



Land and Environment Court  
New South Wales

---

Case Name: Team Tech Pty Ltd v Sutherland Shire Council

Medium Neutral Citation: [2020] NSWLEC 1033

Hearing Date(s): 17-18 October 2019; 6 December 2019; 16 December 2019

Date of Orders: 24 January 2020

Decision Date: 24 January 2020

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:  
(1) The Applicant is granted leave to amend the application and rely upon amended plans in Exhibit A subject to the Applicant paying those costs of the Respondent thrown away, as agreed or assessed.  
(2) The appeal is dismissed.  
(3) Development consent for Development Application DA18/0627 seeking consent for the demolition of existing structures and construction of 14 townhouses and strata subdivision is refused.  
(4) All exhibits are returned, except for Exhibits 9, 10, 11, 12 and K, N and P.

Catchwords: DEVELOPMENT APPEAL – multi-dwelling housing in R2 zone – whether a lot is an internal lot – clause 4.6 written request to justify height exceedance – streetscape and built form

Legislation Cited: Environmental Planning and Assessment Act 1979  
Land and Environment Court Act 1979  
Sutherland Shire Local Environmental Plan 2015

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council

[2018] NSWLEC 118

Texts Cited: Sutherland Shire Development Control Plan 2015

Category: Principal judgment

Parties: Team Teach Pty (Applicant)  
Sutherland Shire Council (Respondent)

Representation: Counsel:  
J Reid (Applicant)  
J Cole (Solicitor) (Respondent)

Solicitors:  
Boskovitz Lawyers (Applicant)  
HWL Ebsworth (Respondent)

File Number(s): 2018/234494

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This Class 1 appeal concerns a development application brought before the Court under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal by the Sutherland Shire Council (the Respondent) of Development Application DA18/0627 seeking consent for the demolition of existing structures and construction of 18 townhouses and strata subdivision.
- 2 Leave was granted by the Court on 21 August 2019 for the Applicant to amend the application for development consent. Leave was also granted by the Court on 5 September 2019 for the Applicant to rely on an amended flood assessment.
- 3 Leave was also granted by the Court at the commencement of the hearing for the applicant to amend the application for development consent subject to the Applicant paying those costs of the Respondent thrown away as a result of the amendment of the leave granted on 21 August 2019 when compared to the application in Exhibit A, as agreed or assessed.
- 4 The amended plans and documents comprise:

- Architectural plans marked Exhibit A, along with a schedule of amendments.
  - Landscape plans, marked Exhibit B.
  - Stormwater Plans, marked Exhibit C.
  - BASIX and NATHERS certification, marked Exhibit D.
- 5 On the second day of the hearing, and prior to hearing the oral evidence of the experts, I directed that the experts further confer on the Exhibit A plans in relation to those matters arising from the joint reports already entered as Exhibits. The experts conferred and provided the Court with supplementary reports marked Exhibit 10, 11 and 12.
- 6 The Applicant relied on the expert evidence of Mr Andrew Darroch (town planning), Mr Ross Jackson (arboriculture), Mr Benny Chen (traffic), and Mr Sam Haddad (stormwater). The Council relied on the expert evidence of Ms Deborah Laidlaw (town planning), Mr Yusuf Riad (traffic and stormwater) and Mr James Van Breda (arboriculture).

### **The issues**

- 7 The Council's contentions may be summarised as follows:
- (1) The site is unsuitable for development in the manner proposed as it is not consistent with the desired future character of the locality.
  - (2) The proposed development exceeds the maximum height permissible.
  - (3) The design, bulk and scale of the proposed development requires excessive excavation, adversely impacts on neighbours amenity.
  - (4) The design and layout of the development results in unacceptable internal amenity for its future occupants.

### **The site and its context**

- 8 The Applicant seeks to consolidate two irregular shaped allotments to form a site with a total area of 4,130m<sup>2</sup>. The site is legally described as comprising Lot 4 in DP 26477, being No. 12 Stansell Avenue, and Lot 2 in DP 233879, being No. 28A Wattle Road.
- 9 No. 12 Stansell Avenue is a wedge shaped lot that fronts the street in an arc formed by a change of direction in Stansell Avenue. On its southern boundary, No. 12 Stansell Avenue adjoins No. 28A Wattle Road which is bounded on all sides by adjoining properties and benefits from a Right of Carriageway and easement for services over No. 28 Wattle Road.

- 10 The site falls from the rear of the site to Stansell Avenue, with an abrupt level change of around 12m in the south eastern quadrant of the site formed by sandstone rock shelves and steep terrain through which a natural watercourse runs that is piped for a section as it meets Stansell Avenue.
- 11 The topography rises around 5m in height to the western boundary across what is currently No. 28A Wattle Road.

