Attachment E

Commissioner Walsh Judgement
19 December 2024

Land and Environment Court
New South Wales

Case Name:	**Billyard Avenue Developments Pty Limited ATF Billyard Avenue Development Trust v The Council of the City of Sydney**
Medium Neutral Citation:	[2024] NSWLEC 1825
Hearing Date(s):	5-6 November 2024
Date of Orders:	19 December 2024
Date of Decision:	19 December 2024
Jurisdiction:	Class 1
Before:	Walsh C
Decision:	The Court orders that: (1) The appeal is dismissed. (2) Development Application No. D/2023/727 for the demolition of existing buildings/trees, construction of two new residential flat buildings (including excavation for a shared basement structure), site landscaping and provision for utilities and stormwater infrastructure at 21C Billyard Avenue and 10 Onslow Avenue, Elizabeth Bay 2011 NSW is refused. (3) The Exhibits are returned, with the exception of Exhibits 2 and A-G which are retained.
Catchwords:	APPEAL – development application – consent orders – demolition of existing residential flat buildings – construction of new – residential flat buildings – building height contravention – whether in the public interest – whether consistent with the objective of providing for the housing needs of the community – finding that jurisdiction not available – lay objections – view loss – building massing
Legislation Cited:	*Environment Planning and Assessment Act 1979*, ss 1.3, 4.15, 8.7, 8.15 *Land and Environment Court Act 1979*, s 34 *Protection of the Environment Administration Act 1991*, s 6

	Standard Instrument (Local Environmental Plans) Order 2006 State Environmental Planning Policy (Housing) 2021, Chs 2, 4, Sch 9, s 46 Sydney Local Environmental Plan 2012, cll 2.3, 2.7, 4.3, 4.4, 4.6, 5.10, 6.21, 6.21C, 7.13, Sch 5
Cases Cited:	*Australian Turf Club v Liverpool City Council (No 2)* [2014] NSWLEC 1099 *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* (2013) 194 LGERA 347; [2013] NSWLEC 48 *Cumberland Council v Tony Younan; Cumberland Council v Ronney Oueik; Cumberland Council v H & M Renovations Pty Ltd* [2018] NSWLEC 145 *GFM Investment Group Pty Ltd in its capacity as Trustee for GFM Home Trust Subtrust No. 7 v Inner West Council* [2023] NSWLEC 1112 *Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the Late Ryan Messenger* (2018) 98 NSWLR 526; [2018] NSWCA 178 *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 *Station Lane Pty Ltd v Penrith City Council* [2024] NSWLEC 1797 *Tenacity Consulting v Warringah* (2004) 134 LGERA 23; [2004] NSWLEC 140
Texts Cited:	Apartment Design Guide July 2015 Land and Environment Court of New South Wales, Practice Note - Class 1 Development Appeals National Housing Supply and Affordability Council, State of the Housing System, 2024 Sydney Development Control Plan 2012
Category:	Principal judgment
Parties:	Billyard Avenue Developments Pty Limited ATF Billyard Avenue Development Trust (Applicant) The Council of the City of Sydney (Respondent)
Representation:	Counsel: R Lancaster SC (Applicant) F Berglund (Respondent) Solicitors: Mills Oakley (Applicant) The Council of the City of Sydney (Respondent)

File Number(s): 2023/440488

Publication Restriction: Nil

JUDGMENT

1 The applicant has lodged an appeal under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by the Council of the City of Sydney Local Planning Panel (LPP) of development application D/2023/727 (DA), lodged on 14 August 2023. The DA seeks consent for the demolition of existing buildings and construction of two new residential flat buildings with basement car parking across two parcels of land at 21C Billyard Avenue and 10 Onslow Avenue, Elizabeth Bay NSW (site). The Council of the City of Sydney (Council) is the respondent in this appeal by virtue of s 8.15(4) of the EPA Act.

Background to the proceedings

2 The proceedings originally came before me on 12 June 2024 as a conciliation conference under the provisions of s 34(1) of the *Land and Environment Court Act 1979*. The conciliation proceedings commenced with a site inspection. During this site inspection the Court and the parties to the proceedings had the opportunity to undertake inspections from quite a large a number of properties, in each case residential properties within apartment blocks, residents of which had made objections against the proposal.

3 A formal conciliated agreement did not eventuate (I terminated the conciliation conference on 9 August 2024). However, subsequently the Chief Judge delegated the hearing of the appeal back to me, and the parties have subsequently agreed that the evidence from the conciliation conference could be accepted into the evidence for this hearing. In turn, I determined that, rather than the usual practice of commencing hearing proceedings with an on-site inspection, this hearing proceedings commenced in Court on 5 November 2024.

4 Prior to the hearing, the parties had been involved in further extended dialogue. This dialogue included detailed work between experts appointed by the parties which resulted in agreed amendments to the DA now before the Court. Again sometime prior to the hearing, the parties made clear to the Court an intention to request final orders from these proceedings be that of the

upholding of the appeal and the granting of consent to the DA, subject to agreed conditions. Consent orders to this effect were initially filed by the parties on 29 October 2024 and the final version was filed on 8 November 2024. With this, the Council is indicating to the Court its position that it is satisfied that the amended plans and agreed conditions resolve the issues raised by it in the Amended Statement of Facts and Contentions filed 11 September 2024 (Ex 2) and that Council is otherwise satisfied with the proposal.

5 The Court's Practice Note - Class 1 Development Appeals (Practice Note) sets out the procedural requirements for consent orders matters at par 99:

> "Any application for consent final orders in development appeals will be listed before the Court for determination. The parties will be required to present such evidence as is necessary to allow the Court to determine whether it is lawful and appropriate to grant the consent or approval having regard to the whole of the relevant circumstances, including the proposed conditions. The consent authority will be required to demonstrate that relevant statutory provisions have been complied with and that any objection by any person has been properly taken into account. Additionally, the consent authority will be required to demonstrate that it has given reasonable notice to all persons who objected to the proposal of the following:
>
> (i) the content of the proposed orders (including the proposed conditions of consent);
>
> (ii) the date of the hearing by the Court to consider making the proposed consent orders; and
>
> (iii) the opportunity for any such person to be heard,
> or that, in the circumstances of the case, notification is not necessary."

6 This makes clear that notwithstanding the position of the parties, the obligation upon the Court in the appeal remains to determine whether it is lawful and appropriate to grant the consent having regard to the whole of the relevant circumstances.

7 Paragraph 99 of the Practice Note also maps out a series of procedural requirements, in particular in regard to the giving of notice to those who have objected to a proposal. The required notice includes: (1) the particulars of the consent orders, (2) advice on the hearing dates and (3) the opportunity to be heard at the Court hearing. I accept the advice of the parties that the relevant

notice has been given. Indeed, a number of objectors did elect to give lay evidence in the proceedings, which (among other lay submissions) I have given consideration to.

8 Something of an iterative approach to the consideration of lay evidence was adopted in these proceedings. The first step was the preparation of combined joint report by the planning and design experts prior to the hearing which specifically addressed the already documented lay objections. Two joint expert reports eventuated which were tendered and marked Ex 4 and Ex 7. The second step involved the presentation of further lay evidence from a number of the objectors (both written and orally) in-Court. A number of specialist town planners were acting for the objectors in that regard. In the third step I asked the experts to return to the witness box (after the completion of each objector submission, individually) to respond to this lay evidence, relevantly (ie essentially in terms of responding to points of particular interest raised by me). Sometimes, during the second step, I asked the objectors their opinion on certain of the points raised in the written expert evidence.

9 Also, in regard to procedure, I will note that after hearing this evidence in Court, I elected to revisit the site, in any event, to inspect from a selected number of properties. That is, some uncertainty remained in my mind which was best addressed by revisiting certain locations.

10 Finally here, I note that Paragraph 99 of the Practice Note also indicates the obvious requirement to demonstrate, for consent orders matters, that the relevant statutory provisions have been complied with and that objections have been properly taken into account. The rest of the judgement adheres to these requirements.

Site and locality

11 I rely on Council's Amended Statement of Facts and Contentions (Ex 2), and the application plans (which I reference relevantly) for certain of the descriptive material in this section and otherwise in the judgement.

