



Land and Environment Court New South Wales

Medium Neutral Citation:

**Starby Pty Limited v The Hills Shire Council [2016]
NSWLEC 1140**

Hearing dates:

1, 2, 3 March 2016, conditions 11 March 2016.

Date of orders:

15 April 2016

Decision date:

15 April 2016

Jurisdiction:

Class 1

Before:

Brown C

Decision:

See directions at pars 98 and 99

Catchwords:

DEVELOPMENT APPLICATION: erection of a residential flat building – whether breach of height standard can be supported – impact on adjoining residential development – streetscape – landscaping – building design – zone objectives – strategic impact on shopping centre – internal amenity issues – car parking and access

Legislation Cited:

Environmental Planning and Assessment Act 1979
Parramatta Local Environmental Plan 2011
The Hills Local Environmental Plan 2012
State Environmental Planning Policy No. 65

Cases Cited:

BGP Properties Pty Limited v Lake Macquarie City Council [2004] NSWLEC 399
Project Venture Developments v Pittwater Council [2005] NSWLEC 191
Schaffer Corporation v Hawkesbury City Council (1992) 77 LGRA 21
Terrace Tower Holdings Pty Ltd v Sutherland Shire Council (2003) NSWCA 289

Category:

Principal judgment

Parties:

Starby Pty Limited (Applicant)
The Hills Shire Council (Respondent)

Representation:

Counsel:
Mr I Hemming's SC (Applicant)
Mr M Wright, barrister (Respondent)

Solicitors:

Hones Lawyers (Applicant)

Matthews Folbigg Pty Ltd (Respondent)

File Number(s): 10565 of 2015**Publication restriction:** No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the refusal by the Sydney West Joint Regional Planning Panel of DA 1410/2015/JP for a development described as “shop top housing” at the Winston Hills Shopping Mall (the Mall), 180-192 Caroline Chisholm Drive (corner Langdon Road) Winston Hills (the site). The application before the Court was amended to seek approval for a “residential flat building” as part of the Mall. The combined use with the Mall is characterised as a “mixed development”.
- 2 The proposed development originally before the Court provides for part two and part three levels buildings to provide for 90 dwellings comprising 23 x 1 bedroom units (25.6% of units), 20 x 1 bedroom plus study units (22.2% of units), 45 x 2 bedroom units (31.1% of units), 16 x 2 bedroom plus study units (17.8% of units) and 3 x 3 bedroom units (3.3% of units). One level of car parking with entry off Langdon Road and egress via Caroline Chisholm Drive is provided below the residential accommodation levels. The development is to be constructed on top of the concrete roof slab located within the south western corner of the site where an Aldi Supermarket and basement level car parking are located.

The site and locality

- 3 The site is Lot 101 DP 1170464 and has an area of 4.29 ha. It adjoins the M2 Hills Motorway to the north and The Winston Hotel to the east. The Mall contains a single level of retail space erected over one and a half levels of car parking which comprise a combination of basement and at grade parking. The retail space currently comprises approximately 73 specialty retailers, three mini-major retailers and four major retailers. The Mall also contains a number of banking facilities, a restaurant and a medical centre.
- 4 The site is a wedge-shaped area of land at the southern edge of The Hills local government area while the land to the immediate south and west is located within the Parramatta City local government area. The area in the Parramatta City local government area comprises predominantly single detached residential housing development.

The contentions

- 5 The council filed a Statement of Facts and Contentions that identified the following

reasons why the application cannot be determined because of a lack of information:

1. lack of detail to demonstrate that there is compliance with the floor space ratio (FSR),
2. lack of detail to demonstrate that there is compliance with the solar access requirements,
3. lack of information to identify the form of subdivision proposed,
4. lack of detail to demonstrate how the proposed residential units will operate and function, and
5. inconsistency between architectural plans.