### **The site view and public submissions**

- 12 Nine resident objectors gave evidence at the commencement of the hearing onsite. Agreed notes of those submissions are contained at Exhibit 9 however the concerns of the resident objectors can be summarised as:
  - The proposed development will worsen the excessive stormwater overland flow in the street, and to No. 7 and No. 9 Stansell Avenue which have experienced flooding in the past.
  - The number of new dwellings, and the resulting car parking is likely to further impact on local traffic congestion and on street parking, and may pose a risk to children in the street.
  - The extent of excavation proposed would result in adverse visual and environmental impact.
  - The extent of development will result in tree loss, loss of privacy to adjoining properties and adversely impact the ecology of the area, with poor water quality downstream in the Honeysuckle Reserve.
  - Construction noise and extent of excavation will impose unacceptable impacts on neighbours amenity and property.
- 13 The Court, accompanied by the parties and their experts viewed properties at No. 10 and No. 14 Stansell Avenue, and No. 27 Third Avenue Jannali, as well as a reserve at the end of Wattle Road marked 'Carina Gully' on maps, and known locally as 'Honeysuckle Reserve'.
- 14 At No. 10 Stansell Avenue, Mr Joost Wichgers explained his concerns at the setback, bulk and height of the proposed Building A and Building B which he said will overlook his family's rear yard which currently acts as a sanctuary for him and his family. A short video was played to the Court showing overland flow in the rear yard during a storm event. The video is contained on a USB that forms part of Exhibit 9.

- 15 At No. 14, Mr Harrison is also concerned at the loss of privacy resulting from visual intrusion and overlooking, and the proximity of the driveway to his boundary fence. He is also concerned at the potential for property damage from excavation, and stated that he is an excavation contractor.
- 16 At No. 27 Third Avenue, Mr Maidment is concerned at the loss of trees resulting from the development, and the impact on visual amenity and ecology.

### **Planning framework**

- 17 The site is located within the R2 Low Density Residential zone pursuant to the Sutherland Shire Local Environmental Plan 2015 (SSLEP) which permits multi-dwelling housing with development consent.
- 18 The objectives of the R2 zone are as follows:

#### **1 Objectives of zone**

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To protect and enhance existing vegetation and other natural features and encourage appropriate bushland restoration particularly along ridgelines and in areas of high visual significance.
- To allow the subdivision of land only if the size of the resulting lots retains natural features and allows a sufficient area for development.
- To ensure the single dwelling character, landscaped character, neighbourhood character and streetscapes of the zone are maintained over time and not diminished by the cumulative impact of multi dwelling housing or seniors housing.

- 19 The SSLEP sets out a minimum lot size of 1,200m<sup>2</sup> for multi-dwelling housing in an R2 zone at cl 4.1E.
- 20 The maximum height of buildings applicable to the site is in dispute. A height of 8.5m appears on the Height of Buildings Map in the SSLEP, unless a site is defined as an 'internal lot in which case cl 4.3 (2D) provides for a maximum height of 5.4m for multi dwelling housing in an R2 zone as follows:

#### **4.3 Height of buildings**

- (1) The objectives of this clause are as follows:
- (a) to ensure that the scale of buildings:
    - (i) is compatible with adjoining development, and

(ii) is consistent with the desired scale and character of the street and locality in which the buildings are located or the desired future scale and character, and

(iii) complements any natural landscape setting of the buildings,

(b) to allow reasonable daylight access to all buildings and the public domain,

(c) to minimise the impacts of new buildings on adjoining or nearby properties from loss of views, loss of privacy, overshadowing or visual intrusion,

(d) to ensure that the visual impact of buildings is minimised when viewed from adjoining properties, the street, waterways and public reserves,

(e) to ensure, where possible, that the height of non-residential buildings in residential zones is compatible with the scale of residential buildings in those zones,

(f) to achieve transitions in building scale from higher intensity employment and retail centres to surrounding residential areas.

...

(2D) Despite subclauses (2) and (2A), the maximum height for multi dwelling housing on an internal lot in Zone R2 Low Density Residential and Zone R3 Medium Density Residential is 5.4 metres.

21 The floor space ratio (FSR) applicable to the site is 0.55:1 as set out in cl 4.4 of the SSLEP and it is agreed by the parties that the proposed development complies with the FSR.

22 As the application proposes excavation on the site, cl 6.2 of the SSLEP relevantly provides:

## **6.2 Earthworks**

(1) The objective of this clause is to ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.

(2) Development consent is required for earthworks unless:

(a) the earthworks are exempt development under this Plan or another applicable environmental planning instrument, or

(b) the earthworks are ancillary to development that is permitted without consent under this Plan or to development for which development consent has been given.

