides adequate passive surveillance and is generally designed in accordance with the CPTED principles. |
| 3.14 Waste | Yes | <p>Adequate waste storage areas have been provided within the basement for residential waste and bulky waste storage.</p> <p>All waste is to be collected from Billyard Avenue from a waste holding area within the west setback. Bins will be transferred to the holding area by building management prior to the collection by Council's waste services.</p> <p>Condition have been recommended to ensure the proposed development complies with the relevant provisions of the City of Sydney Guidelines for Waste Management in New Development.</p> |

Section 4 – Development Types

4.2 Residential Flat, Commercial and Mixed Use Developments

57. The Housing SEPP 2021 states that any DCP requirement, standard or control for residential apartment development relating to the matters listed at section 149 of the SEPP has no effect if the ADG also specifies a requirement, standard or control in

relation to the same matter. As such, this assessment has not been reproduced below. See responses within the ADG table above for assessment of visual privacy, solar access, common circulation, apartment size, private open space, natural ventilation and storage.

| Provision | Compliance | Comment |
|---|--------------------|---|
| 4.2.1 Building height | | |
| 4.2.1.1 Height in storeys and street frontage height in storeys | Partial compliance | <p>The site is permitted a maximum building height of 6 storeys. There is no site specific street frontage height control in the DCP for either street frontage.</p> <p>The Billyard Avenue building is 5 storeys and the Onslow Avenue building is part 6 part 8 storeys in height.</p> <p>The proposed buildings are considered to sit well in their streetscapes and appropriately addresses the street frontage.</p> <p>The building to Onslow Avenue is perceived as 6 storeys within the streetscape, with building articulation at 4 storeys to break down the perceived scale. The building has a further 2 storeys below street level, which is characteristic in this location and is not perceptible in the streetscape. The 8 storey portion of the building located in the middle of the building is not readily perceived from the street.</p> <p>It is noted that the proposed Billyard Avenue building is a storey lower than the control, to better address the streetscape and other constraints of the site.</p> |
| 4.2.3 Amenity | | |
| 4.2.3.1 Solar access | Yes | Proposed overshadowing to neighbouring properties complies with the solar access requirements of the DCP. See also further details in the 'Discussion' section below. |
| 4.2.3.5 Landscaping | Yes | Detailed landscape plans have been submitted as part of the proposal showing proposed shade resistant |

| Provision | Compliance | Comment |
|--|------------|---|
| | | canopy trees co-located with deep soil areas as well as on-structure planting that will provide appropriate amenity to roof top communal open space areas. Details of fencing, retaining walls and paving have also been provided. |
| 4.2.3.10 Outlook | Yes | <p>The proposal will improve the outlook from the buildings onsite by orientation all living spaces to the north.</p> <p>The proposal ensures that there are no unreasonable privacy impacts to adjoining properties. See further details in the 'Discussion' section below.</p> |
| 4.2.3.11 Acoustic privacy | Yes | An acoustic report has been submitted that recommends appropriate noise attenuation measures to ensure acoustic privacy to the proposed dwellings can be maintained. |
| 4.2.3.12 Flexible housing and dwelling mix | Yes | <p>As the development incorporates only 20 dwellings, the dwelling mix provisions of section 4.2.3.12 technically do not apply in this case.</p> <p>Notwithstanding, the proposed unit mix is consistent with the mix controls in the DCP which allow for up to 100% 3+ bedroom apartments. The proposal provides 10% 2 bedroom apartments and 90% 3+ bedroom apartments.</p> |
| 4.2.5 Types of development 4.2.5.4 Residential uses on the ground and first floor | Yes | <p>Ground floor apartments have been designed with landscaped setbacks and are level with the public domain where site conditions allow.</p> <p>Balustrades at the ground floor have been designed to reinforce the desired rhythm of the proposed massing and allowing for passive surveillance, balanced with integrated landscaping to offer privacy from the street.</p> |
| 4.2.6 Waste and recycling Management | Yes | See response under section 3.14 of the DCP above. |

| Provision | Compliance | Comment |
|--|------------|---|
| 4.2.7 Heating and cooling infrastructure | Yes | Proposed infrastructure including a geothermal plant, hydrant plant room, fire tank and fire pump has been centrally located in the basement of the building. |
| 4.2.8 Letterboxes | Yes | Letterboxes are provided within the common entry/lobby of each building. A condition has been recommended to ensure that they are installed with non-master key locks for security. |

Discussion

Land and Environment Court Appeals and Judgements

58. As outlined in the 'Land and Environment Court Proceedings' section above, on 19 December 2024, Commissioner Walsh refused the subject development application following a 2-day Consent Orders hearing in the Land and Environment Court.
59. In his judgement, Commissioner Walsh stated that the power to grant consent was not available under Clause 4.6 as he could not be satisfied that the proposal is in the public interest, citing inconsistency with the objectives of the R1 General Residential zone as the proposal would not provide for the housing needs of the community. Commissioner Walsh also found the proposal failed on merit due to the reduction in housing supply from 28 to 20 dwellings. The judgment can be found at Attachment E.
60. However, in a subsequent appeal to that decision lodged by the Applicant, Chief Judge Preston overturned Walsh's decision and remitted the matter for determination by a different Commissioner.
61. In his judgement, Chief Judge Preston found that Commissioner Walsh had misconstrued the zone objectives and denied procedural fairness by raising and deciding issues that were not raised by the parties. The judgment can be found at Attachment F.
62. A summary of Chief Judge Preston's judgment is outlined below.

Misconstruction of zone objectives

63. The applicant's first and second grounds of appeal against Commission Walsh's decision relate to the misconstruction of the zone objectives and the subsequent reliance on the misconstrued zone interpretation in the decision-making process.
64. The objectives of the R1 General Residential zone within SLEP 2012 are as follows:
To provide for the housing needs of the community.
To provide for a variety of housing types and densities.