6 The council identified in the Statement of Facts and Contentions that the application must or ought be refused for the following reasons:

1. breach of the height requirement, including the impact on the residential area to the south and west,
2. poor residential amenity in relation to inadequate cross ventilation, solar access, inadequate number of lifts for the number of accommodation, inadequate deep soil area, inadequate landscaped area and inadequate setbacks,
3. poor streetscape presentation,
4. non satisfaction of the zone objectives,
5. inconsistent with the definition of “shop top housing”,
6. inadequate off street parking,
7. contrary to the adopted strategic retail hierarchy,
8. breach of unit mix and size requirements, and
9. non satisfaction with design quality principles.

7 Prior to the hearing the applicant provided amended plans that resulted in a number of the matters identified by the council as reasons why the application cannot be determined because of inadequate information being satisfied. The amended plans provided sufficient information to show that the applicable 1:1 FSR standard was achieved, the solar access details were provided (although these details did not fully satisfy the council town planning expert), a draft subdivision plan was prepared although consent was not sought for this plan, greater clarity was provided on how the proposed residential units will operate and function in conjunction with the Mall and any inconsistency between architectural plans was rectified.

8 The amended plans also addressed some of the matters the council identified as matters warranting the refusal of the application. The following matters were not pressed by the council following the submission of the amended plans:

1. residential amenity concerns in relation to inadequate number of lifts for the number of accommodation, inadequate landscaped area and inadequate setbacks,
2. inconsistency with the definition of “shop top housing” as the proposal is now characterised as a “residential flat building”,

3. inadequate off street parking numbers as the parking satisfies the council requirements, and

4. breach of unit mix and size requirements.

9 The remaining issues in dispute are:

1. breach of the height requirement,

2. non satisfaction of the zone objectives,

3. poor streetscape presentation,

4. contrary to the strategic retail hierarchy, and

5. non satisfaction with design quality principles.

10 Following further discussions by the traffic engineers, the question of the number of car parking spaces remained in issue.

11 At the site inspection a large number of residents attended and a number spoke against the proposed development. One resident spoke in favour of the proposed development. The councils report to the Sydney West Joint Regional Planning Panel (Exhibit 7, Folder 7, Tab 7) indicated that the council had received 472 submissions opposing the development, including three petitions. The documentation provided to the Court contained the written submissions to the council. The councils report grouped the objections in the following areas:

- traffic and parking,
- insufficient infrastructure and services,
- non-compliance with the building height,
- non-compliance with FSR,
- inaccurate photomontages,
- out of character, and
- construction related issues.

Relevant planning controls

12 The site is within Zone B2 Local Centre under *The Hills Local Environmental Plan 2012* (LEP 2012). The proposed development is permissible, with consent as a “residential flat building”. When considered with the existing retail and commercial facilities, the combination of land uses is permissible as a “mixed use development”. The Dictionary to LEP 2012 provides the following relevant definitions:

residential flat building means a building containing 3 or more dwellings, but does not include an attached dwelling or multi dwelling housing.

mixed use development means a building or place comprising 2 or more different land uses.

13 Clause 2.3(2) states:

(2) The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.

14 Clause 4.3(2) provides that the height of a building on any land is not to exceed the

maximum height shown on the Height of Buildings Map. The maximum height shown on the Height of Buildings Map is 12m. There is agreement that the development exceeds 12 m in height. In accordance with cl 4.6, the applicant has provided a written request to show that consent should be granted even though the development would contravene the height development standard imposed cl 4.3(2).