(3) In deciding whether to grant development consent for earthworks (or for development involving ancillary earthworks), the consent authority must consider the following matters:

- (a) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development,
- (b) the effect of the development on the likely future use or redevelopment of the land,
- (c) the quality of the fill or the soil to be excavated, or both,
- (d) the effect of the development on the existing and likely amenity and structural integrity of adjoining properties,
- (e) the source of any fill material and the destination of any excavated material,
- (f) the likelihood of disturbing relics,
- (g) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area,
- (h) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.

23 The site is not identified as a 'Flood planning area' on the flood planning map at cl 6.3 of the SSLEP, however as a portion of the site is at or below the flood planning level, the provisions at cl 6.3 apply and are in the following terms:

### **6.3 Flood planning**

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

- (a) to minimise the flood risk to life and property associated with the use of land,
- (b) to allow development on land that is compatible with the land's flood hazard, taking into account projected changes as a result of climate change,
- (c) to avoid significant adverse impacts on flood behaviour and the environment.

(2) This clause applies to:

- (a) land identified as "Flood planning area" on the Flood Planning Map, and
- (b) other land at or below the flood planning level.

(3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development:

- (a) is compatible with the flood hazard of the land, and
- (b) will not significantly adversely affect flood behaviour resulting in detrimental increases in the potential flood affectation of other development or properties, and
- (c) incorporates appropriate measures to manage risk to life from flood, and

(d) will not significantly adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses, and

(e) is not likely to result in unsustainable social and economic costs to the community as a consequence of flooding.

(4) A word or expression used in this clause has the same meaning as it has in the Floodplain Development Manual (ISBN 0 7347 5476 0) published by the NSW Government in April 2005, unless it is otherwise defined in this clause.

(5) In this clause:

flood planning level means the level of a 1:100 ARI (average recurrent interval) flood event plus 0.5 metre freeboard.

24 As the site is burdened by a Council drainage easement, the provisions of cl 6.4 Stormwater management apply, and are in the following terms:

#### **6.4 Stormwater management**

(1) The objective of this clause is to minimise the impacts of urban stormwater on land to which this clause applies and on adjoining properties, native bushland and receiving waters.

(2) This clause applies to all land in:

(a) residential, business and industrial zones, and

(b) Zone E3 Environmental Management and Zone E4 Environmental Living.

(3) Development consent must not be granted to development on land to which this clause applies unless the consent authority is satisfied that the development:

(a) is designed to maximise the use of water permeable surfaces on the land having regard to the soil characteristics affecting on-site infiltration of water, and

(b) includes, if practicable, on-site stormwater retention for use as an alternative supply to mains water, groundwater or river water, and

(c) avoids any significant adverse impacts of stormwater runoff on adjoining properties, native bushland and receiving waters, or if that impact cannot be reasonably avoided, minimises and mitigates the impact.

25 Provisions related to Urban design are found in the SSLEP at cll 6.16 and 6.17, as follows:

#### **6.16 Urban design—general**

(1) In deciding whether to grant development consent for any development, the consent authority must consider the following:

(a) the extent to which high quality design and development outcomes for the urban environment of Sutherland Shire have been attained, or will be attained, by the development,



- (b) the extent to which any buildings are designed and will be constructed to:
  - (i) strengthen, enhance or integrate into the existing character of distinctive locations, neighbourhoods and streetscapes, and
  - (ii) contribute to the desired future character of the locality concerned,
- (c) the extent to which recognition has been given to the public domain in the design of the development and the extent to which that design will facilitate improvements to the public domain,
- (d) the extent to which the natural environment will be retained or enhanced by the development,
- (e) the extent to which the development will respond to the natural landform of the site of the development,
- (f) the extent to which the development will preserve, enhance or reinforce specific areas of high visual quality, ridgelines and landmark locations, including gateways, nodes, views and vistas,
- (g) the principles for minimising crime risk set out in Part B of the Crime Prevention Guidelines and the extent to which the design of the proposed development applies those principles.

#### **6.17 Urban design—residential accommodation**

In deciding whether to grant development consent for development for the purposes of residential accommodation the consent authority must consider the following:

- (a) the extent to which recognition has been given in the design of the development to the needs of the diverse and changing population of Sutherland Shire,
- (b) the extent to which any adverse impacts of the development on adjoining land and open space, in terms of overshadowing, overlooking, views, privacy and visual intrusion, will be minimised,
- (c) the extent to which the quality of the streetscape concerned will be improved by the development,
- (d) the extent to which there will be private open space of a sufficient area and dimensions to enable proposed and required activities,
- (e) the extent to which any adverse impacts of the development on adjoining land, in terms of size, bulk, height, scale and siting, will be minimised,
- (f) the extent to which the residential accommodation concerned integrates with a well-designed landscaped setting,
- (g) any opportunities for the provision of affordable housing.