12 The site is regular in shape and has an area of about 1464 m2. It has a substantial crossfall of approximately 15m from what I will call the western boundary at Onslow Avenue to eastern boundary at Billyard Avenue. There are separate residential apartment buildings fronting Billyard Street and Onslow Avenue providing for a total of 28 apartments.

Figure 1 – Snapshot of existing building at 10 Onslow Avenue (source: Ex 2 p 9)

Figure 2 – Snapshot of existing building at 21C Billyard Avenue (source: Ex 2 p 13)

Figure 3 – Site highlighted in aerial photo (source: Ex 2 p 5)

13 The area surrounding the site is characterised by a mixture of land uses but primarily residential accommodation and comprising residential flat buildings, a number of which are heritage listed. Nearby buildings display considerable variety in terms of build date, architectural form, spatial and landscape setting

and built heights. This area sits near the foreshore of Sydney Harbour and many properties enjoy harbour views.

Proposal

14 After demolition, site excavation and preparation works, the proposal involves construction and use of two residential flat buildings comprising a total of 20 apartments, including an eight level building fronting Onslow Avenue (two levels of which would sit beneath the road level) and a five level building fronting Billyard Avenue.

15 There would be excavation of up to 13m in depth for the basement (straddling the sloping (double) block) for parking, utilities and certain communal uses. Fourteen new trees would be planted including within deep soil zones at the Billyard Avenue frontage (although 16 on-site trees would be removed). Communal open space would also be provided including at the rooftops, with shade canopies.

Statutory considerations

16 For this outline I rely on both Ex 2 and the applicant's closing written submissions filed on 4 November 2024 (AWS).

Sydney Local Environmental Plan 2012

17 Sydney Local Environmental Plan 2012 (SLEP) applies to the site and selected provisions are outlined below.

18 The site is zoned R1 General Residential. Under cl 2.3(2), a consent authority must have regard to the relevant zone objectives when determining a development application. In this instance I note the R1 zone objectives 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.

19 The proposed residential flat buildings are permissible with consent within this zone. Demolition is permissible with consent under cl 2.7.

20 Clause 4.3 specifies that the maximum height of any building on the Billyard Avenue portion of the site is 15 m and the maximum height of any building on the Onslow Avenue portion of the site is 22 m. The proposal breaches the relevant height controls.

21 Clause 4.4 specifies that the maximum floor space ratio (FSR) of any building on the site is 4.5:1. Only 57% of the permissible GFA is used (AWS par 72).

22 Clause 4.6 (relevant as applicable at the time of lodgement of the DA) specifies that development consent must not be granted for development that contravenes a development standard unless relevant matters have been satisfied. The particulars of this are outlined below.

23 The site is located within the Elizabeth and Rushcutters Bay Heritage Conservation Area (HCA) under Schedule 5 of the SLEP. Clause 5.10(4) requires that the consent authority consider the effect of the proposed development on the heritage significance of the HCA.

24 Clause 6.21C requires that development consent must not be granted unless, in the opinion of the consent authority, the proposed development exhibits design excellence and that regard must be given to certain matters set out in subcl 6.21C(2) in considering this question.

25 Clause 7.13 states that the consent authority may, when granting development consent to development to which this clause applies, impose a condition levying the applicable affordable housing contribution (to be satisfied by way of a monetary contribution and/or dedication). The clause applies here and a requirement for payment of this contribution has been incorporated into the agreed conditions of consent.

State Environmental Planning Policy (Housing) 2021 ('Housing SEPP')

26 Chapters 2 and 4 of State Environmental Planning Policy (Housing) 2021 (SEPP Housing) warrant comment here.

Chapter 2 – Affordable Housing

27 Part 3 within Chapter 2 is concerned with the retention of existing affordable housing. However, its provisions do not apply in this matter as, essentially, under s 46(2)(a) the part does not apply to strata subdivided buildings (existing buildings on the site are strata subdivided (AWS par 56)).

Chapter 4 – Design of residential apartment development

28 In determining a development application for residential apartment development, a consent authority is to consider:

- the advice (if any) obtained from a design review panel;
- the design quality of the development when evaluated in accordance with the design quality principles (at Schedule 9 of SEPP Housing); and
- the Apartment Design Guide.

29 I note that a Design Verification Statement (DVS) prepared by SDS was included in the Class 1 application (Tab 26 Ex A), and the advice in the AWS that it demonstrates how the design quality principles are achieved and demonstrates how the objectives of Parts 3 and 4 of the ADG have been addressed. The AWS (par 61) indicates the following findings from the (DVS):

> "Minimum apartment size: All apartments meet the minimum requirements of the ADG.
>
> Solar access: A total of 95% of apartments achieve the ADG recommendation for solar access to living areas and private open space – compliant with the ADG (which targets 70%).
>
> Natural ventilation: 100% of apartments will achieve the ADG recommendation for natural cross ventilation, compliant with the ADG (which targets 60%).

Building separation: … appropriate visual privacy outcomes are achieved using solid walls and the positioning of windows / primary living spaces away from side boundary interfaces.

Communal open space: The proposal includes 415sqm of communal open space, totalling 28% of the site area. Post the Section 34 conference, this includes the provision of communal open space to both the Billyard Avenue and Onslow Avenue buildings. This exceeds the ADG guidance of 25%.

Private open space: All apartments comfortably exceed the ADG recommended areas for balconies.

Deep soil zone: 11.85% of the site accounts for deep soil planting (with a minimum dimension of 3m), compliant with the ADG control (7%).
Storage: Apartments are provided with storage facilities meeting or exceeding the ADG criteria."

Other statutory considerations

30 There are a number of other environmental planning instrument considerations which apply to the evaluation of this proposal. However, the above capture the matters of at least some relevance to my ultimate determination.

Sydney Development Control Plan 2012 (SDCP)

31 SDCP also applies. Relevant provisions are considered below.

Issues and evidence

Expert evidence

32 Council's contentions against the proposal leading into the hearing were documented in Ex 2. As indicated, by the time of the hearing and with further amendments to the proposal, the relevant experts had come to an agreement that all of Council's contentions were now satisfied. I accepted that the particular expertise areas of the relevance to me in these proceedings, as they now stood, were adequately covered by the experts put forward to the hearing by the parties. The experts are indicated in the table below.

Expert	Expertise	Appointed by
W Smart	Architecture	Applicant
A Harvey	Town planning	Applicant
J Maze-Riley	Visual impact assessment	Applicant
J Pressick	Urban design	Council

J Errington	Town planning	Council

33 The essentially shared position of this group of experts was documented in a report which was marked Ex 4. They also prepared a supplementary report (Ex 7) which addressed an error raised by objectors in regard to height plane calculations which Ex 4 had been based upon.

34 Ex 4 covered a number of areas, as follows:

(1) Documentation of a number of agreed amendments to the DA and matters requiring additional information, each subsequently taken up either via amending documentation or consent conditions.

(2) Response to each of the individual outstanding contentions as documented in Ex 2 and an ultimate finding that each of the nominated contentions were now resolved based on the agreed amendments (Ex 4 par 3).

(3) A consideration of lay objecting submissions. Here the experts synthesised the objecting submissions into 32 topics and provided agreed point form responses with respect to each. Again, the ultimate finding was of agreement that there were adequate responses to each of the identified topics.

35 The attachments to Ex 4 included a final view sharing report arising from joint conferencing (Appendix D).

Lay submissions

36 There have been a large number of lay submissions objecting to this proposal, and a considerably lesser number of supportive lay submissions. The objecting submissions were in written and oral form (provided both in Court during the hearing and during the site inspection stage of the s 34 conciliation conference). Council filed a volume of written submissions which was marked Ex 6 in the proceedings. There were also a number of accompanying written

submissions, diagrams or speaking notes prepared by those giving oral evidence in Court, which were tendered into evidence, relevantly.