- 15 Clause 4.4(2) provides that the height of a building on any land is not to exceed the maximum height shown on the Floor Space Ratio Map. The maximum FSR shown on the Floor Space Ratio Map is 1.0:1. There is agreement that the development satisfies this development standard.
- 16 The council submits that cl 5.3 Development near zone boundaries, applies although this was not accepted by the applicant.
- 17 *The Hills Development Control Plan 2012* (DCP 2012) applies. Part B Section 3 applies to Residential Flat Buildings and Part B Section 6 applies to Business. Part B Section 5 applies as “residential flat buildings are a permissible use” in the zone and Part B Section 5 applies to all “business zoned land”. DCP 2012 does not contain any specific reference to residential flat buildings located in business zoned land.
- 18 *State Environmental Planning Policy No. 65 - Design Quality of Residential Flat Development* (SEPP 65) applies to the proposed development even though *State Environmental Planning Policy No. 65 - Design Quality of Residential Apartment Development* is the current policy. SEPP 65 applies because of the transitional provisions in cl 31 of the later policy. Consequently, cl 30 of SEPP 65 requires consideration to be given to the design quality principles in Part 2 (cl 30(2)(b)) and the publication *Residential Flat Design Code* (RFDC) (cl 30(2)(c)).
- 19 The site adjoins land within the Parramatta City local government area on its southern and western sides where the land is largely zoned R2 Low Density Residential under *Parramatta Local Environmental Plan 2011*. Part of the southern boundary opposite the proposed development is zoned RE1 Public Recreation and further to the east, the local government boundary cuts across the site of The Winston Hotel where that part of the site in the Parramatta local government area is within Zone B2 Local Centre.

Can the variation to the height standard be supported?

The requirements

- 20 Clause 4.6 provides the opportunity to provide exemptions to development standards by way of a written request. Clause 4.6 relevantly state:

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

21 The objectives of the height standard are set out in cl 4.3 (1) and state:

(a) to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,

(b) to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.

The extent of the breach of the height standard

22 The Dictionary to LEP 2012 defines building height as:

building height (or **height of building**) means the vertical distance between ground level (existing) and the highest point of the building, including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

23 The maximum extent of the breach of the 12 m height development standard was agreed by town planners Mr Andrew Minto for the applicant and Mr Scott Barwick for the council (in accordance with the definition of building height) as 14.2 m. This is measured from the level of Basement Level B2 (RL 59.05) to the top of the proposed building (RL 85.26). The existing level of the recently constructed roof slab of the Aldi supermarket is 12.35 m above the level of Basement Level B2.

The written request

24 Mr Minto prepared a written request in accordance with cl 4.6 to show why the variation to the height standard is acceptable. The cl 4.6 written request states that compliance with the development standard is unreasonable or unnecessary in the circumstances of this case as strict application of the control would result in building height being measured from the excavated level of Basement Level B2 which is located approximately three storeys below the ground level at the external perimeter of the site. Such an interpretation would be unreasonable given that Basement Level B2 is not

discernible from the outside of the building envelope. Having regard to the objectives of cl 4.3, Mr Minto states that it is more appropriate to relate the height of the proposed buildings to the existing ground level which exists at the boundary of the site and where it interfaces with the public domain.

25 Mr Minto states that the proposal will provide for a built form outcome which when viewed from the public domain interface:

- is consistent with the built form outcomes envisaged for the site under council's planning controls,
- at the front façade, the building is largely compliant with a 12m height line projected from the existing ground level at the interface of the site and the Langdon Road and Caroline Chisholm Drive footpaths,
- is typically provided with a 6m landscape setback from both street frontages, and
- will typically present as a two storey built form (given that the basement level will generally not present as a storey) with the third (top) floor being setback from the lower levels.

26 Mr Minto further states that the proposal will not result in any unreasonable amenity impacts upon adjoining properties noting that:

- the proposal will not result in any unreasonable overshadowing of adjoining properties,
- the proposal as a result of the separation distances (in excess of 22m) provided to the adjoining residential properties will not result in any unreasonable loss of privacy (both visual and acoustic),
- the proposal will not result in the loss of any iconic views from adjoining properties, and
- the proposal provides for an architecturally designed built form which is consistent with the intent of the applicable planning controls.

27 On the question of whether there are there sufficient environmental planning grounds to justify contravening the development standard, Mr Minto states that a strict application of the height of building control would involve a measurement being made from the floor level of Basement Level B2 and which is three storeys below ground level. Such an interpretation would in effect sterilise this part of the site given that the existing roof slab to the Aldi store has a height measured from Basement Level B2 of 12.35m (and as such currently exceeds the 12m height control). Such an outcome would not provide for the orderly and economic use and development of land and would present an outcome whereby the R2 zoned lands located opposite this part of the site would actually present as having a higher building height than a complying building on this part of the site.

