

**Owners Corporation Strata Plan 56631 v Council of the City of Sydney - [2017]
NSWLEC 1007**

Land and Environment Court

New South Wales

Medium Neutral Citation: Owners Corporation Strata Plan 56631 v Council of the City of Sydney [2017] NSWLEC 1007

Hearing dates: 8 December 2016

Date of orders: 13 January 2017

Decision date: 13 January 2017

Jurisdiction: Class 1

Before: Hussey AC

Decision: The Court orders by consent:
(1)The appeal is upheld.
(2)Development consent is granted to Development Application No.D/2015/1200 (as amended) for the internal and external alterations and additions to the existing residential flat building, the addition of one new level containing two, three bedroom apartments to result in a total of 34 apartments at 13-17 Ithaca Road, Elizabeth Bay, subject to conditions specified in Attachment A to these Orders.
(3)The exhibits be returned except for 4, 5, 6, 8, 9, E and F.

Catchwords: Development Application; alterations and additions to an existing residential flat building, building height, design, view impacts, amenity impacts concerning air circulation, light and parking.

Legislation Cited: [Environmental Planning and Assessment Act 1979](#) .
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP).
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
State Environmental Planning Policy 65 - Design Quality of Residential Flat Development and the Apartment Design Guide.

Sydney Local Environmental Plan 2012. Under which the site is Zoned R1 - General Residential
Sydney Development Control Plan 2012.

Cases Cited: Arnott v Sydney Council [\[2015\] NSWLEC 1052](#)
Tenacity Consulting v Warringah [2004] NSW LEC 140

Category: Principal judgment

Parties: Owners Corporation Strata Plan 56631 (Applicant)
Council of the City of Sydney (Respondent)

Representation: Counsel:
Dr S Beverling (Respondent)

Solicitors:
Mr G Green, Pikes & Verekers Lawyers (Applicant)
Ms K Morrin, Principal Lawyer – Council of the City of Sydney (Respondent)

File Number(s): 2016/00157986

judgment

Background

1. This appeal was lodged against the deemed refusal of a development application proposing internal and external alterations and the addition of 2 new levels containing 4 x 3 bedroom apartments to result in a total of 36 apartments at an existing 5 storey residential flat building, located at 13 – 17 Ithaca Road, Elizabeth Bay.
2. This matter commenced by way of a s34 Conference. A considerable number of objections were lodged and the objectors were given the opportunity to express their concerns. Subsequently a view was taken of many of the neighbouring apartments to assess the various impacts on existing views and amenity and this included the respective expert planners, architects and view assessors.
3. Following discussions by the parties, there was no agreement and the s34 Conference terminated. The matter was then listed for hearing on 8 December 2016 and the parties agreed to me hearing the matter and taking into account matters seen and heard at the s34 Conference.
4. Insofar as a number of contentions were raised, the primary issue concerned the impact on views and amenity due to the proposed additional 2 levels. Consequently, the parties addressed the contentions further resulting in the deletion of the upper level and the proposed 2 apartments at this level along with other design detailing amendments.

5. On re-assessment, the amendments were considered acceptable to Council and the parties now agree to Consent Orders. Accordingly these Consent Orders were notified to the objectors/neighbours and a number of additional submissions were lodged and considered at the hearing.

The site

6. The site is described as Lot 1 on Deposited Plan 577616 and Lots 1 - 40 on Strata Plan 56631. It is rectangular in shape and measures approximately 1,537sqm in area. It has a 32m frontage to Ithaca Road (east), a 26m frontage to Billyard Avenue (north) and a curved street corner at the street intersection.
7. The site currently contains a five level residential flat building including a semi-basement level providing 48 car parking bays with vehicle access via a double crossover from Billyard Avenue, four levels of residential apartments containing one, one bedroom apartment and 31 two bedroom apartments. Pedestrian access to the development is provided via Ithaca Road.
8. The site is located in designated "The Bays" locality under the DCP and is situated towards the bottom of the slope near Elizabeth Bay. The site is not a heritage item however it is located in the Elizabeth Bay and Rushcutters Bay Heritage Conservation Area.
9. Surrounding development is predominantly residential in nature. Immediately adjacent to the west of the site is a six level residential flat building. Adjoining the site to the south is a nine level residential flat building known as The Reef which is situated diagonally across the site, curved to face north-east.