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

To maintain the existing land use pattern of predominantly residential uses.

65. In his judgement, Chief Judge Preston upheld the Applicant's appeal and found that the Commissioner misconstrued the zone objectives which caused his decision that the proposed development is inconsistent with the zone objectives to miscarry. In short, Chief Judge Preston found that Commissioner made numerous legal errors regarding zone objectives, in particular the first zone objective, as follows:
- (a) In attempting to understand the meaning of the zone objective, the Commissioner misunderstood the process of statutory interpretation by relying on interpretation derived from people's opinions (being the expert's evidence and objectors lay evidence) as to whether the proposal was consistent (or not) with the zone objectives. As statutory interpretation is not a matter of evidence, but rather a question of law, the evidentiary rather than legal approach to the construction of the objectives was an error.
 - (b) By relying on an evidentiary approach, the Commissioner never correctly interprets the meaning of the zone objectives and as such, does not correctly identify how the proposal is consistent (or not) with zone objectives. The Commissioners analysis of the text, context and mischief of the zone objectives was therefore undermined by his conflation of the issues of interpretation and application of the first zone objective.
 - (c) The Commissioner incorrectly applies a mischief to the first zone objective. As outlined by the Commissioner, the mischief, or the 'problem' the first zone objective is trying to solve, is the provision of housing for the community and more broadly the solving of housing market issues including housing supply, accessibility and affordability.
 - (d) The Commissioner incorrectly relies on the opinions of the experts and the objectors that the proposal solves (or in the case of the objectors, does not solve) the problem of providing for the housing needs of the community.
 - (e) The Commissioners analysis of the text of the first objective was contrary to the orthodox statutory interpretation of text in several ways.
66. In paragraphs 66 to 72 of his judgement, Chief Judge Preston offers an explanation of how the proposal is consistent with the first objective of the residential zone, summarised as follows:
- (a) The first objective is a prescribed objective of the R1 General Residential zone under the Standard Instrument and is required in all local environmental plans. It is not tailored in any way to the SLEP 2012.
 - (b) The first zone objective is expressed in general terms. This contrasts with the first zone objective of the R2, R3 and R4 residential zones. In those zones the objectives begin in same way '*to provide for the housing needs of the community*' however the other residential zones add qualifications '*within a low density (or medium density or high density) residential environment*'. The first zone objective therefore essentially describes the purpose of the zone.

- (c) Each residential zone prescribes different types of permissible residential development, with permissibility being a key method by which each residential zone provides for the housing needs of the community. In contrast to the other residential zones which are more specific as to the intended densities of development permitted, the R1 General Residential zone provides for a wide range of housing types, including residential uses from low density to medium density to high density residential development. This wide range of housing types provides for the housing needs of a diverse range of people in the community.
- (d) The reason Commissioner Walsh gave that the proposal was inconsistent with the first zone objective is as follows:

'This is because the proposed development would (1) decrease housing provision overall, (2) decrease the availability of more affordable housing. Each of these aspects of the proposal work against the first R1 zone objective of 'providing for the housing needs of the community'.'

- (e) As Chief Judge Preston finds, the first zone objective is an explanation of the purpose of the zone. It is not, as Commissioner Walsh interprets, seeking to solve a mischief for which a remedy is required. Specifically, Commissioner Walsh misconstrues that in providing for the housing needs of the community, the proposal must address deep-seated problems with the housing market of providing adequate housing stock, accessibility of housing and housing affordability.
- (f) Chief Judge Preston concludes that by misconstruing the first objective of the zone, the finding that the proposal is not consistent with that zone objective is a miscarry, and this error undermines the Commissioner's conclusion that the proposal is inconsistent with the first objective.

67. In light of Commissioner Walsh's errors and decision being subsequently overturned, the Commissioner's opinion that the proposal does not meet the zone objectives cannot be relied on. Therefore, the Panel can be satisfied that the proposed development is consistent with the objectives of the R1 General Residential zone. See further discussion under the 'Clause 4.6' section below.

Denial of procedural fairness

68. The Applicant's third and fourth grounds of appeal against Commissioner Walsh's decision relate to procedural fairness. As outlined by Chief Judge Preston:

There will be a denial of procedural fairness, first where a court determines a matter on a basis that was not in issue or argued in the proceedings.....and, secondly, where information is used by a decision-maker in a way that could not reasonably be expected by one party and that party is not given an opportunity to respond to that use...

69. Throughout the appeal process numerous amendments were made to the proposal and additional information was supplied. These amendments satisfied the Respondent (Council) that all of its initial contentions raised in the first Statement of Facts and Contentions had been addressed or were able to be addressed via conditions. Importantly, Council agreed that proposal met the zone objectives, and the Applicant's submitted clause 4.6 adequately justified the departure to the building height development standard and should be upheld.

70. Prior to the November 2024 consent orders hearing, Council had come to an agreement with the Applicant that the proposed development was supportable and had signed Consent Orders seeking that development consent be granted subject to conditions.
71. As explained by Chief Judge Preston, in light of this agreement, if Commissioner Walsh wished to rule on a matter contrary to the party's agreement i.e. consistency with the objectives of the zone, he needed to notify them and give them an opportunity to argue that the Commissioner ought not to decide the matter in that way. The Commissioner did not do so and as such, procedural fairness was denied.
72. Chief Judge Preston also outlines two other matters in which procedural fairness was denied with respect to view loss and negative environmental effects of the development. In his judgment Commissioner Walsh noted the following:
- (a) View loss - the Commissioner found that the view loss impacts were understated in the application material and the relevant expert reports with regard to Unit 6C, 15-19 Onslow Avenue, Unit 7, 12 Onslow Avenue and Unit 12, 13 Onslow Avenue. The Commissioner referenced view loss as a negative impact when balancing the positive and negative impacts of the development.
 - (b) Negative environmental impacts - the Commissioner was not satisfied that the proposed buildings high environmental performance credentials were adequately offset by the negative effects of the proposal including waste generation from demolition and disposal of the existing building and embodied energy of the new construction. The Commissioner referenced environmental impact as a negative impact when balancing the positive and negative impacts of the development.
73. In both instances, these negative effects were not contentions raised by Council. View loss was initially raised and subsequently resolved through building amendments and provision of the view sharing assessment, and environmental impacts were never a contention raised by Council throughout the Court proceedings.
74. Chief Judge Preston concluded that if Commissioner Walsh wished to consider the matters of view loss and environmental impacts in balancing the positive and negative impacts of the development in determining the development application, the Commissioner needed to notify and give the parties an opportunity to be heard on the matters. The Commissioner did not do so and as such, procedural fairness was denied.
75. While Chief Judge Preston's judgement deals with the matters of procedural fairness it does not make a merit assessment of the matters in relation to view loss and environmental impacts. These matters are further discussed in the 'View loss' and 'Environmental impact' sections below.