28 Mr Minto suggests that in the circumstances of this case that the prescriptive building height control should be abandoned in favour of a merit based assessment by accepting that the intent of the building height provisions is to control the height and impact of development upon both the public domain and adjoining properties. In this case, the site and proposed development do not directly interface with any adjoining

properties. It does however have an interface with both Langdon Road and Caroline Chisholm Drive.

29 In this context, Mr Minto concludes that in the circumstances it is appropriate to apply the 12m height control to the existing ground levels at the street boundaries of the site. The proposal has been designed so as to be largely responsive to this interpretation.

30 The proposal has also been designed having regard to the underlying objective of the provision as reflected by DCP 2012 whereby the proposal is typically provided with a 6m wide landscape setback from the street frontages and has a street facade which is provided with increased setbacks to the upper level.

31 On the question of whether the proposed development is 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, Mr Minto answers in the positive because it will provide for 90 dwelling units in a manner which is compliant with the zone objectives and the objectives of the particular standard. In this regard, and in relation to the objectives for the B2 Local Centre, Mr Minto concludes that :

- the site will continue to provide for a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area with over 77% of the total floor area provided being for retail/commercial use,
- the site will continue to provide for continued employment opportunities in an accessible location, and
- the proposal will continue to maximise public transport patronage and encourage walking and cycling as a result of its proximity to existing bus networks and the existing shopping centre.

32 In response to the cl 4.2 height objectives, Mr Minto states that:

- the proposed building height at the street interface is largely compliant with the 12m height control when projected from the street boundary,
- the proposed building form is generally consistent with the requirements of council envisaged for the site as the upper level is provided with an increased setback from the level below, and
- the proposal will not result in any unreasonable impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.

33 Mr Minto concludes by stating that based upon the content of the written request that a variation of the height requirements of cl 4.3 of LEP 2012 is appropriate in this instance.

The council's evidence

34 Mr Barwick did not specifically respond to the cl 4.6 written request although he provided a response to the merits of the proposed development and specifically the consequences of the breach of the 12 m height standard. As I understand the position of Mr Barwick (including the particulars in the contentions) is that the building presents

as four levels which exceeds the anticipated building height for the locality and does not discreetly sit within the low rise residential context of the surrounding residential areas. The discreet interface that is currently achieved is lost and an uncharacteristic building bulk and scale is presented.

- 35 Mr Barwick states that the written request under cl 4.6 of LEP 2012 to vary the numerical height development standard does not demonstrate that any planning purpose is served by the non-compliance and the resulting building would be contrary to the intent of the planning framework and results in residential dwellings of poor amenity and design quality.
- 36 The resulting building will have the appearance of a four storey building which is contrary to the anticipated building height under the DCP 2012 and contrary to the Winston Hills Special Character area of the residential properties to the south located in the Parramatta City local government area. The Winston Hills Special Character area recognises the intact subdivision pattern from its development in the mid 1960's and the resulting low rise residential character comprising a mix of one and two storey dwellings. More specifically, the resulting interface between the land zoned B2 Local Centre under LEP 2012 and the land zoned R2 Low Density Residential under *Parramatta Local Environmental Plan 2011* is unacceptable as the height bulk and scale of the development fails to integrate with the low rise residential character of the surrounding development and the Special Character area of Winston Hills.
- 37 Mr Barwick also states that DCP 2012 seeks to limit development on the site with a 6 m landscaped setback. The 6m landscape setback is specifically required on business zoned land that adjoins or is opposite residential zoned land. The objectives of the landscape setback requirement include:
- the provision of attractive streetscapes and screen planting,
 - minimising overshadowing,
 - protection of privacy and amenity, and
 - the provision of desirable and aesthetically pleasing working environments.
- 38 An underlying desirable intended outcome is to ensure that development on business zoned land, in the vicinity of residential land, provides for an appropriate transition in scale and appearance from the domestic residential scale to any development on the business zoned lands. The current development on the site is largely successful in not being an intrusive visual element in the vicinity of the residential dwellings. The perimeter landscaping provided in conjunction with the buildings is largely being tucked into the slope at the intersection of Caroline Chisholm Drive and Langdon Road. The proposed level of car parking and three levels of accommodation requires the landscaping to screen and buffer to a much larger extent with a more visually imposing development than currently exists.
- 39 The resulting building clearly presents as a four level building to both street frontages. While the building to Caroline Chisholm Drive and Langdon Road is setback 6 m, the landscaping proposed is all provided within effectively planter boxes due to the loading