26 Chapter 5 of the Sutherland Shire Development Control Plan 2015 (SSDCP) contains provisions relevant to multi dwelling housing. Part (a) provides objectives and controls specifically for multi dwelling housing in an R2 zone that include, relevantly:

(1) Provisions related to streetscape and building form are as follows:

**“1. Streetscape and Building Form**

**1.1 Objectives**

1. Ensure that all elements of development visible from the street and public domain make a positive contribution to the streetscape and natural features of the area.
2. Create entrances which provide a desirable and safe identity for the development and assist in visitor orientation.
3. Ensure development is compatible with the scale, character and landscape setting of the streetscape, its natural setting and scenic quality.
4. Achieve quality architecture in new development through the appropriate composition and articulation of building elements, textures, materials and colours.
5. Minimise the visual impact of garages, basement car parks, driveways and parking areas on the streetscape.
6. Ensure sites are of sufficient size to accommodate well designed development.
7. Provide for resident amenity.
8. Buildings are to be designed and sited to acknowledge the private open space of surrounding development and spatial character of rear yards. Extensive development should not dominate neighbouring rear yards.”

**“1.2 Controls**

1. Two or three storey development is only permitted on the front of an allotment and may extend to a maximum of 60% of the depth of the site measured from the property boundary.
2. A minimum site width of 20m is required for multi dwelling development. Where a variation is proposed, Council must be satisfied that:
  - a. The development provides safe and efficient vehicle and pedestrian access and allows vehicles to leave the site in a forward direction; and
  - b. The development provides adequate vehicular parking, storage space and waste storage areas; and
  - c. The development achieves a high standard of resident amenity and would have no greater impact on adjoining development that would otherwise be the case; and
  - d. The development is compatible with the streetscape and the landscape setting of the locality.

A smaller or narrower site width may not allow for the full FSR to be realised.

3. Development must be designed and sited so that it addresses the street and must have a clearly identifiable entry.
4. Individual dwelling entries must be designed to ensure safe pedestrian access and easy way finding.

...

7. Roof forms are to be designed to an appropriate size, mass and separation in order to be compatible with the scale and character of existing buildings and landscape elements.

8. The building form must be articulated to avoid large expanses of unbroken wall, and to visually reduce bulk.

9. Facades are to be composed with an appropriate scale, rhythm and proportion, which respond to the desired character of a locality

...

15. Where provided, communal driveways should be designed to provide visual variety and landscaping to reduce the monotony and scale of the pavement.

...

17. Basement car parking must not result in the building having a three storey appearance when viewed from the street.

...

18. Where a basement car park extends above the natural ground level, it is to be designed to ensure that any podium or vehicular entry does not dominate the overall design of the building or the streetscape.

...

20. A 1m deep soil landscaped setback to neighbouring properties is to be provided along the driveways to basement car parks.”

(2) Provisions related to building setbacks are as follows:

## **“2. Building Setbacks**

### **2.1 Objectives**

1. Ensure new development is compatible within the established or desired future streetscape character.

2. Encourage articulated building forms and ensure garages do not dominate the streetscape.

...

5. Incorporate architectural detailing and modulation to side elevations to offset building bulk and visual intrusion.

6. Alleviate the visual intrusion of building bulk on neighbouring properties.”

(3) Provisions related to landform are as follows:

## **“3. Landform**

### **3.1 Objectives**

1. Ensure that building siting, design and construction methods respond to the natural landform of the site.

2. Minimise the visual impact of new development, particularly when viewed from the

public domain.

3. Minimise earthworks so as to maintain the existing landform.
4. Minimise impacts on surrounding vegetation and provide increased opportunities for tree retention, including trees on neighbouring properties.

### **3.2 Controls**

1. Developments should avoid any unnecessary earthworks by designing and siting buildings within the natural slope of the land.
2. Natural ground level surrounding the development and at property boundaries must be retained or reinstated prior to the completion of works.”

(4) Provisions related to landscaping are as follows:

### **“4. Landscaping**

#### **4.1 Objectives**

1. Contribute to streetscape character, local habitat and the amenity of the public domain by using indigenous species which complement scale of the development.

#### **4.2 Controls**

...

3. Development should be designed to retain existing canopy trees in good health in the vicinity of side, rear and front setbacks, including on adjoining land.
4. A minimum of 2 indigenous canopy trees that will attain a minimum mature height of 5m must be planted within 3m of the front boundary and a minimum of 2 indigenous canopy trees that will attain a minimum mature height of 5m must be planted within 2m of the rear boundary.
- ...
6. Any privacy fencing must be appropriately landscaped with screen planting.
7. Appropriate paving must be provided to driveways, walkways, entries, fire egress points, garbage bin enclosures, letter boxes and clothes lines, and under pergolas.
8. Landscaping in the vicinity of a driveway entrance should not obstruct visibility for the safe ingress and egress of vehicles and pedestrians.
9. Where planter boxes edge both sides of a pedestrian path or entrance, the vertical height of the planter shall not exceed a height greater than half the width of the pathway.
- ...
10. Where trees are proposed on roofs or planter boxes an area of 3m x 3m per tree must be provided. Planter boxes in this case must be stepped, mounded or set down in the slab to reduce their apparent height on the surface to 450mm.
- ...
13. A communal rainwater tank and pump should be located underground in common open space. Common open space areas must be provided with a

water efficient irrigation system and taps at a minimum 25m intervals connected to the rainwater tank. Each private open space must be provided with a tap connected to the rainwater tank.”