Initial Proposal Details

10. The proposal was to increase the building height to 7 storeys to contain 36 apartments and 39 car parking spaces as follows:
 1. Addition of two new levels above the existing building, setback from the existing building facade, accommodating four, three bedroom apartments with private balconies;
 2. External alterations to the existing five level residential flat building including demolition of the majority of the external windows, balustrades and a portion of the facade. It is proposed to alter the external design and appearance of the building including the shape, size and area of existing balconies, the replacement of existing windows and changes to the existing facade materials, finishes and colours.

3. Demolition of the existing pedestrian entry structure on Ithaca Road and the conversion of the existing entry lobby into an additional area for Apartment No. 6 to increase the apartment from one to two bedrooms.
4. External alterations to the Billyard Avenue elevation at street level including reducing the existing vehicle access to a single crossover and the introduction of a new central pedestrian entrance.
5. Internal alterations to modify the existing semi-basement level including a reduction in the number of car parking bays from 48 to 39 bays, the provision of accessible car parking bays, motorcycle parking, bicycle parking, residential stores and plant and equipment areas.
6. Internal alterations to modify the internal layout of the existing residential levels including increasing the width of access corridors and refurbish the existing apartments.
7. Alterations to the existing landscaped setback areas including the removal of 18 existing trees to create communal open space areas between the building and the Billyard Avenue boundary and the building and the rear (southern) boundary

Planning controls

II. The following controls apply to the site:

1. [Environmental Planning and Assessment Act 1979](#).
2. Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (Deemed SEPP).
3. State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
4. State Environmental Planning Policy 65 - Design Quality of Residential Flat Development and the Apartment Design Guide.
5. Sydney Local Environmental Plan 2012. Under which the site is Zoned R1 - General Residential and the proposed development is permissible with consent. The Sydney LEP imposes a maximum height of 22m and a maximum floor space ratio of 2.5:1 on the site. Sydney Development Control Plan 2012.
6. Sydney Development Control Plan 2012. This DCP contains a number of general provisions and Locality Statements wherein the subject land is within “*The Bays*” locality.

This locality consists of the Elizabeth Bay and Rushcutters Bay neighbourhoods and are bounded by Sydney Harbour and naval lands to the north; the rear of eastern lots along

Macleay Street; the rear of lots to the south of Greenknowe Avenue; the rear of lots to the west of Roslyn Gardens; St Lukes Hospital; Roslyn Street to the West; Rushcutters Bay Park to the east and New South Head Road to the south.

The Bays is a predominantly residential area with a diversity of housing styles and densities within a landscape setting that allows view sharing to continue from the private domain and gaps between buildings. Elizabeth Bay House is to be preserved as a heritage item and a landmark heritage building.

There are small clusters of shops at Elizabeth Road and Bayswater Road that complement the Kings Cross centre

The relevant stated “Principles” include:

(a) Development must achieve and satisfy the outcomes expressed in the character statement and supporting principles.

(b) Development is to respond to and complement heritage items and contributory buildings within heritage conservation areas, including streetscapes and lanes.

*(c) Maintain view corridors to Sydney Harbour and parks. *

(d) Maintain important views from Elizabeth Bay House towards the harbor, and from the harbour towards Elizabeth Bay house.

(e) Maintain buildings within a landscape setting. New buildings should be positioned in the middle of lots and surrounded by gardens and informal \ tree planting.*

Initial application assessment

12. The assessment of the original application involved public notification to the surrounding neighbourhood and this resulted in a large number of submissions, which are summarized as follows:

- significant view loss to Elizabeth Bay, Bradleys Head, Garden Island, Taronga Zoo and Mosman Bay from surrounding apartments and communal open space areas;
- acoustic and visual privacy loss from overlooking and use of the large balconies and the proposed Zen Garden;
- reduction in the parking and on-site visitor parking placing additional demand on street parking;
- Loss of light and air circulation;
- The appearance of the building is out of character with the heritage identity and charm of the area and will dominate the area;
- The scale and bulk is not in keeping with the area;

- The removal of trees;
- Increase in density in an already high density area;
- Loss of value of the surrounding properties.