Clause 4.6 Request to Vary a Development Standard

76. The site is subject to a maximum height of building control of 15m to Billyard Avenue and 22m to Onslow Avenue.
77. The proposed development has maximum building heights as follows:
- Billyard Avenue building
- 18m to the lift overrun, resulting in a variation of 3m or 20%

- ## Onslow Avenue building

- 25.5m to the lift overrun, resulting in a variation of 3.5m or 15.9%
- 24.6m to the main building, resulting in a variation of 2.6m or 11.8%

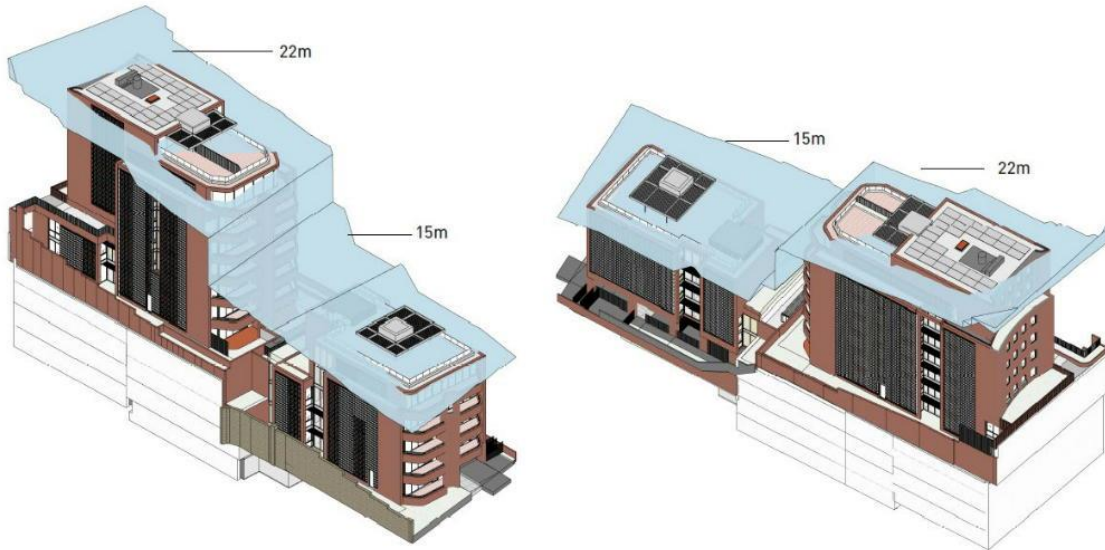


Figure 12: Section showing the LEP height control in red

78. A written request has been submitted to Council in accordance with Clause 4.6(3)(a) and (b) of the Sydney LEP 2012 seeking to justify the contravention of the development standard by demonstrating:

- a. that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case
- b. that there are sufficient environmental planning grounds to justify contravening the standard
- c. the proposed development will be consistent with the objectives of the zone and
- d. the proposed development will be consistent with the objectives of the standard.

Applicant's Written Request - Clause 4.6(3)(a)

79. This Applicant's request addresses the first method outlined in *Wehbe v Pittwater Council* [2007] NSWLEC 827. This method alone is sufficient to satisfy the 'unreasonable and unnecessary' requirement and establishes that compliance is unreasonable or unnecessary if the objectives of the standard are achieved notwithstanding non-compliance with the numerical standard.

80. The Applicant's clause 4.6 written request indicates that the objectives have been achieved for the following reasons:

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

- (a) The elements above the height plane are centrally located, minimising their visibility from the street frontages, and mitigating resultant environmental impacts.
- (b) The areas of breach largely relate to lift overruns and plant equipment located centrally on each roofscape, again demonstrating that regard has been had to 'the condition of the site and its context', in a dense urban environment.
- (c) This siting strategy also successfully mitigates adverse shadowing impacts to neighbouring residential dwellings. The proposal fully complies with the Sydney DCP 2012 overshadowing controls to neighbouring dwellings.
- (d) The proposed building heights are consistent with the building height in storeys control and at both street interfaces, the buildings are under the LEP height control at the street.
- (e) The contravention to the height plane is largely a result of the extreme slope of the site (which falls approximately 15m from west to east). Providing a chamfered or split-level apartment design would not achieve the 'design excellence' provisions of the Sydney LEP 2012.
- (f) The proposed building height is appropriate within the Elizabeth Bay area which features many taller, multi-storey buildings. At the Onslow Avenue frontage, the proposal provides a graduation in height from 8 Onslow Avenue (3 storeys) to 12 Onslow (5 storeys). In the backdrop of the site, other far taller buildings are present on the western side of Onslow Avenue, including 13 Onslow Avenue (8 storeys, at a raised topographical level above the street) and 15-19 Onslow

Avenue (16 levels). In this respect, the building height is considered appropriate for its context.