dock and car parking entry ramps. This compromises the extent and nature of landscaping able to be undertaken. As a result, the development does not present an appropriate transition from the low scale residential development to the development on the business zoned land as is clearly intended by DCP 2012 controls which specifically require the provision of landscaped setbacks when the business zoned lands are located adjacent to or opposite residential zoned land.

- 40 As the landscape screening of the current building will be overwhelmed by the scale of the building proposed there is no justification for the numerical non-compliance of the 12 m building height development standard under clause 4.3 of the LEP and no better planning outcome is presented to justify support the non-compliance.

The assessment framework

- 41 Clause 4.6 of LEP 2012 imposes three preconditions on the Court in exercising the power to grant consent to the proposed development. The first precondition (and not necessarily in the order in cl 4.6) requires the Court to be satisfied that the proposed development will be consistent with the objectives of the zone (cl 4.6(4)(a)(ii)). The second precondition requires the Court to be satisfied that the proposed development will be consistent with the objectives of the standard in question (cl 4.6(4)(a)(ii)). The third precondition requires the Court to be satisfied that the written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(a) and cl 4.6(4)(a)(i)). This precondition also requires the Court to be satisfied that the written request demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard and with the Court finding that the matters required to be demonstrated have been adequately addressed (cl 4.6(3)(b) and cl 4.6(4)(a)(i)).

- 42 In considering the question of consistency, I have adopted approach of the former Chief Judge, Justice Pearlman in *Schaffer Corporation v Hawkesbury City Council* (1992) 77 LGRA 21 where, Her Honour expresses the following opinion [at 27]:

The guiding principle, then, is that a development will be generally consistent with the objectives, if it is not antipathetic to them. It is not necessary to show that the development promotes or is ancillary to those objectives, nor even that it is compatible.

- 43 I have also adopted the meaning of compatibility, for height objective (a), as set out in *Project Venture Developments v Pittwater Council* [2005] NSWLEC 191 where (at [22]) it states:

There are many dictionary definitions of *compatible*. The most apposite meaning in an urban design context is *capable of existing together in harmony*. *Compatibility* is thus different from *sameness*. It is generally accepted that buildings can exist together in harmony without having the same density, scale or appearance, though as the difference in these attributes increases, harmony is harder to achieve.

- 44 A negative finding for any precondition must see the appeal dismissed and a positive finding would enliven the power to grant development consent subject to a merit

assessment.

The zone objectives

45 The B2 zone objectives are:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.

46 The zone objectives are broad and are not particularly helpful in dealing with the question of whether a variation to the height standard can be supported. The zone objectives relate principally to the allocation of appropriate land uses rather than, in this case, whether a variation to the height standard is acceptable. The relationship of the development and the zone objectives required by cl 2.3(2) is addressed later in the judgment.

47 As there are no issues that are raised in the zone objectives that give rise to any questions on the appropriateness or otherwise of the variation to the height, pursuant to cl 4.6(4)(a)(ii), I find that the proposed development is consistent with the zone objectives and as such would not be a reason to refuse the application.

The height standard objectives

48 The objectives of the height standard are:

- (a) to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,
- (b) to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.

49 The height of any development on the site is set by cl 4.3(2) of LEP 2011 that provides that the height of a building on any land is not to exceed the maximum height shown on the Height of Buildings Map. The maximum height is 12m. The Dictionary to LEP 2012 provides the following relevant definitions:

building height (or height of building) means:

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
 - (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,
- including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

ground level (existing) means the existing level of a site at any point.