Amended proposal

13. As noted, the proposal was amended after the s34 Conference and consideration of the various submissions. These amendments include the deletion of the proposed 7th level resulting in a building height of 18.29m, which is comfortably below the 22m height standard and it proposes a FSR of 2.2:1, which satisfies the numerical control of 2.5:1.

14. The detailing amendments include:

- Deletion of one (top) storey (two apartments), from the original two storey addition, resulting in a reduction in the FSR and the Building Height of the development,
- Shaved the south-east and south-west corners of the envelope of the revised single storey addition;
- Deletion of the east, south and west facing balconies from the revised single storey additions-Internal re-configuration of Apartments 33 and 34 to relocate non-habitable rooms (bathrooms) towards the rear of the units to delete any window opening facing south towards the 'Reef residential building;
- Conversion of the previously proposed communal open space located in the south-east corner of the site to an area of private open space (courtyard) for Apartment 5. Internal alterations to the proposed layout of the apartment in the north-east corner of the retained structure;
- Significant alterations to the proposed external appearance and materials of the retained building and the revised single storey addition to include brickwork, black powder-coated aluminium panels, black metal balustrades, tinted/frosted glazing, glass balustrades and painted render
- Revised landscaping; and
- Additional basement storage and bicycle parking facilities.

Discussion of the evidence

15. In support of the Consent Orders, there is a Joint Expert Report (Exhibit 5) which deals with all of the contentions. This was prepared by:

Ms A McCabe ; Consulting town planner (Applicant)

Mr R Staas; Consulting Architect/Heritage Specialist (Applicant)

Ms J Kingsbury; Town Planner (Respondent)

Mr H Wan; Heritage Specialist (Respondent)

Ms J Pressick; Urban Design Specialist (Respondent)

Dr R Lamb; View loss/sharing specialist (Respondent).

16. The expert report deals with all the contentions identified, resulting in their agreement that the amended plans are now acceptable because all the contentions are reasonably satisfied. Insofar as the contentions were formulated by the council and in consideration of the detailed resident's submissions, I have included the following relevant s79C assessments from the respective experts in response to some of the misconceptions of the current planning control outcomes expressed by the objectors:

16.1 Contention 1: Floorspace variation - Sydney LEP 2012; *The proposed development does not comply with the maximum floor space ratio for the site of 2 5 1 contained within the Sydney LEP 2012 Clause 4 4(2)*

Expert Points of Agreement

- that the amended scheme proposes a floor space ratio (FSR) of 2 2-1 which is below the maximum permitted FSR for the site under the Sydney LEP 2012

16.2 Contention 2: Building height in storeys and street frontage height; *The proposed building height in storeys to Billyard Avenue is seven storeys which is not consistent with the height of the adjoining building and does not comply with the provisions for building height in the Sydney DCP 2012 Clauses 42 1 1(1) and (4).*

Experts Points of Agreement

- that the amended scheme, which includes the deletion of one storey, complies with the maximum building height in storeys provision of the Sydney DCP 2012 of six (6) storeys and is compatible with adjacent building on Billyard Avenue.

16.3 Contention 3: View Impacts; *The development will impact on the view and outlook from surrounding properties which is inconsistent with outlook provisions of 4 2 3 10(2), the building height objectives of clause 4 3(l)(c) of the Sydney LEP 2012 to promote the sharing of views nor adequately address the 'Tenacity Consulting v Waringah [2004] NSWLEC140' view sharing principles*

Points of Agreement

- that a comprehensive view analysis was undertaken from 24 - 26 Onslow Avenue, 27 Ithaca Road, 4 Ithaca Road, 20 - 22 Onslow Avenue and 19 Ithaca Road, for both the original scheme and the amended scheme to specifically address view impact issues and urban design issues

- general agreement with the assessment of the view impact as detailed in the view analysis reports