- (g) The site is affected by flood, requiring the floor level of the buildings to be raised by 0.5m which contributes to extent of non-compliance.



Figure 13: 3D Image showing tall buildings in the locality

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

- (a) The proposed replacement building meets the requirements of infill buildings in Heritage Conservation Areas, as outlined in the Sydney DCP 2012 (including those related to siting, external form, character, and detailing). The development presents an important opportunity to introduce a new, high-quality building within the locality which will enhance its architectural character and diversity.
- (b) The proposed development is commensurate with the high-density residential nature of the HCA.
- (c) The proposed development will not generate any material or adverse visual impacts on the established character, setting, or significance of the nearby heritage items.



Figure 14: Photomontage illustrating transition in height on Onslow Avenue

Objective (c) - to promote the sharing of views outside Central Sydney,

- (a) The potential view loss for the closest and most affected neighbours ranges between negligible (the lowest on the Tenacity qualitative rating scale) to minor for mid-level dwellings in 13 Onslow Avenue and minor for dwellings at Darnley Hall.
- (b) The view sharing outcome is reasonable, where the non-complying parts of the proposal do not cause any significant view loss or impacts for the whole dwelling.
- (c) The proposal offers an equitable and reasonable view sharing outcome where existing neighbours retain virtually all of the views they currently enjoy, and future residents will gain some views.

Objective (d) and (e) relate to development adjoining Central Sydney and adjoining/within Green Square. These objectives have therefore not been considered by the applicant.

Applicant's Written Request - Clause 4.6(3)(b)

81. The applicant's variation request provides the following environmental planning grounds to justify the contravention of the height standard:
 - (a) The proposal is consistent with the objectives of the development standard, as provided in clause 4.3 of the SLEP 2012.
 - (b) The proposal is well under the maximum GFA/FSR control for the site with approximately only 57% of the available GFA used.
 - (c) The site is affected by flooding. Accordingly, the floor level of the buildings must be raised by 0.5m. This directly contributes to extent of non-compliance.

- (d) The proposed building heights are consistent with the building 'height in storeys' control prescribed in the Sydney DCP 2012 at the street.
- (e) Having regard to the built form in the locality, the proposal represents an appropriate addition to the streetscape. At the Onslow Avenue frontage, the proposal provides a graduation in height from 8 Onslow Avenue (3 storeys) to 12 Onslow (5 storeys).
- (f) In the backdrop of the site, other taller buildings are present on the western side of Onslow Avenue, including 13 Onslow Avenue (8 storeys, at a raised topographical level above the street) and 15-19 Onslow Avenue (16 levels). In this respect, the building height is considered appropriate for its context, which is characterised by tall residential flat buildings on narrow lots facing Sydney Harbour.
- (g) The elements above the height plane are located centrally on each roofscape. This strategy has the effect of:
 - (i) Minimising the visibility of non-compliant elements from both Onslow Avenue and Billyard Avenue.
 - (ii) Ensuring the proposal complies with Council's DCP overshadowing controls.
 - (iii) Ensuring the proposal has an acceptable view sharing outcome in accordance with the Tenacity Planning Principle.
 - (iv) Ensuring the building is appropriately scaled, maintaining non-dominant relationships with surrounding buildings, streets and the broader urban context.

Consideration of Applicant's Written Request - Clause 4.6(4) (a) (i) and (ii)

82. Development consent must not be granted unless the consent authority is satisfied that:
- (a) The applicant's written request has adequately addressed the matters required to be demonstrated by subclause 3 of Clause 4.6 being that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the standard; and
 - (b) The proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.

Does the written request adequately address those issues at Clause 4.6(3)(a)?

83. The applicant's statement has correctly referred to Test 1 of Wehbe and has demonstrated that the development meets the objectives of clause 4.3 of the LEP, notwithstanding noncompliance with the numerical standard.
84. The applicant has identified that the areas of non-compliance for each building are centrally located, having regard to the surrounding urban context and does not unreasonably impact on any views.

85. The applicant has adequately demonstrated that the elements which exceed the height standard will not be prominent or incompatible within the streetscape or the HCA, and will be compatible with the character of other heritage listed and contributory buildings in the area.
86. The applicant has demonstrated that despite the noncompliance, the proposed buildings present appropriate infill buildings within the HCA, sitting well in their streetscapes and surrounding context.

Does the written request adequately address those issues at clause 4.6(3)(b)?

87. The statement provides environmental planning grounds specific to the circumstances to justify the extent of non-compliance with the height of building development standard.
88. The building elements that exceed the height standard will have no adverse impacts on the amenity of the locality, in terms of overshadowing, overlooking or view sharing.
89. As the exceedances are centrally located within each building, they do not contribute to any undue visual bulk.

Is the development in the public interest as required by clause 4.6.(4)(a)(ii)?

90. On 1 November 2023, the provisions of clause 4.6 were amended to delete the requirement for the consent authority to be satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out. This amendment, however, only applies to applications made on or after 1 November 2023 and therefore does not apply to this DA.
91. For the reasons already discussed above, the proposal is considered to be consistent with the objectives of the height of buildings development standard.
92. In relation to the objectives of the zone, the Panel can be satisfied that the proposed development is consistent with the objectives of the R1 General Residential zone as follows:

Objective: To provide for the housing needs of the community.

- (a) The proposal will provide for a residential flat building which is a permitted use in the R1 General Residential zone.
- (b) As outlined in the 'Misconstruction of zone objectives' discussion above, the first zone objective is a description of the purpose of the zone, and the objective does not seek to solve any issues relating to housing supply, accessibility or affordability. As such, as the proposal is permissible in the zone it is consistent with the first zone objective.

Objective: To provide for a variety of housing types and densities.

- (c) The proposed unit mix by the applicant meets unit mix controls in the DCP which allow for 100% 3+ bedroom apartments.