50 As the proposed development is to be located on the roof slab of the Aldi development that included basement car parking, the strict interpretation of “ground level (existing)” is the underside of the lowest basement car parking slab (Basement Level B2). The impact of the breach of the height standard is further difficult to quantify given the slope of the site however the experts agree that the maximum breach is 14.2 m. Due to the

excavation for the Aldi development and the definition of ground level (existing), the curious situation arises where the Aldi development already exceeds the 12 m maximum height (by 0.35 m) although at the point where the breach occurs is below the ground level adjoining this point at the boundary of the site. Given these facts, Mr Barwick's response to a question of what would constitute a reasonable height for development on this part of the site was not forthcoming and unhelpful in dealing with the height issue. At best, Mr Barwick maintained his position that "the discreet interface that is currently achieved is lost and an uncharacteristic building bulk and scale is presented".

- 51 Mr Minto's approach is that "the prescriptive building height control should be abandoned in favour of a merit based assessment" and that the height should be measured from an arbitrary level that reflects the natural ground level of the site at the boundary.
- 52 Clearly, the variation to the height standard can only be considered in the terms set by cl 4.6. It is not a question of no variation being acceptable, abandoning the development standard or setting a new arbitrary definition of ground level. To give some context to the question of whether the variation of the height standard is appropriate, it would be reasonable to theoretically ask, given the existing planning controls, what form of development could reasonably be expected on that part of the site where the application is proposed from the public and private domain (and absent the Aldi development). I have taken this to be principally from Caroline Chisholm Drive and Langdon Road and the private properties opposite the site, with frontage to these roads. To help answer this question, the principal planning controls are:
- a 12 m height (cl 4.3(2), LEP 2012),
 - a 6 m street setback where development is located opposite a Residential zone (cl 2.5(c), Pt B, Sec 6, DCP 2012),
 - an attractive streetscape and substantial areas for landscaping in the 6 m setback (objective (i) cl 2.5, Pt B, Sec 6, DCP 2012),
 - step development on sloping sites (cl 3.4(a), Pt B, Sec 5, DCP 2012),
 - reinforce street corners (cl 3.8(c), Pt B, Sec 5, DCP 2012), and
 - a maximum 3 storey building height for the B2 zone (cl 2.6(a), Pt B, Sec 6, DCP 2012).

- 53 In relation to how the proposed development would "fit" with these principal planning controls, the diagrammatic section (Plan A-303, Rev DA-02) indicates that when the height is measured from the existing Aldi slab (RL 71.40) to the top of the roof, the height is around 12.01 m. This provides for 2.7 m floor to ceiling height for the three levels of accommodation and 2.75 m for the car park level.

Height objective (a) - *to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape,*

- 54 Mr Barwick raised a number of separate matters over the design and form of the building that could be seen as being incompatible with "adjoining development and the

overall streetscape". These are:

- the relationship with the residential development opposite the site,
- the relationship with the Winston Hills Special Character Area in the Parramatta City local government area,
- the inability of landscaping to screen the proposed building, and
- the unacceptable streetscape.

The relationship with the residential development opposite the site

55 I am satisfied that the proposed development has a satisfactory relationship with the residential properties in Langdon Road. There are around six dwellings that directly face the proposed development on the opposite side of Langdon Road. Across Langdon Road, the proposed development will be seen as having three levels of accommodation and a level of parking and being around 12 m in height. While the levels of accommodation maintain the same levels through the development (because of the consistent level of the slab the accommodation levels are constructed on) there will be a variation with the existing ground level external to, but adjoining the site. For example, the public land on the corner of Caroline Chisholm Drive and Langdon Road has an RL of 72.8 m and further along Langdon Road towards the end of the proposed development, the land has an RL of 70.3 m (compared to the slab RL of 71.4 m). In my view, the application properly responds to the change in topography (rather than adopting the flat level of the Aldi slab) by removing part of the third level of accommodation where the difference between the level of the slab and the natural ground level is greatest thereby providing a building form that responds to the changing elevations of the natural topography. If compared to the natural level, the proposed development will be perceived as being less than 12 m in height at this location. This change in the number of levels is also consistent with the DCP 2012 approach of reinforcing the street corner.