37 I have noted the number of lay submissions supportive of the proposal. I think I have reviewed each of the supportive submissions from the last round of notification. The common themes of these submissions included support for the architectural scheme itself, seeing it as respectful of local heritage and providing for a development which would breathe some new life into the already unique local area, "a leap forward to a brighter future". The proposal would address "pressing needs" (Ex 3 p 1219). A quote from the following three submissions assists me in understanding the particular "need" which the proposal was seen to be able to address (Ex 3 p 1234 and p 1237, p 1244):

> "Elizabeth Bay is renowned for its unique charm, characterised by a blend of historical architecture, lush green spaces, and [a] dynamic community spirit. However, some areas within our suburb have aged and require thoughtful redevelopment to meet contemporary standards and the needs of our growing population."

38 A suggested outcome of some submissions was that the new development will support increased owner occupation of apartments. One of the submissions suggested a long list of significant building defects and deficiencies (Ex p 1230), a line of argument not supported in submissions by the parties or expert evidence.

39 A point arising in both objecting and supportive submissions was that the other side was selfishly interested in their own private financial benefits. These kinds of concerns are commonplace. It is the substance of the arguments put in any such submissions which is of concern to me here.

Primary issues arising from lay objecting submissions

40 Having read over, and in some instances heard, the objecting submissions in relation to the proposal and mindful of relevant policy settings, I consider the primary or more substantive issues raised in the objecting submissions (sometimes inter-related) to be the following:

- Building height and breach of development standard

- Inconsistency with zone objectives
- Loss of affordable dwellings, reduction of dwellings
- View impacts
- Visual bulk and inadequate building separation distances
- Demolition of the existing building and the design of the proposed development is not sustainable
- Amenity effects of excavation and general construction stage impacts (including traffic, noise, dust, vibration).

41 The matters nominated in the first three bullet points are related, involve jurisdictional power and, as it happens, involve the determinative issue in this matter. I deal with them, together, below. The finding I make is that there is no power to grant consent, due to the contravention of the height of buildings development standard under SLEP. I do turn to merits matters before finalising the judgement, initially with respect to view impact assessment then some other merits considerations, briefly.

Building height contravention and related factors associated with consistency with R1 zone objective to "provide for housing needs of the community"

Setting the scene

42 Clause 4.6 of SLEP is an important element of the case because of the DA's breach of the building height controls under cl 4.3 of SLEP. There is no dispute that the provisions in cl 4.3 of SLEP are a development standard and thus the permissive powers in cl 4.6(2), to grant development consent for a development that contravenes a development standard, could apply. It is also not in dispute that as the DA was lodged in August 2023 (Ex 2 p 1), that is prior to 1 November 2023, the changes to cl 4.6 (as presenting in SLEP at the time of writing) are not in effect. The DA is to be determined under the provisions of cl 4.6 at the time of lodgement of the DA, and these are the provisions that I reference below.

43 There are well known preconditions to the exercise of the powers in cl 4.6(2), to consent to a proposed development even though the development would contravene a development standard. These preconditions require positive findings of satisfaction on the part of a consent authority or the Court in this instance. These requirements for positive findings are indicated in cl 4.6(4). I reproduce cl 4.6, as relevant now:

> *4.6 Exceptions to development standards*
>
> (1) The objectives of this clause are as follows—
>
> (a) to provide an appropriate degree of flexibility in applying certain development standards to particular development,
>
> (b) to achieve better outcomes for and from development by allowing flexibility in particular circumstances.
>
> (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument. However, this clause does not apply to a development standard that is expressly excluded from the operation of this clause.
>
> (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the applicant that seeks to justify the contravention of the development standard by demonstrating—
>
> (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
>
> (b) that there are sufficient environmental planning grounds to justify contravening the development standard.
>
> (4) Development consent must not be granted for development that contravenes a development standard unless—
>
> (a) the consent authority is satisfied that—
>
> (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
>
> (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
>
> (b) the concurrence of the Planning Secretary has been obtained.

44 The first opinion of satisfaction, in cl 4.6(4)(a)(i), is that a written request by the applicant, seeking to justify the contravention of the development standard has

adequately addressed the matters required to be demonstrated by cl 4.6(3). It is not this first opinion of satisfaction, which involves an evaluation relating to the "contravention of the development standard", that is my point of attention here. I can note that the applicant did supply the nominated written request (Ex F) which provided, in a sense, a point of entry to the facilitative provisions available through cl 4.6.

45 The second opinion of satisfaction required under cl 4.6(4)(a)(ii) is that the consent authority, or in this case the Court, needs to be satisfied that "the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard that is contravened and the objectives for development for the zone in which the development is proposed to be carried out". In contrast with the first opinion of satisfaction, it is the "proposed development" which is in focus here.

46 As noted in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 (*Initial Action*) (at [26]):

> "[the] second opinion of satisfaction under cl 4.6(4)(a)(ii) also differs from the first opinion of satisfaction under cl 4.6(4)(a)(i) in that the consent authority, or the Court on appeal, must be directly satisfied about the matter in cl 4.6(4)(a)(ii), not indirectly satisfied that the applicant's written request has adequately addressed the matter in cl 4.6(4)(a)(ii)".

47 To emphasise, there is a particular reasoning which any such direct finding of satisfaction, under cl 4.6(4)(a)(ii) (that the development "will be in the public interest"), must be based upon (Initial Action at [27]):

> "The matter in cl 4.6(4)(a)(ii), with which the consent authority or the Court on appeal must be satisfied, is not merely that the proposed development will be in the public interest but that it will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. It is the proposed development's consistency with the objectives of the development standard and the objectives of the zone that make the proposed development in the public interest. If the proposed development is inconsistent with either the objectives of the development standard or the objectives of the zone or both, the consent authority, or the Court on appeal, cannot be satisfied that the development will be in the public interest for the purposes of cl 4.6(4)(a)(ii)."

48 It is the first of the zone objectives of the zone of the R1 zone (reproduced together at [18]) which is the concern to me here:

> To provide for the housing needs of the community.

49 To find against satisfaction that the proposed development is in the public interest because it is consistent with this zone objective would mean power is not available to grant consent to the application. In all of the circumstances before me here, the question warrants close interrogation which I attempt to undertake now.

Opinion evidence relating to interpretation of the first R1 zone objective

50 I will initially refer to the evidence of the experts and also objecting lay submissions with respect to the interpretation of the first R1 zone objective. The reasoning behind the supportive lay submissions' view that the proposal is consistent with the objective of meeting housing needs has been previously outlined (see [37]-[38]), and generally aligns with certain opinions expressed by the experts.

The expert evidence is that the proposed development is consistent with the first R1 zone objective

51 The overall findings of the experts were supportive of the proposal, notwithstanding the height standard contravention. There were direct and indirect references of relevance to me with respect to the question of consistency with the first zone objective. I will refer here to four areas where relevant material was provided by the experts. First, is the cl 4.6 written request (Ex F). While there was no necessity for it to do so, it directly addressed the question of consistency with zone objectives and found as follows with respect to the first zone objective (Ex F p 21):

> "The proposal will replace ageing buildings (50+ years old) with new, high-amenity housing stock which will meet the housing needs of the community.
>
> Importantly, the new housing delivered will comply with contemporary apartment amenity controls, ESD standards and BCA/DDA requirements (the existing buildings do not)."

52 The first paragraph from the above quote has good alignment with some of the lay submissions supportive of the proposal.

53 Second, I refer to the experts' agreed responses to lay submissions. As indicated, this work provided a brief synthesis of different lines of objections and provided an agreed expert response. Two of the synthesised topics have relevance to my interest here. Topic F was as described by the experts as follows (Ex 4 p 28):

> "Loss of affordable dwellings, reduction of dwellings and inadequate mix of dwelling types."

54 The experts' agreed response to this topic was as follows (ibid):

> **"Dwelling mix**
>
> 1. As the development incorporates only 20 dwellings, the dwelling mix provisions of section 4.2.3.12 of the SDCP 2012 are not applicable in this case. The development provides 2 [two] – bedroom apartments, 17 three-bedroom apartments and 1 four-bedroom apartments. The experts agree that the proposed apartment mix is acceptable.
>
> **Retention of affordable rental housing**
>
> 2. As the existing building is strata subdivided, Part 3 Retention of existing affordable rental housing of the Housing SEPP does not apply to the existing building pursuant to clause 46(2)(a). There is no current planning mechanism to retain the existing building based on the affordability of the existing accommodation.
>
> **Reduction of dwellings**
>
> 3. There is no planning mechanism currently in effect which prohibits that reduction in the number of dwellings overall on a development site. It is noted that the City of Sydney dwelling retention planning proposal received gateway determination on 5 April 2024, was publicly notified between 11 July 2024 and 23 August 2024 and is still under review and not yet in effect. The development application was lodged 14 August 2023 and therefore no weight can be given to this draft policy."