- (a) Existing buildings within the locality will continue to offer more compact, older style dwellings. Many of these existing buildings are heritage listed (and have a lower susceptibility to redevelopment in the short to medium term).
- (b) Specifically, Elizabeth Bay currently contains a high proportion of smaller apartments, with ABS data confirming that only 8.9% of the area accommodating 3 bedroom apartments, and 1.4% accommodating 4 bedroom apartments. The remaining 90% of housing stock is Studio/1 and 2 bedroom units.
- (c) Therefore, the provision of newer and larger apartments in the locality will provide a variety of housing typologies.

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

- (a) While the proposal seeks consent for a residential land use, this does not inhibit the continued provision of other land uses in the locality that provides facilities and services to meet the day to day needs of residents.
- (b) While some commercial uses are permissible in the R1 General Residential zone, the site is not located within an active frontage area and as such the planning controls do not specifically envisage other land uses on the subject site.

Objective: To maintain the existing land use pattern of predominantly residential uses.

- (a) The proposal retains the existing high density residential use in a locality that is zoned for and suited to this use.
- (b) The proposed development maintains the existing land use pattern of predominantly residential uses in this locality.

Conclusion

93. For the reasons provided above the requested variation to the height of buildings development standard is supported as the applicant's written request has adequately addressed the matters required to be addressed by clause 4.6 of the Sydney Local Environmental Plan 2012 and the proposed development would be in the public interest because it is consistent with the objectives of height of buildings development standard and the R1 General Residential zone.

Loss of dwellings, change in dwelling mix and loss of housing affordability

94. As outlined in the 'Misconstruction of zone objectives' discussion above, the first objective of the R1 Residential zone does not seek to solve any issues relating to housing supply, accessibility or affordability. Notwithstanding, as these matters are raised in Commissioner Walsh's judgment in addition to numerous written and verbal submissions, the following discussion is provided for consideration by the Panel.

Loss of dwellings and change in dwelling mix

95. The proposal seeks to reduce the number of dwellings onsite from 28 to 20 and change the dwelling mix as follows:
- Existing buildings - 16 x 1 bedroom, 4 x two bedroom and 8 x three bedroom apartments, with a total of 48 bedrooms

- Proposed buildings - 2 x two bedroom, 17 x three bedroom and 1 x 4 bedroom apartments, with a total of 58 bedrooms
96. In addition to the loss of 8 apartments overall, concerns have been raised from objectors and Commissioner Walsh that the replacement of majority 1 bedroom apartments with majority 3 bedroom apartments would reduce the availability of smaller housing product, reducing housing choice (housing diversity) and in turn reduce housing affordability.
97. It is acknowledged that the loss of dwellings due to the redevelopment of existing residential flat buildings is a concern for the City of Sydney. This is evident through Council's recent dwelling retention planning proposal that introduces a new development standard within SLEP 2012. The planning proposal seeks to ensure that development does not significantly reduce the diversity of dwellings available particularly for smaller and more affordable apartment sizes by limiting the loss of housing stock in redevelopment project to not more than 15%.
98. The dwelling retention planning proposal received gateway determination on 5 April 2024, was publicly notified between 11 July 2024 and 23 August 2024. The planning proposal is still under review and not yet in effect. When made, the development standard will be subject to a savings provision that excludes DAs made but not determined before the commencement of amendments.
99. The development application was lodged 14 August 2023 and therefore no weight can be given to this draft policy. As such, there is no planning mechanism currently in effect which prohibits a reduction in the number of dwellings overall on a development site.

Loss of affordable housing

100. Chapter 2 Part 3 of the Housing SEPP addresses the reduction in the availability of low rental residential accommodation arising from a development and incorporates provisions to encourage retention and mitigate the loss of existing low-cost rental housing.
101. Clause 46(2) of the Housing SEPP states that Part 3 does not apply to a building approved for subdivision under the Strata Schemes Development Act 2015.
102. The existing residential flat building is strata subdivided and as such, Part 3 of the Housing SEPP does not apply.

View sharing

103. In response to the public notification of the proposal, submissions were received from 34 properties within 5 buildings raising concerns about loss of views.
104. With respect to the sharing of views, there has been comprehensive analysis of the properties around the site which share views through the subject site by the Applicant's view sharing consultant (Urbis). All view sharing documentation has been prepared in accordance with the view sharing principles established by Senior Commissioner Roseth in the Land and Environment Court decision of *Tenacity Consulting v*

Warringah Council [2004] NSWLEC 140 (Tenacity) and the Court practice note for preparation of photomontage. See Attachment D.

105. The view sharing documentation and assessment makes the following key conclusions:
- (a) The potential view loss for the closest and most affected neighbours ranges between negligible (the lowest on the Tenacity qualitative rating scale) to minor for mid-level dwellings in 13 Onslow Avenue and minor for dwellings at Darnley Hall.
 - (b) The view sharing outcome is reasonable, where the non-complying parts of the proposal (using both Merman or Bettar methods) do not cause any significant view loss or impacts for the whole dwelling.
 - (c) The proposal offers an equitable and reasonable view sharing outcome where existing neighbours retain virtually all of the views they currently enjoy, and future residents will gain some views.
106. The impact of the proposed development on view sharing was assessed by the experts in their written evidence submitted to the Court to assist the first Consent Orders hearing in November 2024. In their written evidence, the experts agree that the proposed development meets the relevant planning controls in relation to view sharing. The experts detailed assessment of view sharing can be found at pages 21 to 24 in Attachment G.
107. In his 19 December 2024 judgement (Attachment E), Commissioner Walsh largely agreed with the expert's assessment on view sharing with the exception of three properties. Commissioner Walsh states that the view loss impacts were understated in the application material and the relevant expert reports with regard to the below properties:

| Property | Experts' assessment | Commissioners' assessment |
|------------------------------|---------------------|---------------------------|
| Unit 6C, 15-19 Onslow Avenue | Negligible | Moderate |
| Unit 7, 12 Onslow Avenue | Minor | Moderate |
| Unit 2, 13 Onslow Avenue | Minor | Minor-moderate |