- there will be some impact on views principally those enjoyed from 19 Ithaca Road particularly Levels 2, 3, and 4 with levels 2 and 3 most severely affected and also 20-22 Onslow, particularly Unit 2D

- acknowledge that any development, resulting in additional height on the subject site would have some impact on the views enjoyed from No 19 Ithaca and to a lesser extent on those from other surrounding sites

- the amended scheme, including the revisions in response to view loss issues, has resulted in a development that complies with Council's development controls including a building height that is approximately 3.7m below the maximum height control of the Sydney LEP 2012 and compliant with the height in storeys control of the DCP and approximately 300m² below the maximum permitted FSR of the LEP

- that the approach to the scheme had tested a range of design options including a narrower and taller addition and a shorter and wider addition This resulted in the amended envelope for the amended scheme, which provides a balance between achieving some level of development and achieving acceptable view sharing.

- that the amended scheme achieves a higher, reasonable and acceptable level of view sharing, where it is reasonable to expect this in the light of the prevailing development standards and controls on built form for the site and in consideration of the planning principle in 'Tenacity Consulting v Warringah [2004] NSWLEC140'

- that the amended scheme proposes a more skilful design than the design the subject of the SoFC, which includes:

A setback from the eastern and western alignment of the building,

Tapering of the envelope of the addition towards the rear of the site, and

An additional level that is limited to two thirds of the existing building footprint.

Reduction in the height of the building by a full storey.

- that the amended scheme is consistent with the promotion of the sharing of views in relation to the building height objectives of the Sydney LEP 2012 The scheme proposes an additional single level that through its siting and massing has consideration for the existing views and outlook from surrounding sites, is consistent with the outlook provisions of the DCP and adequately address the 'Tenacity Consulting v Warrmgah/2004] NSWLEC 140' view sharing principles resulting in an a reasonable and acceptable impact on views.

16.4 Contention 4: Communal open space, building separation and storage;

- *The proposed communal open space does not comply with the minimum area of 25% of the site is not located in a well designed , easily identifiable or useable area*

- *The southern and western setbacks of the proposed two levels does not comply with the building separation distances required under the Apartment Design Guide*
- *The proposal does not provide adequate residential storage areas.*

Points of agreement

- that the provision of communal open space in the amended scheme does not comply with the minimum requirements of the ADG. However in this instance it is considered to be acceptable for the following reasons;
- it is acknowledged that the proposal involves an existing building with minimal identifiable and useable existing communal open space,
- the conversion of the proposed communal open space, originally proposed in the rear setback of the site, to private open space for the adjoining unit is a more appropriate outcome for the amenity of the occupants of this unit and the occupants of the adjacent site,
- the only opportunity for a highly identifiable and useable area of communal open space is on the rooftop of the development, which is not considered to be an appropriate solution in this instance given the potential adverse impacts on the amenity of and the views enjoyed from surrounding sites
- that the single storey addition proposed in the amended scheme complies with the building separation requirements of the ADG in regard to distances required from the side boundaries.
- acknowledge that the amended scheme reduces the setback of the single level addition to the southern boundary, however this distance is compliant with the ADG as the area of the building envelope is occupied by non-habitable rooms with no south facing windows
- that the two new apartments contained within the proposed single storey addition comply with ADG storage requirements
- that the storage facilities for the existing units have been improved to an acceptable level, with each unit being provided with a storage cage within the basement level.

16.5 Contention 5: Car Parking and Bicycle Parking;

- *The proposed car parking exceeds the maximum number of residential car parking bays as permitted under Sydney LEP 2012 clause 7 5(b)*
- *The proposal does not provide sufficient bicycle parking spaces as required under Sydney DCP 2012 clause 3 II.3*

Points of Agreement

- that the amended scheme improves the proposals provision of bicycle parking facilities for residents and visitors and the number of car parking bays for visitors to adequately satisfy the transport and parking objectives of the Sydney DCP. Subject to the recommended

conditions of consent the proposal's provision of car parking bays and bicycle parking facilities is considered acceptable.