55 Topic W in the experts' response to objecting submissions was titled (Ex 4 p 41):

> "The proposal does not achieve the objectives of the R1 General Residential zone."

56 After specifying the R1 zone objectives, the experts' agreed response to this objection topic was as follows (ibid):

> "...
>
> 2. The proposed development is consistent with the zone objectives because it will:
>
> a. Provide for a residential flat building which is a permitted use in the zone.
>
> b. Replace an ageing building with new housing with a mix of 2, 3 and 4 bedroom apartments.
>
> 3. 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.
>
> 4. The proposed unit mix by the applicant meets unit mix controls in the DCP which allow for 100% 3+ bedroom apartments.
>
> 5. In addition to the above, the development will be subject to the provision of an affordable housing contribution mandated under Clause 7.13 of SLEP 2012. A condition of consent will be imposed, and in accordance with the City's Affordable Housing Policy, will go towards the provision of purpose-built affordable housing in the City of Sydney LGA."

57 Third, in oral evidence, I raised the issue generally with the experts. The experts' oral evidence essentially followed the points nominated above. I asked the experts about their reference to there being "no planning mechanism currently in effect which prohibits that reduction in the number of dwellings overall on a development site", and did they think there was a need for one in this instance.

58 In response, Mr Harvey referred to Council's draft policy "where they don't want to see a reduction in more than 15% of the total number of dwellings", and that this was not in effect yet (T 6/11/24 110 (36)). Ms Errington indicated an understanding of a savings provision which would mean the policy wouldn't apply to current DAs. In regard to the "no current planning mechanism" concept, and affordable housing, Ms Errington also referred to the exclusion of strata subdivision from the provisions of SEPP Housing aimed at retaining low cost rental accommodation. Finally, in relation to oral evidence, Ms Pressick

referring to heritage conservation considerations indicated (T 6/11/24 113 (16-20)):

> "Under our controls, the existing building is identified as a neutral item, and has been assessed by our heritage officer as not making a contribution a positive contribution to the established character setting or significance of the Elizabeth and Rushcutters Bay HCA, and therefore demolition of the buildings is supported under those controls."

Lay evidence that the proposed development is not consistent with the first R1 zone objective

59 There were a number of lay submissions of pertinence here. I will refer to two persons providing oral evidence on this topic during the proceedings. After referring to what was called "the pressing housing needs of the city" and "the social impacts for the suburb", the evidence of L Adkins included the following (T 05/011/24 23 (28) - 24 (4)).

> "....The proposed development will result in a net loss of homes. Across the period of seeking approval for this DA, the planned number of new apartments, as we heard this morning, has shrunk. Now the existing 28 apartments on this site will be replaced by only 20 new dwellings, a 28% reduction.
>
> It's difficult to see how the applicant can maintain that this proposal is compliant with the LEP land use zone objective "to provide for the housing needs of the community" when it creates a net reduction in housing supply in the midst of a housing crisis. This is not in keeping with the City of Sydney's commitments in Sustainable Sydney 2030-2050 to being a city where everyone has a home. The existing building provided for comparatively affordable housing and a high level of rental accommodation. This proposal is for a limited number of luxury apartments. For the interests of the Court, Fortis agents are currently quoting two-bedroom apartments starting at 5.2 million and rising to three-bedroom apartments for 11 million with a view; that is not counting the penthouses.
>
> Across this suburb, successive DAs such as this seek to remove the housing stock that provides for the needs of young people, older people, creatives, essential workers. This constitutes a form of social cleansing as these groups are effectively forced out of the area. Something I have personally witnessed in recent weeks, as residents of 10 Onslow and 21C Billyard have packed up and left. Some of those people had lived in those buildings for decades. It's hard to see how, in practical terms, the affordable housing contribution of a meagre $1.47 million set out in the proposed conditions of consent goes any way to remediating this situation."

60 The evidence of H Hughes included the following (T 05/011/24 29 (11-31):

> "Finally, I'd like to talk about the significant loss of affordable housing posed by this development. As has already been mentioned, the site accommodates 28

units, many of which provide accessible and moderately priced housing options within Elizabeth Bay. This proposal seeks to reduce the dwelling count to just 20 units, which is a 28% decrease and this will be replaced with primarily three-bedroom luxury units. I'd like to say that this decrease does not align with the social and economic needs of the community, where affordable housing options are already dwindling.

The City of Sydney has recently exhibited a new planning proposal that aims to prevent developments reducing the net number of dwellings by more than 15%. Although this policy is still under consideration, and may not technically apply to this proposal, we strongly submit that the rationale behind it remains valid. Loss of affordable housing supply is a relevant consideration under the social impacts and public interest components of s 4.15 of the Environmental Planning and Assessment Act. Here the redevelopment reduces housing supply and affordability which threatens to detract from the social diversity and accessibility of an inner city neighbourhood. This is precisely the type of redevelopment that the City of Sydney's draft planning proposal seeks to curb and we believe, on social impact and public interest grounds, cannot be approved."

61 There are many other references in lay submissions to reduction in more affordable housing supply which the proposal was suggested to bring about.

Synthesising alternative views on interpretation of the term "housing need"

62 The determination of the meaning to be assigned to "housing need" in the first R1 zone objective is at the centre of question I face in regard to making a positive finding of satisfaction with respect to cl 4.6(4)(a)(ii) of SLEP. To help focus the next phase of the interrogation of this question I try to illustrate two, outline, alternative interpretations which might be understood from the evidence above:

(1) The proposed development is inconsistent with the first objective of the R1 zone because it would (1) decrease housing provision overall, (2) decrease the availability for those in need (eg decrease more affordable housing); and each work against the objective of "providing for the housing needs of the community".

(2) The proposed development is consistent with the first objective of the R1 zone because it would (1) provide for a greater amount of three and four bedroom housing which is in relatively short supply in the local area (based on ABS data [56]) and (2) there is a demand, or "want" for the form of housing proposed, therefore there is a need for it.

63 The first interpretation, more aligned with views expressed in objecting submissions, suggests two distinct points: (1) providing for housing need is related to the availability of housing stock, and (2) providing for housing need is related to those who are in need, or with limited access to such stock. It seems to me clear that if this interpretation is correct the proposed development would not be consistent with it (given the reduction in housing and the reduction in at least somewhat more affordable housing).

64 The second interpretation aligns, for example, with the statement in Ex F that "(the) proposal will replace ageing buildings (50+ years old) with new, high-amenity housing stock which will meet the housing needs of the community" (see [51]). Similarly, the proposal is entirely consistent with this interpretation of the phrase providing for housing need.

Applying principles of statutory construction

65 The principles of statutory construction were well considered in *Cumberland Council v Tony Younan; Cumberland Council v Ronney Oueik; Cumberland Council v H & M Renovations Pty Ltd* [2018] NSWLEC 145 at [71]–[72], where Robson J found in par [71-72]:

> "In resolving the meaning of s 127(5A), the ordinary approach to statutory interpretation applies. The now well-accepted approach was recently considered in Hunter Quarries Pty Ltd v Alexandra Mexon as Administrator for the Estate of the Late Ryan Messenger [2018] NSWCA 178, where Payne JA, with whom Basten and Gleeson JJA, Sackville AJA, and Simpson AJA agreed, said at [57]:
>
> > The relevant principles of statutory construction were not controversial. The parties referred to Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory) (2009) 239 CLR 27; [2009] HCA 41 at [47], where the plurality emphasised that construction must begin with a consideration of the text itself and while the language employed is the surest guide, its meaning may require consideration of the context, which includes the general purpose and policy of the provision, in particular the mischief it is seeking to remedy. The importance of context, including the general purpose and policy of the provision has subsequently been emphasised by the High Court: Board of Bendigo Regional Institute of Technical and Further Education v Barclay (2012) 248 CLR 500; [2012] HCA 32 at [41]; Federal Commissioner of Taxation v Consolidated Media Holding Ltd (2012) 250 CLR 503; [2012] HCA 55 at [39]; SZTAL v Minister for Immigration and Border Protection [2017] HCA 34; 91 ALJR 936 at [14] and [25]-[39].