Figure 15: Unit 6C, 15-19 Onslow Avenue, assessed as moderate rather than negligible impact by Commissioner Walsh



Figure 16: Unit 7, 12 Onslow Avenue - assessed as moderate rather than minor impact by Commissioner Walsh

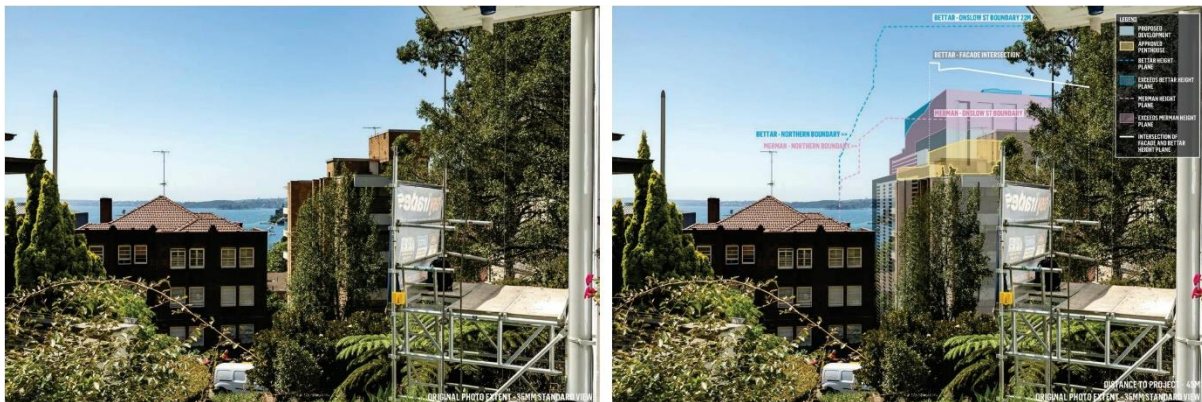


Figure 17: Unit 12, 13 Onslow Avenue - assessed as moderate rather than minor impact by Commissioner Walsh

108. In paragraph 133 of the judgment, Commissioner Walsh questions the reasonableness of the development, as per the fourth step of the Tenacity principle, suggesting that even a minor view impact may not be acceptable when there is a greater negative impact, being the reduction of housing.
109. Notwithstanding, paragraph 138 of Commissioner Walsh's judgement concludes that the overall amenity (including view) impacts of the proposal are moderate and if the situation were reversed regarding housing supply, the weighting of the amenity impacts could also be reversed.
110. As outlined above, there are no current applicable planning controls that prohibit the reduction in the number of dwellings overall on the subject site. Further as outlined in Chief Judge Preston's judgement, Commissioner Walsh misconstrued the zone objectives regarding housing supply.
111. As the loss of housing supply is not a matter for consideration in the assessment of the application, it stands to reason that the weighting of the view loss impact outlined by Walsh could be reversed. In short, even though Commissioner Walsh's merit

assessment increased the view sharing impact of three views above that stated by the experts, the proposal is still acceptable on merit regarding view sharing.

Calculation of height

112. The method of correctly calculating the height of the proposed buildings was assessed in detail by the experts in their written evidence submitted to the Court to assist the first consent orders hearing in November 2024.
113. In their written evidence, the experts agree that the correct method of calculating height for the proposed development was to adopt the approach established under *Bettar v Council of the City of Sydney [2014] NSWLEC 1070* ('Bettar') which is a leading decision on determining "ground level (existing)" on land that is sloping or completely excavated.
114. However while the Bettar method was adopted for the purpose of the assessment, for completeness, the Clause 4.6 variation request (Attachment C) and the View Sharing Report (Attachment D), the approach adopted in *Merman Investments Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1582* was also examined and modelled. This Merman method assumes 'ground level (existing)' is measured to the artificially excavated underside of the existing building slabs.
115. The experts detailed assessment of calculation of height can be found at pages 15 to 16 in Attachment G. It is noted that his judgement Commissioner Walsh accepted the position of the experts regarding the method for calculating height.

Solar access

116. Solar access, including the overshadowing of neighbouring properties, was assessed in detail by the experts in their written evidence submitted to the Court ahead of the November 2024 Consent Orders hearing.
117. In their written evidence, the experts agreed that the proposed overshadowing to neighbouring properties complies with the solar access requirements of section 4.2.3.1 of the SDCP 2012 and Objective 3B-2 of the ADG. Further, in paragraph 118 of his judgement Commissioner Walsh accepts that the proposal would meet the solar access provision of the SDCP 2012.
118. The experts detailed assessment of solar access and overshadowing can be found at pages 25 to 28 in Attachment G.

Building separation and privacy

119. A detailed assessment of building separation and overlooking was undertaken by the experts to assist the first Consent Orders hearing in November 2024.
120. In their written evidence, the experts agree that even though the building separation distances do not meet the design guidance in Part 3F of the ADG, the proposal provides an equitable share of separation, with generally greater setbacks provided compared with neighbours, which meets the design criteria outlined in Objective 3F-1 of the ADG. The experts also found that screening devices, the use of solid walls and the positioning of windows has been utilised to ensure privacy is maintained to surrounding properties in accordance with the ADG.

121. It is noted that Commissioner Walsh did not comment on the matter of building separation, overlooking or visual privacy as a merit issue in his 19 December judgement.
122. The experts detailed assessment of building separation and visual privacy can be found at pages 30 to 32 in Attachment G.