16.6 Contention 6; Contribution to Heritage Conservation Area;

- The proposal fails to conserve the heritage significance of the heritage conservation area including associated fabric, setting and views
- *The proposed design does not enhance the character and heritage significance of the Elizabeth Bay and Rushcutters Bay Heritage Conservation Area nor respond positively to the character of adjoining and nearby buildings*
- *The proposed design is not compatible with the surrounding contributory buildings and does not complement and respect the character of the Elizabeth Bay and Rushcutters Bay Conservation Area*

Points of Agreement

- that the amended scheme responds positively to the locality and is more sympathetic to the heritage conservation area by way of scale, proportions, facade treatment, materiality and colours including the primary use of brick detailing which is sympathetic to other contributory buildings in the conservation area and the immediate locality
- that the amended scheme will enhance the character of the locality as it improves the existing neutral, but visually prominent and unremarkable, building
- that the amended architectural response will result in a positive contemporary addition to the conservation area, which will be compatible with the mixed character of the conservation area and the immediate locality.

16.7 Contention 7: Streetscape Character;

- *The development does not contribute to the quality of the established character of the streetscape in terms of scale, finish and architectural character or relate to neighbouring buildings*
- *The scale, modulation and facade design of the development does not respond to the context of the immediate locality*

Points of Agreement

- that significant amendments have been made to the architectural character and scale of the development
- that the proposal has been revised significantly to achieve a more compatible development through the reduction of scale by the deletion of one level, changes in materials and finishes and the articulation of the facades, including improvements in the appearance of the existing building
- that the revised scheme is more compatible with the existing character of the area and is of a higher level of detailing which is sympathetic to other buildings in the immediate context

- that the revised scheme has resulted in a development that will make a positive architectural contribution to the locality.

16.8 Contention 8: Tree Management;

- *The existing trees within the Billyard Avenue setback area should be retained*

Points of Agreement

- that the amended scheme appropriately retains existing trees located within the Billyard Avenue setback
- that the revised scheme provides an appropriate landscaped setback which is consistent with the setting of the existing building

16.9 Contention 9: Design Excellence;

- *The development is not considered to exhibit design excellence*

Points of Agreement

The experts agree that the amended scheme satisfies the requirements of the design excellence provision of the Sydney LEP 2012 including in regard to

- The standard of architectural design, materials and detailing,
- The response to the heritage and streetscape issues,
- Built form, massing and presentation,
- Improvement on the internal amenity of the existing apartment which is more compliant with contemporary amenity standards, and
- Retention of existing mature vegetation and integration of proposed landscaping ensuring a continuation of the current landscaped presentation to the street

16.10 Contention 10: Inaccurate Information;

- *The maximum building height limit of 22 metres has not been correctly illustrated on the proposed plans*

Points of Agreement

- acknowledge that the proposed building height has been calculated by the difference between the basement level and the uppermost RL of the lift overrun and agree that the revised scheme is well under the 22 metre building height control of the Sydney LEP 2012.

16.11 Contention 11: Insufficient Information - Solar and Daylight Access of Neighbouring Properties;

- *Insufficient information has been provided to demonstrate that the development will not reduce any existing solar access non-compliance of a neighbouring property*

Points of Agreement

- acknowledge that hourly shadow diagrams have been provided and agree that the diagrams demonstrate that the amended scheme, being a single level addition to an existing five (5) level building, will not detrimentally impact on the solar access of neighbouring buildings

16.12 Contention 12: Insufficient Information - Flood Assessment Study;

- *Insufficient information has been provided to demonstrate that the development manages and mitigates flood risk*

Points of Agreement

- that a Flood Assessment Study has been provided and agree that appropriate conditions of consent for specific design modifications have been proposed to manage and mitigate the flood risk of the site in accordance with the recommendations of the study

16.13 Contention 13: Insufficient Information - View Loss Impact;

- Insufficient information has been provided to illustrate the view loss impact on surrounding developments

Points of Agreement

- that a view analysis for the original and the amended scheme have been provided and agree that this matter is no longer a contention.

16.14 Contention 14: Approval would not be in the public interest

- Approval of the development would not be in the public interest

Points of Agreement

- that the amended scheme, including the reduction in height, the removal of the side and rear balconies of the addition, the increase in the number of visitor car parking bays, the retention of additional trees and the improved compatibility of the appearance of the development to be more sympathetic to the existing character of the heritage conservation area, adequately addresses the concerns raised in the submissions received by Council in response to the original proposal.