56 The two dwellings at the Caroline Chisholm Drive frontage, opposite the site are used for commercial purposes (a vet hospital and hairdresser). The rest of the area that directly faces the proposed development on the opposite side of Caroline Chisholm Drive are associated with sporting facilities at Caroline Chisholm Park and zoned RE1 Public Recreation under *Parramatta Local Environmental Plan 2011*. As is the case with Langdon Drive, the proposed development responds to the change in topography by removing part of the third level of accommodation where the difference between the level of the slab and the adjoining natural ground level is greatest thereby providing a building form that responds to the changing elevations of the natural topography and reinforcing the corner of the site.

57 While Mr Barwick maintains that there is an inappropriate transition from the site to the residential properties opposite, I disagree with this conclusion. The site and the adjoining properties have different zonings and consequently different likely forms of development, including use, height and floor space. If the change in zoning was not separated by two relatively wide roads, then Mr Barwick's approach of having a

transition between the zonings would have greater force. In this case however, I accept that the proposed building generally represents the form of building contemplated by the council's planning controls in that it is around 12 m in height, has a landscaped setback of 6 m, responds to the topography provides an attractive streetscape appearance and reinforces the corner.

- 58 While DCP 2012 requires a maximum of three storeys, I do not accept that simply because the proposal provides four storeys, in some locations on its frontage, that this is a sufficient reason to refuse the application. I have also taken into consideration the provisions of s 79C(3A)(b) of the *Environmental Planning and Assessment Act 1979* that state:

(3A) Development control plans

If a development control plan contains provisions that relate to the development that is the subject of a development application, the consent authority:

(a) .

(b) if those provisions set standards with respect to an aspect of the development and the development application does not comply with those standards—is to be flexible in applying those provisions and allow reasonable alternative solutions that achieve the objects of those standards for dealing with that aspect of the development, and

The Winston Hills Special Character Area

- 59 The Winston Hills Special Character Area is identified in pt 4.2 of the *Parramatta City Council Development Control Plan 2011* (DCP 2011). The general objectives for the special character areas in DCP 2011 are stated as:

General Objectives

O.1 Development within each Special Character Area is to be compatible with the identified character and is to reinforce the special attributes and qualities of the area.

O.2 Development should seek to maintain the level of residential amenity currently enjoyed and positively contribute to the distinctive characteristics of each area.

- 60 The Statement of Significance of the Winston Hills Special Character Area is set out in pt 4.2.1 and states:

Statement of Significance

This large development was the most important subdivision of its time The land was acquired by Hooker-Rex and developed as the Model Farm Estate, a complete neighbourhood development It was one of the last releases of land zoned as Green Belt, providing one of the last greenfields development areas A number of the original farmhouses remain, incorporated in the subdivision plan It was opened in 1965 as Winston Hills The subdivision plan is characterised by curvilinear street designs, gully parklands, wider and less deep allotments than traditional subdivision patterns House construction is 'wide-fronted' with low, horizontal lines This appearance is created by a number of factors including the siting of houses across the allotments, garages integrated with the house, simple low-pitched roofs with ridges parallel to the street, overhanging eaves or verandahs, and window and door detailing. Most homes are of brick construction with tiled roofs There is a mixture of single, split level and two-storey homes, and wall finishes include face brick, painted brick and cement rendering There are additions on some houses, in both brick and lightweight construction

- 61 Mr Barwick, many of the residents who gave evidence and Parramatta City Council maintained that the appearance of the proposed building will be contrary to the Winston

Hills Special Character area as the proposed building will not integrate with the low rise residential character of the special character area. I respectfully disagree for two important reasons. First, the location of the proposed development is sufficiently distant not to have any impact on the Winston Hills Special Character area. At its closest point, the site of the proposed development is some 200m from the nearest point of the Winston Hills Special Character area. I note that part of the B2 zone within the Parramatta City local government area that contains the The Winston Hotel directly adjoins the Winston Hills Special Character area.