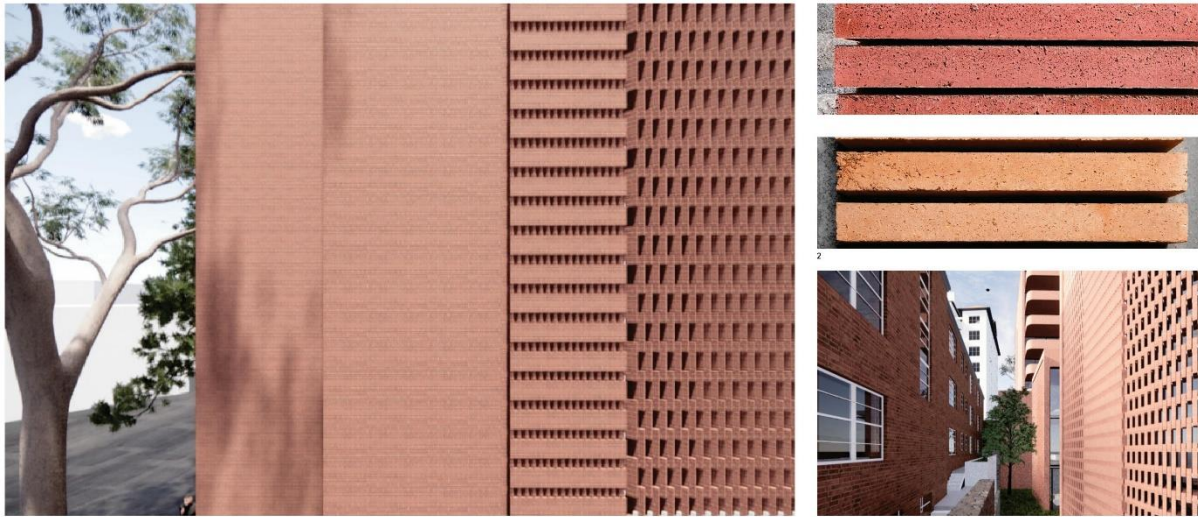


Figure 18: Proposed east and west facade privacy treatments

Environmental impact

123. The issue of environmental impacts arising from the demolition of the existing building was not a contention that was raised by Council throughout the appeal proceedings. However in his judgement, Commissioner Walsh specifically raised the issues of waste generation from demolition and disposal of relevant materials and embodied energy associated with construction of new development.
124. While it has been established by Chief Judge Preston that the raising of these issues was failure in procedural fairness, for the completeness of the merit assessment of the proposal, these matters are addressed below.
125. The proposal will result in the demolition of two existing brick and concrete buildings.
126. There are no current planning controls that prohibit the demolition of existing structures on grounds of unacceptable waste generation from demolition or unacceptable levels of embodied energy involved in the new construction of buildings. The proposal does however, meet the controls for the demolition of the existing building as a neutral building in the HCA.
127. In 2023 the BASIX SEPP was replaced with the State Environmental Planning Policy (Sustainable Buildings) 2022. The Sustainable Building SEPP requires new developments to calculate and monitor embodied emissions of material used in construction of buildings. However, as the subject DA was made prior to the introduction of the Sustainable Building SEPP, these measures do not apply to the proposal.
128. Notwithstanding, the proposed new building is supported by an ESD report which demonstrates an ongoing commitment to sustainability throughout the project. This

framework has been informed by the sustainability measures outlined in the Sydney LEP 2012, Sydney DCP 2012 and the Building Sustainability Index (BASIX), and includes:

- (a) Improving upon minimum legislated BASIX benchmarks in line with City of Sydney Design Excellence guidelines: a) Energy 35% b) Water 50%.
- (b) Delivering a high level of thermal performance.
- (c) A range of sustainability initiatives across the site spanning energy efficiency, water efficiency, indoor environment quality, materials selection, waste management and user/visitor comfort.

129. Conditions have been imposed in Attachment A that require the following:

- (a) The submission of a Waste and Recycling Management Plan including demolition and construction waste and recycling details, in accordance with Council's Guidelines for Waste Management in New Developments 2018.
- (b) The salvage, use and recycling of building materials including stone, bricks and roof tiles.
- (c) The salvage and reuse of excavated sandstone, if found to be of appropriate quality.

Design excellence

130. Development consent must not be granted to the proposed development unless, in the opinion of the consent authority, the proposed development exhibits design excellence as outlined at clause 6.21C of the Sydney LEP 2012.
131. The proposal compliance with clause 6.21C was assessed in detail by the experts in their written evidence submitted to the Court to assist the first consent orders hearing in November 2024.
132. This assessment, which is included in Attachment H demonstrates that the development exhibits design excellence.

Consultation

Internal Referrals

133. The application was discussed with Council's:

- (a) Environmental Health Unit
- (b) Heritage and Urban Design Unit
- (c) Public Art Unit
- (d) Public Domain Unit
- (e) Surveyors
- (f) Transport and Access Unit

- (g) Tree Management Unit
- (h) Waste Management Unit

134. The above advised that the proposal is acceptable subject to conditions. Where appropriate, these conditions are included in the Notice of Determination.

External Referrals

Ausgrid

135. Pursuant to Section 2.48 of the SEPP (Transport and Infrastructure) 2021, the application was referred to Ausgrid for comment.
136. A response was received raising no objections to the proposed development.

Water NSW

137. Pursuant to Section 91(3) of the Water Management Act 2000, the application was referred to Water NSW for concurrence as approval is required for an aquifer interface activity, relating to the intended basement excavation levels being below the depth of the standing groundwater table.
138. General Terms of Approval were issued by Water NSW in response to the amended proposal on 25 October 2024 and have been included in the schedules within the recommended conditions of consent.