- that the amended scheme is consistent with the main planning framework applicable to the site, and therefore results in a development that could be reasonably expected on this site, which has been designed to minimise potential impacts on the amenity of surrounding developments including overlooking, overshadowing and view sharing.

17. In response to further issues raised by the objectors at the hearing, the heritage experts Mr Wan and Mr Staas provided a further joint statement (Exhibit 8) explaining that they have taken into consideration the requirements under cl 5.10.4 of the City of Sydney LEP 2012 with regard to conserving the heritage significance of the Conservation Area. In achieving compliance with this control they have also considered the statement of significance contained in the State Heritage Inventory for Elizabeth Bay and Rushcutters Bay Heritage Conservation Area.
18. Accordingly, they say that the physical description of the area indicates that the aesthetic qualities relate to the mixture of building scale, height and character in this location. The listing also indicates that improvements to façade treatments could be encouraged by slightly increased development potential.
19. Consequently, the heritage experts have agreed that the revised design, materials and façade treatments have achieved the desired outcome for infill development in the Conservation Area and addresses the original concerns of Council as stated in Contention 6.

Planning assessment framework

20. Having considered the objections/submissions together with the expert evidence it is apparent that there are different understandings of the current planning controls and the associated outcomes, particularly by the objectors.
21. As noted, the SLEP 2012 and SDCP 2012 are comparatively recent controls. I understand that these controls are based on the findings of the Allen Jack and Cottier Architects and Godden Mackay Logan Heritage Consultants 'City of Sydney Urban Design Study (Exhibit E – extract from AJ+C & GML study, October 2016).
22. From the assessment of the character of this locality, the study identifies the '*Future Character Vision*', which includes:

It will maintain its predominant character of buildings in a landscape setting. This will allow view sharing to continue from the private domain and gaps between buildings will promote views to Sydney Harbour from the public domain.

23. The neighbourhood strategies included:

Maintain view corridors to the Sydney Harbour and parks.

Encourage buildings in a landscape setting with new buildings typically set in the middle of blocks surrounded by gardens with informal tree planting in front gardens and between buildings

Recognise the role of buildings in a landscape setting to provide the surrounding denser areas with borrowed landscapes for outlook and amenity.

Preserve and promote strong building forms that maintain a consistent datum (RL) at the top while responding to a change in slope. These forms are typical in the area and result in lower building heights on the top of the slope and taller building heights on the bottom of the slope. Building forms that step in elevation with the topography are not consistent with the areas character.

24. The resultant LEP recommendations relevantly note and include:

24.I.I.I 4.I Height Controls

Existing building height controls were reviewed and refined to reflect:

- 1) The change of building height definition, resulting from the consolidation of South Sydney height controls into the City of Sydney height controls; and*
- 2) The place-based approach in this report, supporting the desired neighbourhood characters and heritage.*

*24.I.I.2 Similarly, the place based approach in this report seeks to reflect the proposed urban structure within the height control map and to define a clear nexus between the two. However, unlike the existing controls, the recommended controls are based on an in-depth survey of the existing context heights. The mapping of existing development heights reveals a diverse patchwork of height distribution throughout the study area. (Refer to Maps 4.I.2 and 4.I.5). **The recommended controls balance existing development heights, heritage values, and future character, resulting in a finer distribution of height controls across the study area . (Emphasis added).***

25. According to the AJ+C & GML study the key objectives underpinning the recommended height controls were:

To retain and respond to heritage items, contributory items and heritage streetscapes

To reinforce the existing and desired future character statements and strategies for neighbourhoods

To retain the existing skyline buildings as unique elements within the area.

To reinforce the centres hierarchy while retaining existing residential areas.

To improving the public domain by ensuring new development creates attractive and well proportioned streetscapes.

To reinforce the building typologies in the study areas (i.e.. responding to the appropriate height in storeys).

To support the desired use (i e. accommodating appropriate ceiling heights)

To promote solar access/amenity and views.