- (5) Provisions related to building layout, solar access and private open space are as follows:

#### **“5. Building Layout, Solar Access and Private Open Space**

##### **5.1 Objectives**

1. Ensure outdoor living areas are functional and responsive to the environment and the internal layout of the building.
2. Ensure development provides opportunities for cross-ventilation and natural ventilation

##### **5.2 Controls**

...

5. Each dwelling is to provide an area of private open space that has a minimum area of 36m<sup>2</sup> with minimum dimension of 5m, of which 9m<sup>2</sup> must be paved.

...

7. The primary living area of a dwelling is to provide direct access to its private open space.

8. For the proposed multi dwelling development:

- a. Orientate the area of private open space to take advantage of the northern solar access,
- b. Ensure 10m<sup>2</sup> of private open space has 3 hours of solar access between 9:00am and 3:00pm at the winter solstice (21 June).
- c. Overshadowing by vegetation should be ignored,
- d. Overshadowing by fences, roof overhangs and changes in level should be taken into consideration.”

- 27 Provisions related to visual and acoustic privacy are as follows

#### **“6. Visual and Acoustic Privacy**

##### **6.1 Objectives**

1. Ensure a high level of amenity by protecting the acoustic and visual privacy of occupants within dwellings and their associated private open spaces.
2. Ensure dwellings are sited and designed so that visual and acoustic privacy and vibration from outside sources is controlled to acceptable levels.
3. Minimise direct overlooking of windows and private open space so that the amenity of neighbours and intended occupants is respected.
4. Recognise the outlook and views from principal rooms and private open space without compromising visual privacy of others.

##### **6.2 Controls**

1. Locate, orientate and design new development to maximise the provision of visual privacy.
2. Use detailed site and building design elements to increase visual privacy without compromising access to light and air.”...

28 Provisions related to parking are as follows:

**“7. Parking**

7.1 Objectives

...

5. Ensure vehicle access, garages, carports and parking areas do not visually dominate either the development or the streetscape.”

**Consideration**

- 29 The parties are agreed that a jurisdictional precondition must be satisfied in order to enliven the Court’s power to grant consent and that I must first consider whether the Applicant’s development application satisfies the preconditions before considering the merit contentions in this appeal.
- 30 I am asked to consider whether the application has been properly made and, if so, whether Lot 2 at 28A Wattle Road is an ‘internal lot’ or, by registering a plan of subdivision for consolidation of Lot 2 with Lot 4 at No. 12 Stansell Avenue, it can be said to have access and so be exempt from the provision at cl 4.3(2D) limiting the height of building to 5.4m.
- 31 The Applicant’s position is set out in written submissions dated 18 October 2019 prepared by Ms Reid, that assists me to understand her preferred construction of cl 4.3(2D).
- 32 In the event that I find No. 28A is an internal lot, the Applicant has prepared a written request pursuant to cl 4.6 of the SSLEP to justify the contravention of the development standard at cl 4.3 (2D).
- 33 Any further consideration of the merits of the proposal then rest upon the findings that result from consideration of the matter above.

*Whether Lot 2, at No 28A Wattle Road, is an internal lot*

- 34 The Respondent submits that the Applicant has failed to properly prepare the Development Application by failing to seek consent to consolidate the Lots intended to form the site. The description of the proposed development in the

Development Application (Exhibit E) does not state an intent to consolidate the lots, and the box marked 'subdivision' remains unchecked.

- 35 The Applicant relies on the consolidation of the lots to gain access from Stansell Avenue so as to exempt Lot 2 at No. 28A Wattle Road from the height limit of 5.4m which, at cl 4.3 (2D), applies to multi dwelling housing on an 'internal lot' in the R2 zone, and to ensure the proposed multi dwelling housing is on one lot as defined in the dictionary of the SSLEP as being:

**multi dwelling housing** means 3 or more dwellings (whether attached or detached) on one lot of land, each with access at ground level, but does not include a residential flat building.

- 36 An 'internal lot' is defined in the dictionary of the SSLEP as being:

**internal lot** means a lot to which there is no practicable means of vehicular access by motor vehicle or to which the only practicable means of vehicular access is by way of:

- (a) an access corridor (in the case of a hatchet-shaped lot), or
- (b) a right of way that traverses another lot, or
- (c) an access corridor that is common property in a strata or community title scheme.