Advertising and Notification

139. In accordance with the City of Sydney Community Participation Plan 2019, the proposed development was notified and advertised for a period of 28 days between 22 August and 20 September 2023. A total of 693 properties were notified and 116 submissions were received.
140. Amended plans to address issues raised by Council during the Section 34 Conference were provided by the Applicant on a without prejudice basis on 22 July 2024.
141. It was agreed by the parties that the amended plans could be used for the purpose of notification. The amended plans were publicly re-notified for 14 days during the period 24 July and 8 August 2024. This period was further extended to 27 August 2024.
142. Re-notification of the amended plans resulted in 77 individual submissions in objection to the proposal.
143. The issues raised in the submissions were assessed in detail by the experts in their written evidence submitted to the Court prior to the consent orders hearing. The experts considered matters raised in response to both the original notification and re-notification. This assessment, which is included in pages 15 to 45 of Attachment G outlines how concerns have been addressed and/or resolved in the amended application.
144. During the Consent Orders hearing, verbal submissions were heard from numerous objectors. A transcript of the hearing has been provided at Attachment I.

145. The hearing transcript has been reviewed, and it is considered that the issues raised by verbal submissions during the hearing have either been previously address by the experts in their written evidence or are subsequently address by the experts in their verbal evidence provided at the hearing.
146. It is noted that with the exception of the issue of housing supply and environmental impact, both of which have been discussed at length within this report, Commission Walsh did not raise any issues in his judgement with regard to public submissions that should lead the Panel to conclude that the proposal is not in the public interest.

Financial Contributions

Contribution under Section 7.11 of the EP&A Act 1979

147. The City of Sydney Development Contributions Plan 2015 applies to the site however the development is not subject to a section 7.11 local infrastructure contribution under this Plan.
148. Credits have been applied for the most recent past use of the site, being a residential flat building with 28 units. As the proposal reduces the number of dwellings on the site from 28 to 20, a local infrastructure contribution is not applicable.

Contribution under Section 7.13 of the Sydney Local Environmental Plan 2012

149. The site is located within the Residual Lands affordable housing contribution area. As the proposed development includes additional floor space, a contribution is required at a rate of \$11,646.8 per square metre of total residential floor area 4,437sqm totalling \$1,549,956.14. A condition of consent is recommended requiring payment prior to the issue of a construction certificate.
150. Section 7.32 of the Act outlines that the consent authority may grant consent to a development application subject to a condition requiring dedication of part of the land for the purpose of providing affordable housing, or payment of a monetary contribution to be used for the purpose of providing affordable housing where the section of the Act applies.
151. The Act applies with respect to a development application for consent to carry out development within an area if a State environmental planning policy identifies that there is a need for affordable housing within the area and:
 - (a) the consent authority is satisfied that the proposed development will or is likely to reduce the availability of affordable housing within the area, or
 - (b) the consent authority is satisfied that the proposed development will create a need for affordable housing within the area, or
 - (c) the proposed development is allowed only because of the initial zoning of a site, or the rezoning of a site, or
 - (d) the regulations provide for this section to apply to the application.
152. Clause 222B of the Environmental Planning Assessment Regulation 2021 provides that section 7.32 of the Act applies to a development application to carry out development in the City of Sydney local government area.

153. An affordable housing condition may be reasonably imposed under Section 7.32(3) of the Act subject to consideration of the following:
- (a) the condition complies with all relevant requirements made by a State environmental planning policy with respect to the imposition of conditions under this section, and
 - (b) the condition is authorised to be imposed by a local environmental plan, and is in accordance with a scheme for dedications or contributions set out in or adopted by such a plan, and
 - (c) the condition requires a reasonable dedication or contribution, having regard to the following -
 - (i) the extent of the need in the area for affordable housing,
 - (ii) the scale of the proposed development,
 - (iii) any other dedication or contribution required to be made by the applicant under this section or section 7.11.
154. Having regard to the provisions of Section 7.32 of the Act, the imposition of an affordable housing contribution is reasonable. A condition of consent is recommended requiring the payment of an affordable housing contribution prior to the issue of a construction certificate.

Housing and Productivity Contribution

155. The development is not subject to a Housing and Productivity Contribution under the Environmental Planning and Assessment (Housing and Productivity Contribution) Order 2023 as it was submitted prior to the Order coming into effect.

Relevant Legislation

156. Environmental Planning and Assessment Act 1979.
157. Water Management Act 2000.

Conclusion

158. The proposed development has been the subject of a detailed assessment by town planning, architecture, urban design and view sharing expert witnesses during the Land and Environment Class 1 appeal proceedings.
159. The proposal has been amended during the Class 1 appeal proceedings to address a number of issues identified by Council officers and experts. In their assessment, the experts agreed that as a result of amended plans and additional information provided, there are no outstanding points of disagreement between the experts that cannot be resolved via conditions.
160. Where necessary and for completeness, this report addresses matters that were raised following the filing of the experts written evidence during the Consent Orders hearing and subsequent judgements.

161. This report outlines that the proposed development generally satisfies the relevant provisions of the applicable planning instruments including the Housing SEPP, Sydney Local Environmental Plan 2012 and Sydney Development Control Plan 2012 and is acceptable.
162. The applicant has submitted a written request pursuant to clause 4.6 for a variation to the height of buildings standard specified under clause 4.3 of the Sydney Local Environmental Plan 2012. The request to vary the development standard is supported by the experts written and verbal evidence as well as the assessment contained in this report. Importantly, the merit assessment has found that the proposed height exceedance will not cause any unacceptable amenity impacts with regard to solar access, overshadowing or view sharing.
163. The proposal represents design excellence, with a high standard of architectural design, materials and detailing and a built form that is consistent with the existing and future desired character of the area.
164. Issues raised in all submissions have been taken into account and, where appropriate, conditions of consent are recommended to address these issues.
165. Having regard to all of the above matters, the proposed development will not result in any adverse impacts on both the natural and built environment and the locality, is suitable for the site, and is in the public interest, subject to appropriate conditions of consent being imposed.

ANDREW THOMAS

Executive Manager Planning and Development

Natasha Ridler, Area Planning Manager