26. Consequently, the aforementioned controls that have been incorporated into the SLEP 2012 and associated SDCP 2012 and intentionally envisage some changes to the form and height of buildings in this locality subject to any constraints arising from existing non-complying buildings.

27. It is obvious in this matter that the increase in building height arising from the additional floor will impact on view opportunities from some apartments. Some of the objectors referred to the matter of *Tenacity Consulting v Warringah* [2004] NSW LEC 140, which prescribes the following four step planning principle:

26 The first step is the assessment of views to be affected. Water views are valued more highly than land views. Iconic views (eg of the Opera House, the Harbour Bridge or North Head) are valued more highly than views without icons. Whole views are valued more highly than partial views, eg a water view in which the interface between land and water is visible is more valuable than one in which it is obscured.

27 The second step is to consider from what part of the property the views are obtained. For example the protection of views across side boundaries is more difficult than the protection of views from front and rear boundaries. In addition, whether the view is enjoyed from a standing or sitting position may also be relevant. Sitting views are more difficult to protect than standing views. The expectation to retain side views and sitting views is often unrealistic.

28 The third step is to assess the extent of the impact. This should be done for the whole of the property, not just for the view that is affected. The impact on views from living areas is more significant than from bedrooms or service areas (though views from kitchens are highly valued because people spend so much time in them). The impact may be assessed quantitatively, but in many cases this can be meaningless. For example, it is unhelpful to say that the view loss is 20% if it includes one of the sails of the Opera House. It is usually more useful to assess the view loss qualitatively as negligible, minor, moderate, severe or devastating.

29 The fourth step is to assess the reasonableness of the proposal that is causing the impact. A development that complies with all planning controls would be considered more reasonable than one that breaches them. Where an impact on views arises as a result of non-compliance with one or more planning controls, even a moderate impact may be considered unreasonable. With a complying proposal, the question should be asked whether a more skilful design could provide the applicant with the same development potential and amenity and reduce the impact on the views of neighbours. If the answer to that question is no, then the view impact of a complying development would probably be considered acceptable and the view sharing reasonable

28. In this regard and as stated previously the experts undertook a detailed view impact assessment report and specifically referred to the *Tenacity* principle in coming to their agreement that the view impacts were reasonable and acceptable in the subject context.

Conclusions

29. In determining this matter concerning the parties agreement to Consent Orders, I have carefully considered the evidence and objections, the submissions and undertaken a detailed view.
30. Insofar as there were a considerable number of objections, I have endeavoured to summarise the background of the prevailing controls i.e. *Sydney LEP 2012* and the Sydney DCP 2012, which allow for changes to the form and building height increases at the subject location. In this regard, I note that the adopted building height controls arose out of the AJ+C & GML study, which sought to “balance existing development heights, heritage values, and future character, resulting in a finer distribution of height controls across the study area”. At the subject site the numerical controls, two additional levels could be considered.
31. Accordingly, the aforementioned agreed s79C assessment in the joint expert report deals in detail with the original contentions, which were all satisfactorily addressed and agreed by the amended plans and conditions.
32. Whilst many of the objectors were dissatisfied with this outcome, there was little substantive technical evidence to the contrary. However, Mr J McFadden (consulting town planner) prepared an assessment report on behalf of the owners of 19 Ithica Road, Elizabeth Bay. This report is dated 7 December 2016 as was apparently lodged with parties shortly before the hearing on 8 December 2016.
33. This report deals with the “devastating” view impact on Units 10 and 14. He does not consider the existing building is compliant with the controls or satisfies the building design excellence criteria and raises public interest concerns, particularly in relation to the application of the *Tenacity* principles on Units 10 and 14.
34. These concerns were tested against the joint expert assessment agreement and Ms McCabe confirmed that a detailed view analysis/photo record was undertaken to assess view corridors and various design options considered. Whilst a few properties are significantly impacted, nevertheless in an overall assessment of the prevailing planning control outcomes (i.e. allowing for increased heights and floor space) the resultant outcome is a reasonable balance in terms of the competing private and public interests.
35. Having carefully considered the joint expert report and final submissions, I am satisfied in my s79C evaluation of this amended proposal to give determinative weight to the joint expert agreed positions and diminished weight to the objectors and Mr McFadden’s assessment, which was not filed in accordance with the Court expert witness requirements, which does not address the *Tenacity* qualification for residential apartment buildings and which does not provide an objective view of the overall outcomes envisaged by the SLEP 2012 and DCP 2012, in my opinion.
36. Therefore, I am satisfied to rely on the agreement that the provisions of cl 5.10(4) of SLEP 2012 have been considered and reasonably satisfied. In accordance with cl 6.2I(3), I rely on the expert’s agreement to contention 9 that this consideration is satisfied. I also accept the joint experts assessment that the proposed parking satisfies the requirements of cl 7.5 (2) of SLEP 2012. With regard to cl 7.15. I note that an updated flood assessment study was submitted and agreed by the experts as acceptable for conditional consent and on this basis I am also satisfied this provision is acceptable.