> However, the importance of context does not detract from the centrality of the text and the principle that each word should be given work to do: Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28 ('Project Blue Sky') at 381-382. Where the clear words of a statute demand a particular outcome, the fact that the outcome may appear inconvenient will not, in itself, be determinative."

66 To try to synthesise, the points of attention for me here include: (1) begin with consideration of the text itself, with its language "as the surest guide" and the principle that each word should be given work to do and (2) interpretation of meaning of a provision may require consideration of context, "in particular the mischief it is seeking to remedy".

Beginning with the text: definitions and general meanings ascribed to "need" and "want"

67 The Dictionary to SLEP is of limited use in regard to the terms I seek to interpret here. Where below I refer to a Macquarie Dictionary definition, I am referring to my own access to the NSW Law Courts Library's online subscription service. Access in all instances was on the afternoon of 12 December 2024.

68 I am happy to adopt a slightly adjusted Macquarie Dictionary definition of "provide for", as follows: "to make arrangements for the supply of means of …".

69 The Macquarie Dictionary provides the following relevant definitions of "community":

> "noun (plural communities)
>
> 1. all the people of a specific locality or country: the new transport service is for the benefit of the whole community.
>
> 2. the community, the public.
>
> 3. a particular locality, considered together with its inhabitants: a small rural community."

70 SLEP does not provide a definition of "housing need", "housing" or "need" within its Dictionary. The term "residential accommodation" is defined and might be seen to include at least most of the various forms of housing (for me it is more to the point than the MD definition). It is defined as:

"a building or place used predominantly as a place of residence".

71 For completeness the most suitable Macquarie Dictionary definition of housing is: "the provision of houses or other accommodation for the community".

72 I now turn to the more critical definitional material. The term "need", as a noun, is defined in the Macquarie Dictionary as follows:

> 1. a case or instance in which some necessity or want exists; a requirement: to meet the needs of the occasion.
>
> 2. urgent want, as of something requisite: he has no need of your kindness.
>
> 3. necessity arising from the circumstances of a case: there is no need to worry.
>
> 4. a situation or time of difficulty; exigency: a friend in need.
>
> 5. a condition marked by the lack of something requisite: the need for leadership.
>
> 6. destitution; extreme poverty.

73 The term "want", as a noun, is defined in the Macquarie Dictionary is as follows:

> 10. something wanted or needed; a necessity.
>
> 11. a need or requirement: the wants of humankind.
>
> 12. absence or deficiency of something desirable or requisite; lack: *Even the rabbits were gone now – either killed for food or dead for want of something to eat. –W.E. HARNEY, 1947.
>
> 13. the state of being without something desired or needed; need: to be in want of an assistant.
>
> 14. the state of being without the necessities of life; destitution; poverty.
>
> 15. a sense of lack or need of something.

74 For me the better understanding of *need* (in the sense of "housing needs of the community") from these definitions would be more aligned with the first of the interpretations I outline at [62]. This is through reference to terms like "necessity", "requirement" and "a situation of difficulty".

75 I now turn to some examples of use of the terms *need* and *want*, in practical use. Directly contrasting use of the terms is prominent in popular culture, for

example. One example is use of the terms *need* and *want*, in popular music standards such as the Rolling Stones' "You Can't Always Get What You Want":

> You can't always get what you want
>
> But if you try sometimes, well, you might find
>
> You get what you need …

76 Another popular music standard which uses both terms together is the Coldplay song "Fix You":

> When you try your best, but you don't succeed
>
> When you get what you want, but not what you need …
>
> …
>
> Stuck in reverse

77 If I focus on the text alone, these dictionary definitions and popular common usage interpretations differentiate rather than correlate the two terms *need* and *want*. They suggest to me that the first of the two interpretations "housing need" I reference at [62] is the correct one.

78 I acknowledge some suggestion of a correlation between the terms *need* and *want* in the two Macquarie Dictionary definitions. I think this correlation is better understood only in the sense of a particular meaning of the term *want* (ie that meaning already aligned directly with my interpretation of the term *need*). However, if a fulsome interrogation of this question of interpretation is to be undertaken, under the principles of statutory construction referred to above, it is appropriate to turn to the question of "context". Contextual considerations

Zone objectives in context

79 To read the zone objectives in context, as relevant to the question before me, only need involve consideration of the first two zone objectives:

- To provide for the housing needs of the community.
- To provide for a variety of housing types and densities. unfiltered

80 When I consider these zone objectives, I am inclined to the view that there is a kind of pairing evident. The first zone objective is concerned with "housing needs of the community" – the sense is direct and unfiltered, of a higher order ambition. The second zone objective is then concerned with how this housing might be provided, or the detail of its provision (ie provide for a variety in housing types and densities). When I look at the current version of the Standard Instrument (Local Environmental Plans) Order 2006 (SI Order), relevantly for the R1 zone, these two objectives are listed in order (along with a third objective which is not relevant here). "Direction 1" in the notes to the Land Use Table in the SI Order suggests these as "core objectives":

> "Direction 1—
>
> Additional objectives may be included in a zone at the end of the listed objectives to reflect particular local objectives of development, but only if they are consistent with the core objectives for development in the zone as set out in the Land Use Table."

81 For the other residential zones in the SI Order, there is a similar structure, although not precisely the same. That is, taking on the same two points in the pairing: at the primary level providing for housing need but then within certain environmental settings (low density/medium density/high density environment, for R2, R3, R4), and for the higher density zones, also (like the R1 zone) providing for variety in housing type (see Land Use Table SI Order).

82 The fact that these core objectives are, essentially, State-wide with respect at least to the R1 zone (and notably similar core objectives for other residential zones) supports the idea that the establishment of the first zone objective of the R1 zone is a high level policy ambition relating to housing supply to meet community need in the sense of an essential or requisiteness . It relates to but is separate from the ambition (in the second R2 zone objective) to provide for variety of housing form, which might relate to different *want*s.

<u>What "mischief" is sought to be remedied: understandings of "housing needs of the community" from research and policy</u>

83 If the development application evaluation-related provisions of planning instruments are concerned with attending to a "mischief", it can assist at looking

at the wider policy settings for clues. First, I note some particular aims of SLEP, which have some relevance:

> (2) The particular aims of this Plan are as follows—
>
> (c) to promote ecologically sustainable development,
>
> (d) to encourage the economic growth of the City of Sydney by—
>
> (i) providing for development at densities that permit employment to increase, and
>
> (ii) retaining and enhancing land used for employment purposes that are significant for the Sydney region,
>
> (e) to encourage the growth and diversity of the residential population of the City of Sydney by providing for a range of appropriately located housing, including affordable housing,
>
> ...
>
> (g) to ensure that the pattern of land use and density in the City of Sydney reflects the existing and future capacity of the transport network and facilitates walking, cycling and the use of public transport,
>
> (h) to enhance the amenity and quality of life of local communities,
>
> ...
>
> (j) to achieve a high quality urban form by ensuring that new development exhibits design excellence and reflects the existing or desired future character of particular localities,
>
> ...

84 I can also turn to the aims of the EPA Act (s 1.3), also with some selectivity as to relevance:

> The objects of this Act are as follows—
>
> (a) to promote the social and economic welfare of the community and a better environment by the proper management, development and conservation of the State's natural and other resources,
>
> (b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,
>
> (c) to promote the orderly and economic use and development of land,
>
> (d) to promote the delivery and maintenance of affordable housing,
>
> ...

(f) to promote the sustainable management of built and cultural heritage (including Aboriginal cultural heritage),

(g) to promote good design and amenity of the built environment,

(h) to promote the proper construction and maintenance of buildings, including the protection of the health and safety of their occupants,

...