- 37 Ms Reid, counsel for the Applicant, submits that cl 2.6 of the SSLEP does not require consolidation of the lots prior to strata subdivision. Furthermore, s 4.12(1) of the EPA Act permits a development application 'subject to the regulations'.

- 38 To this end, the Applicant relies on s 50 of the Environmental Planning and Assessment Regulations 2000 (EPA Regulations) which, at Part 1 of Schedule 1 lists a Statement of Environmental Effects (SEE) in the documents to accompany a Development Application.

- 39 The Applicant's SEE at Exhibit F states on page 28 that the application proposes strata development, a fact acknowledged in the Council's amended statement of facts and contentions (Exhibit 7). Furthermore, drawing DA.01.11 shows a draft Strata plan, and Condition 23 of the proposed draft conditions of consent (Exhibit 6) provides for the registration of a plan of subdivision for the consolidation of the lots prior to the issue of any Construction Certificate.

- 40 Additionally, a title search confirms No. 12 Stansell Avenue and No. 28A Wattle Road are in common ownership (Exhibit M), and the Applicant maintains the proposal should satisfy the Court that Lot 2 is not an 'internal lot', and a height control of 8.5m applies.
- 41 For the reasons above, I am satisfied that the development the subject of the development application includes a strata subdivision of Lots 2 and 4, and I accept the Applicant's submission that the SSLEP does not require consolidation of the lots prior to the registration of a strata plan. I also accept that if or when a plan of subdivision is registered, access to Lot 2 would be made practicable from Lot 4 by the provision of a driveway and other works integral to the development the subject of the development application.
- 42 However, in seeking to define the land at Lot 2 to which the application before the Court partly relates, it is relevant that vehicular access to the lot at No. 28A Wattle Road is, today, only possible via a right of way over the land at No. 28 Wattle Road, being Lot 1 in DP 233879.
- 43 As the only means of practicable vehicular access is via the right of way traversing No. 28 Wattle Road, the land to which the application partly relates is best defined, in my view, as an 'internal lot'. In arriving at this conclusion, I consider the definition in the SSLEP to be framed so as to provide for two circumstances. Firstly, a lot where there is no practicable means of vehicular access or secondly, where vehicular access is provided, it may not be via a means that answers to the descriptions at (a), (b) or (c) in the definition.
- 44 Read in this way, the text serves to provide further assistance as to what is meant by "practicable means of vehicular access" by reference to (a) an access corridor (in the case of a hatchet-shaped lot), or (b) a right of way that traverses another lot, or (c) an access corridor that is common property in a strata or community title scheme.
- 45 A lot that has practicable vehicular access by a means other than those means excluded by operation of (a), (b) and (c) in the definition would not be defined as an internal lot.



46 As the lot at No. 28A Wattle Road is properly defined as an ‘internal lot’, cl 4.3(2D) is applicable and a maximum height of 5.4m applies to this portion of the site. The proposal exceeds this height control and it is for this reason that the Applicant prepared a written request to justify the contravention of the height standard at cl 4.3(2D) of the SSLEP which I now consider.

*Written request to justify contravention of the height standard*

47 The Applicant initially relied on a written request to justify the contravention of the height standard already reproduced at [20], as prepared by Mersonn and dated October 2019, and marked as Exhibit N.

48 The written request at Exhibit N acknowledges that the development does not comply with cl 4.3(2D) but incorrectly refers to the relevant environmental planning instrument being variously “WLEP” or “WLEP 2015” and incorrectly identifies the permissible height as 5.6m, and not 5.4m as reproduced at [20]. Furthermore, the allowable height under cl 4.3 is incorrectly identified as 8.4m and not 8.5m.

49 I noted the errors contained in the written request, and granted the Applicant leave to amend the cl 4.6 request filed with the Court as I accept Mr Darroch’s explanation that the errors were inadvertent. An updated cl 4.6 request dated November 2019 was filed with the Court on 16 December 2019.

50 Clause 4.6 of the SSLEP provides the Court with the power to grant development consent to the development even though the development would contravene the development standard found in cl 4.3(2D) of the SSLEP, but that power is subject to conditions.

51 As shown by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 18 (“*Initial Action*”), for the Court to have the power to grant development consent for a development that contravenes a development standard, cl 4.6(4)(a) requires that the Court, in exercising the functions of the consent authority, be satisfied that:

- (1) The proposed development will be consistent with the objectives of the particular standard in question (cl 4.6(4)(a)(ii)), and;
- (2) The proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii));

- (3) The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a)), and;
  - (4) The written request adequately establishes sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b)).
- 52 The Court must form two positive opinions of satisfaction under cl 4.6(4)(a) to enliven the power of the Court to grant development consent (Initial Action at [14]). I must be satisfied that:
- (1) the applicant's written request has adequately addressed the matters required to be demonstrated by subcl (3) and;
  - (2) that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objective of the zone in which the development is proposed to be carried out.
- 53 Clause 4.6(4)(b) also requires that the Court is satisfied that the concurrence of the Secretary has been obtained, noting that the Court has the power under cl 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(2) LEC Act but should still consider the matters in cl 4.6(5) of the SSLEP (Initial Action at [29]).
- 54 Clause 4.6 of the SSLEP is in the following terms:

#### **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 Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Secretary must consider:

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Secretary before granting concurrence.