37. In addition to this, I have considered the comments by the experts agreed positions relative to the various objections in regard to the SDCP 2012 provisions and I am satisfied to rely on the expert opinions that the designated “Principles (a), (b), (c), (d) and (e)” are reasonably satisfied.
38. In this regard I accept that some properties are significantly impact by way of view losses to various degrees, particularly Units 14/19 and 10/19 Ithica Road. Their objections refer to the “*Tenacity*” principles in support of their claim that the application should be refused.
39. However in submissions I was referred to a recent decision in [*Arnott v Sydney Council*](#) [2015] NSWLEC 1052 wherein O’Neill C dealt with similar view impact issues relative to a nearby property at Potts Point based on the same planning controls. Commissioner O’Neill decided that:

72 I accept and adopt Ms Morrish’s interpretation of the skilful design test in the fourth step of the Tenacity planning principle. The skilful design test is not about whether a design is skilful, in the sense of the architect’s expertise in creating a successful architectural composition; instead the intent of the fourth step is to look for opportunities within the massing and form of the proposal to minimise the impact on views across the site, whilst maintaining the capacity to reasonably develop the site. This is evident in Dr Roseth’s own words at paragraph 29 of the Tenacity planning principle, ‘whether a more skilful design could provide the applicant with the same development potential and amenity’ [bold added]. It is partly for this reason that the Tenacity planning principle is less helpfully applied to impacts on views from individual apartments within residential apartment buildings, as there are generally more limited opportunities to rearrange massing to preserve what is often a singular orientation to a view. For this reason, it is also appropriate to consider the residential apartment building as a whole in assessing view impacts. (Emphasis added)

40. In consideration of the objector’s reference to the *Tenacity* principles, I think its application in the subject matter has limitations due to the qualifications in respect residential apartment buildings. Therefore, I am satisfied that greater weight should be given to the overall public interest considerations in approving the amended, substantially complying development notwithstanding the private interest loss of views from some units. This outcome is inevitable in some circumstances considering the SLEP 2012 and SDCP 2012 provisions for “The Bays” locality, which contains the following built form strategy:

“Preserve and promote strong building forms that maintain a consistent datum (RL) at the top while responding to a change in slope. These forms are typical in the area and result in lower heights on the top of the slope and taller buildings at the bottom of the slope.”

41. Whilst other objections were raised concerning loss of amenity in terms of light, air circulation and parking, there was no substantive evidence presented to support this speculation, so as to warrant refusal of this amended application, in my assessment of the evidence. Therefore the Consent Orders merit consent.

Orders

42. The Court orders by consent:
1. The appeal is upheld.

2. Development consent is granted to Development Application No.D/2015/1200 (as amended) for the internal and external alterations and additions to the existing residential flat building, the addition of one new level containing two, three bedroom apartments to result in a total of 34 apartments at 13-17 Ithaca Road, Elizabeth Bay, subject to conditions specified in Attachment A to these Orders.

3. The exhibits be returned except for 4, 5, 6, 8, 9, E and F.

R Hussey

Acting Commissioner

[157986.I6 - Attachment A - Conditions of Consent \(160 KB, pdf\)](#)

Decision last updated: 13 January 2017