(j) to provide increased opportunity for community participation in environmental planning and assessment.

85 The aims and objectives of SLEP and the EPA Act reveal the intricacy and range of matters involved in the planning and development control challenge. There is reference to the promotion of economic use of land (something which it might be thought of as occurring with the recapitalisation process involved across the site with this intended project), along with the encouragement of diversity (an issue seen as within the ambit of the project at least at the local level). Moreover, there is a clear indication of ambition relating to social and economic welfare including the principles of ecologically sustainable development principles (ESD) (as per s 6(2) of the *Protection of the Environment Administration Act 1991*), which introduce such matters as intergenerational equity. Likely social impact is also directly referenced as a consideration in DA evaluation under s 4.15(1) of the EPA Act.

86 Drawing down from the above, I have found the consideration of the objecting submissions of use in interpreting, more directly, the mischief which is sought to be addressed by the particulars of the first R 1 zone objectives. Apart from the net reduction in housing stock in this local setting and "dwindling" local affordable rental accommodation, the objecting submissions raised suggestions of more systemic housing supply issues and serious adverse social impacts (at [59]-[60]). In my view these arguments are well made, and entirely consistent with research findings. The National Housing Supply and Affordability Council is a statutory body, comprising cross sectoral members, which provides advice in the field of housing supply and affordability. Its publication: "State of the Housing System" (2024) identifies Australia as in a "housing crisis" (agreeing with one of the objector submissions on this description [59]). The "crisis" is suggested to be based on insufficient supply

"from social housing through to market home ownership"; and that rather than "abstract and theoretical" the problem is real and a source of "significant stress" (p 1). It is not unfair to say that most NSW residents, excepting those living in quite rarified space, would hold a similar understanding; if not through direct experience, then that of younger family members. There is also little doubt, based on empirical experiences of most of us, that Sydney is at least in the thick, if not at the apex, of this setting.

87 The housing problem (if not crisis) relates to notable increases in housing costs (in relation to average earnings) over recent decades. There are then finer points, in my opinion, relating to inter and intra generational equity problems and spatially-based disadvantage (housing more affordable in areas where accessibility to work and services is lower), which was raised in objecting submissions. This was that essential workers like teachers, nurses, police and childcare workers (key workers) are priced out of home ownership and affordable rental housing. The objecting submissions linked "young people, older people, creatives" to that group: [59].

88 The development control aspect of the planning system, including DA evaluation, can be expected to acquaint with access to housing for those in need of it. Insofar as the R1 zoned land in areas covered by SLEP, in my opinion this is manifest in the first zone objective. Or to put another way, in the terminology of the principles of statutory interpretation, if particular provisions of planning instruments are to be interpreted as concerned with attending to a "mischief" [65], the "mischief" that the first zone objective is seeking to address is deep-seated problems with providing required levels of housing to meet essential community needs. In my interpretation of both a direct reading of the text, but also mindful of the contextual setting of the provision, each of the two factors identified initially in the first interpretation option (at [62]) are relevant. That is, that the first zone objective's particular mischief involves both supply of housing stock generally and the accessibility of housing (ie including affordability).

89 The replacement of the existing (smaller, more affordable and perhaps lower amenity) housing with larger and higher amenity housing; as a suggested

beneficial outcome in providing for a more diverse population in the local Elizabeth Bay precinct, whether or not that is a good thing overall, lines up with the second R1 zone objective ("provide for a variety of housing types and densities"). But the first zone objective is the point of concern for me, and again under the principles of statutory construction, and the notion that words must have "work to do", it cannot be held that the second interpretation option (at [62]) is correct. If so the second zone objective would have no work to do.

Proposed development is not consistent with the first objective of the R1 zone to "provide for housing needs of the community" – no power to grant consent

90 It is certainly not always the case that in the development application evaluation process there is a requirement for a finding on the part of the consent authority that a development is consistent with a related zone objective. But when proposed development breaches a development standard, that test (as applicable in this instance), requiring such a positive finding of the particular decision-maker (under the applicable provisions of s 4.6 of SLEP), happens to apply.

91 While I have been mindful of other opinions and documentary particulars, it is my own finding, essentially in accordance with the reasoning outlined above, that the proposed development is inconsistent with the first objective of the R1 zone. 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".

92 Given this finding, power is not available to grant consent to the proposal.

The requirement for a "planning mechanism" or other similar matters as raised in expert evidence do not bring a different jurisdictional position

93 In expert evidence, reference was made to certain policy provisions or draft provisions, which I think in one way or another, the experts believed did not empower a decision to "prohibit reduction in dwellings": [54]-[55]. I was not persuaded that any of the referenced provisions "prohibit", or perhaps better

put, direct (in a legal sense) the decision I have to make with respect to cl 4.6(4)(a)(ii) of SLEP in another way. I can deal with the relevant matters, as raised in the evidence, relatively briefly in point form.

- Section 46(2)(a) of the Housing SEPP makes directly plain that it does not apply to this DA, as it is strata subdivided.

- Section 4.2.3.12 of SDCP, relating to dwelling mix, while not applying to the proposal directly, is not the point of concern for me, which relates to the loss of existing more affordable housing supply (of community need). It is true (mindful of the cited ABS stats) that the local housing mix in Elizabeth Bay diversifies if new housing containing more 3+ bedroom residences is provided and housing of two bedroom or less are taken away. But even if this is a desirable environmental outcome (and Section 4.2.3.12 of SDCP does not take on this question as it is concerned with new housing mix not loss of existing comparably affordable housing), it relates to the second R1 zone objective, concerned with providing for a variety of housing types and densities.

- Similarly, cl 7.13 of SLEP is concerned with contributions from new development, together incrementally contributing to future affordable housing over time. The concern here is on a different topic: the loss of existing (comparably affordable) housing. The loss of such housing stock would likely place greater pressure on existing programs concerned with providing affordable housing.

- There were no submissions on the imminence and certainty of Council's draft planning proposal relating to "dwelling retention". However, even if it were (imminent and certain), there was no suggestion of an intention to override applicable provision with respect to cl 4.6(4)(a)(ii) of SLEP in the case of a development standard contravention.

94 While each of these matters are notable, I don't see any of these provisions as providing an exit pathway from the Court being required to decide its opinion in

relation to satisfaction or otherwise that the proposed development is in the public interest because it is consistent with the objectives of the R1 zone (cl 4.6(4)(a)(ii) of SLEP).

Merits considerations

95 For completeness I will address the merits of the proposal now.

View impacts

Policy

96 I do note that cl 6.21 of SLEP relating to design excellence includes a requirement to consider (among many other things) "whether the proposed development detrimentally impacts on view corridors". Also section 4.2.3.10(2) of SDCP provides that "views and outlooks from existing residential development should be considered in the site planning and massing of new development". Otherwise, it was the Court's planning principle relating to "view sharing" that was the point of attention in view impact evaluation (*Tenacity Consulting v Warringah* 134 LGERA 23; [2004] NSWLEC 140, in particular the four-step process outlined at [23]-[29]).

Expert evidence

97 Ex 4 indicates view loss objections were raised from some 34 individual apartments, within apartment buildings identified as: (1) 15 – 19 Onslow Avenue, (2) 12 Onslow Avenue, (3) 13 Onslow Avenue, (4) 8 Onslow Avenue and (5) 23 Billyard Avenue. One communal area was also identified as of concern (within 15 – 19 Onslow Avenue). Objections also raised view loss from the public domain.

98 An approach agreed between the parties (ie with full participation of the Council) determined which of these apartments did not, and which did, warrant more detailed investigation (including preparation of view loss photomontages based on associated photogrammetric modelling) and which did not. The VSR includes a *Tenacity*–based evaluation of view loss impact for selected properties.

99 Ms Maze-Riley and Ms Errington agreed that the final View Sharing Report (VSR), dated 25 September 2024 (Ex 4 Appendix D), accurately depicts the proposed building design as amended (including rooftop shade structures) allowing, through its "certifiably accurate" photomontages, the full extent of view sharing and view loss to be determined. Notably, the experts agreed that the VSR "assessed the potential view impacts based on a sample of the closest and most impacted apartments located in neighbouring residential buildings" (Ex TP Table 1 Topic C Point 2) and that 'worst-case' views for modelling and analysis were adopted (Ex TP Table 1 Topic C Point 5).