...

55 The written request is not assisted by diagrams, images or plans that depict the precise extent of the exceedance, apart from a height blanket drawn at 8.5m in height, but it is said to comprise the following aspects of the proposal:

- A height exceedance of 700mm at the leading edge of the roof of Unit B1 where it protrudes onto Lot 4
- A height exceedance of 1000mm at the leading edge of the roof of Unit C3 Block C
- A height exceedance that varies at the leading edge of the units within Block D to a maximum of 2100mm, at Unit D6.

56 Pursuant to cl 4.6(3)(a) of the SSLEP, the written request states that compliance with the development standard found in cl 4.3(2D) would be unreasonable or unnecessary, as the objectives of the height standard are achieved notwithstanding non-compliance with the standard because:

- (1) The height of the proposal is considered compatible with the adjoining development and consistent with the desired scale and character of the street and locality.
- (2) The proposal is appropriate to the condition of the site and its context with particular regard having been given to complementing the natural landscape setting by retaining and consolidating a significant part of the

site as natural landscape and reducing building footprint and intensity of development well below that anticipated by the controls.

- (3) The proposal is an appropriate built form and land use intensity ensuring that surrounding buildings and public areas will continue to receive satisfactory exposure to sky, daylight and sunlight.
- (4) The plans demonstrate that as the breach of the height control is located centrally in the site, or set well back from boundaries, overshadowing, loss of privacy and visual impacts for the neighbouring properties are minimised.
- (5) The proposal is set down in to the landscape, and steps up the site so as to not give rise to any adverse environmental impacts in respect to overshadowing, traffic, heritage, wind, reflectivity, stormwater, flooding, noise, waste, economic and social impacts.

57 I accept that there is evidence the Applicant has considered the natural landscape setting of the site, and that the consolidation of the built form arises, in part, from the reservation of land in the vicinity of the watercourse as natural landscape.

58 I also accept that the general arrangement of the buildings on the site is stepped such that a substantial proportion of built form is not visible above the finished ground level which has the effect of minimising the impact of overshadowing generated by the proposed development.

59 However for the reasons that follow, I am not satisfied that the objectives of the height standard are achieved notwithstanding non-compliance with the standard:

- (1) Firstly, the objective at cl 4.3(1)(a)(ii) is to ensure the scale of buildings is consistent with the desired scale and character of the street and locality in which the buildings are located or the desired future scale and character.
- (2) The breach of the height control at Units B1 and C3 occurs centrally in the site, however as the units are located adjacent to the central driveway, the exceedance is made prominent by the view corridor formed by the driveway which rises steeply from Stansell Avenue.
- (3) Furthermore, as the height exceedance occurs at the top most portion of buildings at Blocks B and C, I consider controls in Chapter 5 of the SSDCP relevant to roof forms to provide guidance on the desired future character that is the intent of the objective. Control 7, re-produced at [26(1)], requires that "Roof forms are to be designed to an appropriate size, mass and separation in order to be compatible with the scale and character of existing buildings and landscape elements".