100 The agreed position of the experts is that (Ex TP par 21):

> "... the extent of view loss is low and limited, view impacts per dwelling are negligible or minor, and view sharing is reasonable and supportable."

101 Notably the experts also indicated that non-complying elements of the proposal (ie relating to the building height contravention) do not cause unreasonable view loss (or shadow) impacts (Ex 4 Table 1 Topic A Point 12).

102 Briefly here, I note that a number of objecting submissions expressed considerable disagreement with these opinions of the experts.

Findings in relation to view impact

103 I gave some consideration to the question of how to balance differing expert and lay evidence in *GFM Investment Group Pty Ltd in its capacity as Trustee for GFM Home Trust Subtrust No. 7 v Inner West Council* [2023] NSWLEC 1112 at [41]:

> How lay submissions of this kind are to be addressed is a matter of common consideration in this Court. I note for example the more recent framing of the topic by Dixon SC in *McDonald's Australia Limited v Coffs Harbour City Council* [2023] NSWLEC 1067 ([49] et seq) who refers to the findings of Lloyd J in *New Century Developments Pty Ltd v Baulkham Hills Shire Council* (2003) 127 LGERA 303; [2003] NSWLEC 154 (*New Century Developments*) [61]. The statutory position is clear in that s 4.15(1)(d) of the EPA Act requires a consent authority to take into consideration submissions of this kind. *New Century Developments* then points to the need for discernment and to seek objective substantiation (ie rather than "blindly accepting") such lay submissions.

104 My own evaluation of view loss is based on the VSR, the evidence of the relevant experts, and objectors, and my own physical inspection from a small number of apartments within certain of the apartment buildings, the relevant private (communal) open space, and Onslow Avenue as the relevant public domain view area. It was this physical inspection from selected locations that provided the "objective substantiation I sought in this instance.

View loss from the public domain

105 I was not persuaded by objecting submissions raising concern about view impact from the public domain (also noting Ex 1 Contention 6(d) which had been struck out by Council in any event). It seemed the most at-risk area was the gap between buildings as viewed from along the Onslow Avenue road reservation. On my own experience, one would need to stand very tall at the very western edge of the footpath for there to be an effect on the public experience of a view to the harbour.

Unit 6C – 15-19 Onslow Avenue

106 There was certain descriptive material relating to Unit 6C which was in error in the VSR. This and the content of an objecting submission, querying the VSR findings with respect to Unit 6C, triggered my interest in re-inspecting from this property. I have reviewed the VSR analysis of this property's view loss which found it "negligible". Having viewed from the property, I disagree significantly.

107 I disagree with the following commentary in the VSR with respect to views from this property (generally referencing p 27 VSR). The description of current harbour views as "highly oblique" is inappropriate and misdirects. The available views are more towards the front than the side boundary. The views are very evident within the unit, both sitting and standing, and are in alignment with a central movement path between the dining room and the balcony. The available harbour views are the highlight of the balcony experience and have a presence when walking around the living area of the unit. It is an overstatement (in the VSR) to say that in this case the "intervening vegetation heavily screens". At present the visual experience of the harbour view includes

this tree canopy. That is, there is reasonable visual permeability through the tree to the water.

108 The most significant point of disagreement I have with the VSR is that the existing view from the balcony would be unaffected. Having viewed from the balcony, I believe Figure 27 in the VIA does not adequately represent the setting. A photograph in Ex 16 (seventh page), from a standing position (a reasonable aspect to consider views) more objectively represented the whole of the view available from the balcony and the view loss factor (within a reasonable margin of error having regard to the estimated height of the proposed building). It is the case that an area of water/land interface view would remain, but this is a narrow field of view and the whole view would be cut off markedly by the proposal. There would be a moderate view loss impact from Unit 6C.

Communal open space – 15-19 Onslow Avenue

109 15-19 Onslow Avenue is the tallest building in the immediate locality, with the built form itself suggestive of quite high density, although unusually beneficially endowed with communal open space. I revisited this area after one of the objectors (Mr Moody) drew to my attention certain provisions within the ADG, and other policy documents, highlighting the importance of high quality communal open space and its beneficial aspects for higher density developments. It was suggested that a number of apartments in this building "have no balcony and no aspect" (T 5/11/24 36 (28)). This property has a large area of grassed communal open space ("a breathing space") and a pool where there are views between buildings to the harbour. That is, an existing high amenity feature of the property comprises the view eastwards, between the site and 12 Onslow Avenue, to the harbour and a land/water interface across the immediate bay. It is available only from a certain area of the communal open space near the pool. My recall is that this communal open space area was a point of congregation of residents from time to time.

110 At a maximum, and very imprecisely, the existing view corridor (between the buildings) to the harbour is about 5.5m wide. Most of this corridor associates

with the existing building setbacks on the site itself (minimum of 4.656m at present, reducing to a minimum of 3.027m with the proposed development (Ex C Tab 12 DA003 Rev E). With the proposal, about 30% of the view corridor from the ideal spot within the communal open space at 15-19 Onslow Avenue would be lost. This aspect of the view loss of the development was not part of the photomontage modelling or *Tenacity* testing.

111 My general conclusion with respect to communal open space at 15-19 Onslow Avenue is that the proposal would bring an adverse effect on the amenity enjoyed from there. A quite special feature and likely point of some social congregation, which is easily understood to be of value, would be diminished to a noticeable extent. I can note that the building height contravention is not a relevant factor here.

Units 5 and 7 - 12 Onslow Avenue

112 I agreed with the evidence in some objecting submissions that the photomontages for both Units 5 and 7, 12 Onslow Avenue, were taken at the left or northern corner of the balcony, whereas the natural area to sit and stand was more central to the balcony. During the site inspection I inspected from these two balcony locations to better understand the implications if view loss was considered more central to either balcony, both of which had harbour views more or less directly outwards to the east. Insofar as the particulars of the photomontage location, there was no difference in impact in regard to Unit 5 at the lower elevation.

113 For Unit 7 there was a difference in impact when view loss was considered more centrally on the balcony. In the filed photomontage (Ex 4 Appendix D DWG: VP7-C – ie from the left corner of the balcony) the highest elements on the roof of the proposed Billyard Ave building (the lift over run and open area canopy) would align with an existing viewline towards a large thick-canopied tree, which limits the harbour view (although the existing tree is naturally more pleasant in aspect compared to the proposed building). However, when viewed from the centre of the balcony these higher elements of the Billyard Avenue building would restrict an existing available view of a baylet and

harbour shoreline. At present this relatively foregrounded detail of the "interface between land and water" (*Tenacity* [26]) is visible. It is also significant to the "wholeness" (*Tenacity* [26]) of the view which is available from this setting (the canopy tree I mention is viewed as a harmonious element in that sense).

114 Again I see it as not useful to describe the existing view as "highly oblique to the north-east" (VSA p 39). Rather the segment of harbour available to view is quite perpendicular to the balcony and not narrow (straddling the foreground palm tree). It is the case that the view which would be constrained is to the left of centre but it also acts as an interesting land/water interface element of the whole view from this balcony. When compared to the current view, the above described view loss, replaced by way of an immediate foreground view of the upper level of the Billyard building would make for a moderate, rather than minor, view loss impact.

Unit 2 – 13 Onslow Avenue

115 There is a similarity here with the situation described in regard to the communal open space at 15-19 Onslow Avenue, in that it is not the building height but its massing which would further narrow an existing limited but valued view corridor, especially from an open balcony. Relevant here is that the corridor which would be lost does involve a mid-ground water land interface view, which enriches it. Otherwise, there are limits to the views available from this ground floor unit. In this case, again something which could be reasonably understood to be of some significant amenity to the residence would be diminished. There would be a moderate-minor (rather than minor) view impact on this dwelling, while recognising the limits to the views that are available. The layer of assessment of reasonableness then would set this impact into context.

Other matters

116 There are some other considerations raised, related to merits, which I can deal with now more briefly.

117 Having regard to the various objecting and supportive submissions, in this balancing exercise, I place no weight on the private financial benefits to the owners of the existing units of the site. Similarly, no weight applies to those who benefit financially from the development not going ahead. Impact on property values is not a proper planning consideration: *Australian Turf Club v Liverpool City Council (No 2)* [2014] NSWLEC 1099 at [16].

118 There were considerable objections raised in lay submissions about the adopted maximum building height plain as presented in architectural drawings (ie above existing land, which itself was a matter of some dispute on the part of objectors). The parties' experts advised me that they have scrutinised this topic considerably and it is reasonable for me to accept the position of these very experienced experts on this technical question.

119 Similarly, I accept that the proposal would meet the solar access provisions of SDCP, which are quite intricate and technical. Council's experts had scrutinised this closely and were convinced in this regard.

120 I am not convinced that what I might call the "modernisation" aspect of the proposal raised in some objecting submissions and even in some expert evidence has any merit. It is unreasonable to think generally that buildings need modernisation after "50+" years of existence, it would depend on the circumstances of the case.

121 The reference to the proposal providing "high-amenity housing stock which will meet the needs of the community" needs to be balanced against the point that this high-amenity stock is only available to a small cohort and the existing housing on the site also meets needs of the community because of its relative pricing, as it happens, related to lower "amenity" credentials. Based on the lay objecting submissions there was a positive feeling about the existing social and housing mix.

122 I do not see an argued preference for owner occupiers over renters as a planning consideration.

123 The positive economic impacts associated with the development's construction are important and notable. I don't recall any quantification in the material before me, apart from the $23m figure on development cost quoted in the Class 1 Application (Ex A Tab 1). This would be a considerable scale demolition, earthworks and construction effort that would bring important benefits to a number of individuals and firms by way of investment, job creation and multiplier effects.

124 While the new building is argued to be a relatively high performer in environmental terms (mindful of Ex 4 p 39 Topic V Point 5), I do not see the environmental benefits argued by the experts as convincing. As far as I could see the arguments do not give consideration to the negative effects (eg waste generation from demolition and disposal of relevant materials, embodied energy associated with construction of new development).

125 I do not see the expert reference to demolition of the existing "neutral" buildings, in heritage terms, as being "supported under [SDCP heritage] controls" (see [57]), as an accurate representation of the policy position. I understand the heritage-related provisions concerning infill buildings to be at s 3.9.8 of SDCP and are as follows:

> *3.9.8 Neutral and appropriate infill buildings*
>
> Neutral buildings are buildings that do not contribute nor detract from the significant character of the heritage conservation area.
>
> Neutral buildings are:
>
> • From a significant historical period, but altered in form, unlikely to be reversed;
>
> • sympathetic contemporary infill; or
>
> • from a non-significant historical period but do not detract from the character of the Heritage Conservation Area.
>
> (1) Demolition of neutral buildings will only be considered where it can be demonstrated that:
>
> (a) restoration of the building is not reasonable; and
>
> (b) the replacement building will not compromise the heritage significance of the heritage conservation area.

(2) Where demolition of a neutral building is allowed, a photographic record of the building may be required to be submitted to the City.

(3) Alterations and additions to a neutral building are to:

(a) remove unsympathetic alterations and additions, including inappropriate building elements;

(b) respect the original building in terms of bulk, form, scale and height;

(c) minimise the removal of significant features and building elements; and

(d) use appropriate materials, finishes and colours that do not reduce the significance of the Heritage Conservation Area.

126 While I may have interpreted the expert's comments over-literally, the above provisions would not properly be seen as being supportive of demolition of neutral buildings as a matter of policy. They would be better interpreted as seeking to retain neutral buildings in HCAs, and not allowing demolition unless certain prerequisites can be demonstrated. Heritage itself is a neutral factor in this evaluation.

127 There was a concern raised about impact upon the outlook enjoyed through window areas in an upper level area within Unit 12/12 Onslow Avenue. The VIA determined that the proposed penthouse in this Onslow Avenue building "blocks all scenic attributes" currently available from this position. I certainly agree with the VIA conclusion that a factor here is that other much more accessible and higher valuable harbour views are available within this residence. But objectively it can be observed that a particular point of enjoyment of this residence would be lost. A very pleasing outlook would be replaced by the proposed development's building massing in the immediate foreground.

Given the need to balance positive and negative impacts - the proposal would also fail on the merits

128 As a commissioner of the Court it is common when evaluating the merits aspects of development applications which do provide for more housing (ie consistent with the core objective of residential zones) to consider whether to be more tolerant of potential impacts. Just because it happens to be very recent, I note my judgement in the following case in that respect: *Station Lane Pty Ltd v Penrith City Council* [2024] NSWLEC 1797 at [40].

129 Such an approach is quite consistent with the evaluation framework outlined by Preston CJ in *Bulga Milbrodale Progress Association Inc v Minister for Planning and Infrastructure and Warkworth Mining Limited* (2013) 194 LGERA 347; [2013] NSWLEC 48 (eg at [484]). Here it was suggested as an essential task of the Court to apply appropriate weight to relevant matters in determining whether the preferable decision is to approve or disapprove of a proposal.

130 This proposed development would bring certain beneficial aspects, which are consistent with, for example, Objective 1(c) of the EPA Act. This is through the development's promotion of the economic use and development of land. This development would make a contribution to the construction sector, an important factor in the economic welfare of the community.

131 The proposal would also add to the housing mix in the locality by providing for more 3+bedroom residences. Removing the larger cohort with two bedrooms and less would also assist with this statistical equation. I am not convinced that great weight goes to this factor.

132 There are obvious negative social impacts associated with the proposal which are more substantial and warrant greater weight. These are centred on the important matter of the reduction of housing which meets community need.

133 Despite considerable positive design responses as the proposal has evolved, there remain some negative amenity impacts. Above I have identified view loss impacts, which were in some instances understated in the application material and in the relevant expert reports. The fourth step of *Tenacity* is concerned with the reasonableness of the development as proposed and there is a question why even minor say view or other amenity impact is acceptable when there is a more serious negative effect associated with the proposal.

134 Other amenity impacts include new visual bulk in excess of height controls and there is the general neighbourhood annoyance associated with the demolition and construction of a significant scale project of this kind.

135 It is regular practice for such impacts to be balanced out by the positive aspects of a development (eg when providing for the housing needs of the community). But in this instance, because I can't rely on this proposal as responding to a higher order housing goal, in fact finding it would work against it, a differing set of weightings need to be in place in this (*Bulga*-identified) balancing exercises.

Concluding remarks

136 I note the fact that the proposal comes before me with agreed draft orders requesting the grant of consent. Having regard to the whole of the relevant circumstances, I am unable to do so.

137 As outlined above, the proposed development would breach an applicable development standard relating to building height under SLEP. The permissive powers of cl 4.6(2) of SLEP are not available to me because I am not satisfied that the proposed development is in the public interest because it is consistent with the objectives for development within the R1 zone objectives (cl 4.6(4)(a)(ii)). The essence of it is that the proposed development would not provide for the housing needs of the community. It would have the opposite to effect. There is no power available to grant consent.

138 The proposal would also fail on merits. The merits failure is also essentially concerned with the adverse social impact of reduced housing supply which meets community need. In my view this easily outweighs the construction-related economic benefits which generate, the platform for which is created by effecting the removal of existing housing stock. The amenity impacts are moderate and would, were the situation to be "reversed" (ie the proposal was increasing housing supply, particularly were it for an in-need group), the weightings could also be reversed.

Orders

139 The Court orders that:

(1) The appeal is dismissed.

(2) Development Application No. D/2023/727 for the demolition of existing buildings/trees, construction of two new residential flat buildings (including excavation for a shared basement structure), site landscaping and provision for utilities and stormwater infrastructure at 21C Billyard Avenue and 10 Onslow Avenue, Elizabeth Bay 2011 NSW is refused.

(3) The Exhibits are returned, with the exception of Exhibits 2 and A-G which are retained.

I certify that this and the preceding **40** pages are a true copy of my reasons for judgment.

.....

P Walsh

Commissioner of the Court

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