- (4) Put another way, the objective at cl 4.3(1)(a)(ii) of the SSLEP requires the scale of the building be consistent with a desired future character, which is defined by the SSDCP to be achieved through compatibility with the scale and character of *existing* buildings (my emphasis).
- (5) While the town planning experts are not agreed as to whether there is a mixed or uniform scale and character in Stansell Avenue, Exhibit P contains images of properties in Stansell Avenue comprising gable, hip and skillion roof forms. Regardless of the particular roof form, all incorporate eaves, exposed gutters and downpipes fixed to the face of the dwelling. The eaves cast shadow upon the façade of the dwelling, and in most instances, provide some shelter and shading to window openings.
- (6) The height exceedance at Unit B1 and C3, being visible from the street, is topped with a parapet, which has the function of concealing any roof form whatsoever, and so precludes any eaves from casting a shadow, or providing shelter or shading to window openings. The lack of a visible roof, eavesline, gutter or downpipes would be a unique circumstance in the street. Coupled with the siting of Block B and C in an elevated position above the street, the effect is at odds with the character of existing buildings and so would be inconsistent with the desired future scale and character which is an objective of the height standard.
- (7) In arriving at this conclusion, I accept Ms Laidlaw's evidence that the flat roof form, concealed behind a parapet, is uncharacteristic of existing buildings, and that the exceedance contributes to large expanses of unbroken wall that fails to visually reduce bulk as required by Control 8 of the SSDCP.
- (8) Large expanses of unbroken wall that do not have the benefit of a visible roof further offend Control 9 of Chapter 5 in the SSDCP which requires that "Facades are to be composed with an appropriate scale, rhythm and proportion, which respond to the desired character of a locality", and contribute to a character that is incompatible with the existing buildings in the street.
- (9) Considered together, the departure from Control 7, 8 and 9 of the SSDCP suggest to me that the objective for Streetscape and Building Form is not met, being to "Ensure that all elements of development visible from the street and public domain make a positive contribution to the streetscape and natural features of the area".
- (10) Secondly, the objective at cl 4.3(1)(d) is, relevantly, to ensure that the visual impact of buildings is minimised when viewed from the street. The written request states that the Applicant has achieved this objective by setting down the building into the landscape and stepping it up the site. However, as stated at [59(2)] the exceedance at Units B1 and C3 is prominent when viewed in its elevated position from Stansell Avenue and appears to result from the continuation of the Level 2 floor slab in Unit C3 (see S-10 at Dwg DA.01.29, Exhibit A), and the Level 3 floor level in Unit B1 (see S-09 at Dwg DA.01.29, Exhibit A). This is unlike the decision to discontinue, and step down the Level 2 slab at Unit D6 (see

S-11 at Dwg DA.01.29, Exhibit A). In my view this does not sustain an argument that the visual impact of the exceedance when viewed from Stansell Avenue has been minimised.

- 60 Next, the written request addresses the environmental planning grounds on which the proposed development seeks to justify contravention of the development standard.
- 61 The environmental planning grounds relied upon must be sufficient to justify a contravention of the development standard with a focus on the aspect of the development that contravenes the development standard, not the development as a whole. Accordingly, the environmental planning grounds found in the written request must be adequate to justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).
- 62 The written request relies on the following environmental planning grounds to justify contravening the development standard:
- (1) The subject site is not a typical lot, being a remnant lot at the foot of a steep slope with a level change of 10-15m and having been significantly modified with retaining walls and benched platforms.
  - (2) The arrangement of the proposed development on the site generally follows the natural topography and steps with the site.
  - (3) The proposal makes a positive contribution to the streetscape, with entrances that are safe and desirable, is compatible in scale and character with the form, scale and siting of existing dwellings, includes quality architecture that is consistent with the existing and recent development in the locality with articulation of building elements, textures, materials and colours.
  - (4) As a result of the low scaled, well-mannered proposal, there are no significant overshadowing, privacy, view or bulk and scale amenity impacts imposed on adjoining properties.
  - (5) The proposed additional height sought all the built form on the site to achieve the desired future character of the locality, as expressed under the SSDCP.
- 63 For the reasons stated at [59], I do not accept that the manner in which the proposal breaches the height control achieves, or gives rise to a consistency with, Control 7 or Control 8 of Chapter 5 of the SSDCP. Furthermore, in my view, the remaining grounds advanced by the written request are in such

general terms that I am unable to form a positive opinion of satisfaction that the written request adequately addresses cl 4.6(3)(b) (see Initial Action [25]).

- 64 The written request is not supported by a plan, diagram or other depiction of the specific location of the exceedance of the 5.4m height, for example in the form of a height blanket diagram, and is silent as to the particular aspects that give rise to the said compatibility with existing dwellings, and the consistency with existing and recent development in the locality with articulation of building elements, textures, materials and colours.
- 65 Finally, the Court is required 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 R2 zone.
- 66 However, for the reasons already stated at [59], I cannot form an opinion of satisfaction that the proposal is consistent with the objectives of the height control. Furthermore, for the reasons stated at [59(7)], I consider the height exceedance contributes, in part, to large expanses of unbroken wall that are not consistent with a single dwelling character that is required to be held safe and not to be diminished by the cumulative impact of multi-dwelling housing according to the zone objectives.
- 67 As I am not satisfied that the written request adequately addresses the requisite matters in cl 4.6, I cannot approve the contravention to the height control at cl 4.3(2D) and there is no jurisdiction to approve of the development application or consider anything else. Consequently I must refuse the application before the Court.

## **Orders**

- 68 The Court orders that:
- (1) The Applicant is granted leave to amend the application and rely upon amended plans in Exhibit A subject to the Applicant paying those costs of the Respondent thrown away, as agreed or assessed.
  - (2) The appeal is dismissed.
  - (3) Development consent for Development Application DA18/0627 seeking consent for the demolition of existing structures and construction of 14 townhouses and strata subdivision is refused.

(4) All exhibits are returned, except for Exhibits 9, 10, 11, 12 and K, N and P.

.....

T Horton

Commissioner of the Court

\*\*\*\*\*

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