62 Second, and while pt 4.2.4 of DCP 2011 contains Design Controls; these controls apply only to additions and new dwellings within the Winston Hills Special Character area rather than development in the vicinity of the special character area.

63 For these reasons, I can comfortably conclude that the proposed development will have no impact on the Winston Hills Special Character area.

Landscaping

64 Part C Sec 3 of DCP 2012 addresses landscaping. Pt 3.10 addresses Business and Industrial Development and pt 3.11 addresses Residential Development. I did not understand there to be any specific landscaping controls that deal specifically with residential development in commercial zones.

65 The objectives in pt 3.10 are:

(i) To integrate high quality landscaping into the built environment of the Shire's industrial and business precincts.

(ii) To present an attractive visual character and robust landscaped treatments that are appropriate and functional in industrial and business precincts.

66 The objectives in pt 3.11 are:

(i) To ensure that the landscaping of open space areas, both private and communal is functional and meets user requirements for privacy, solar access, shade and recreation.

(ii) To provide attractive landscapes, which reinforce the function of the street and contribute to the amenity of dwellings.

(iii) To ensure that the landscaping does not unduly impact on adjoining developments.

67 The application proposes landscaping in accordance with a landscape plan (Exhibit B) for the setback area to Caroline Chisholm Drive and Langdon Road (and the central courtyard). The landscape plan provides details on species type, number of species, location, size, spread and height. No expert landscaping evidence was provided and subject to a condition requiring at least 1200 mm planter box depth, no contentions remained in relation to the proposed landscaping. I do not accept the comments of Mr Barwick that the proposed landscaping "will be overwhelmed" by proposed building. The role of the landscaping is not to hide the building but to provide a softening of the appearance of the building from the public areas around the site. There was no expert evidence to suggest that this would not be achieved by the proposed landscaping.

68 On this basis, I am satisfied that the proposed landscaping will satisfy the objectives in pt 3.10 and pt 3.11 of DCP 2012.

Streetscape

69 Part C Sec 3 of DCP 2012 addresses landscaping. Pt 3.8 addresses Building Design and Streetscape. The objectives in pt 3.8 are:

- (i) To ensure residential flat building development of a high standard based on appropriate building design and attention to detail, which integrates suitably into the existing or future urban environment.
- (ii) To achieve residential flat building developments that is of a high standard of design and construction in terms of both internal and external appearance.
- (iii) To ensure that developments are aesthetically pleasing, encourage creativity and diversity in design, incorporating architectural relief and modulation of facades to avoid a bulky or monotonous appearance.
- (iv) To ensure the appearance of residential flat building developments enhance the streetscape, complement adjoining and surrounding development in terms of scale and character.

70 Relevant controls include:

- designs must be in harmony in terms of form, mass, colour and structure with the existing and likely future development in the street. (pt 3.8(b) Part B Sec 5 of DCP 2012),
- the siting and design should seek to ensure a clear definition of the street edge and reinforce street corners. Building lines together with landscaping treatments should distinguish the public and private realms (pt 3.8(c) Part B Sec 5 of DCP 2012), and
- developments must not be repetitive in design and should incorporate harmonious variations into design features such as verandas, entrances, facades etc. (pt 3.8(d) Part B Sec 5 of DCP 2012).

71 Apart from the original inconsistencies between architectural plans and the need to provide a transition between the site and residential properties opposite, Mr Barwick did not raise any specific concerns over the building design. I am satisfied that the proposed development, when viewed in the streetscape, will be acceptable. The SEPP 65 Architectural Statement (Exhibit E, Appendix C) provides the following comments that I consider to properly reflect the design philosophy (even based on an earlier version of the plans):

These apartment building forms have been designed to make them appear visually smaller and less intrusive, through:

- a varied material and colour palette;
- extensive building articulation;
- significant modulation of both horizontal and vertical elements;
- expressed balcony elements;
- use of louvred privacy screens as facade elements.

These design elements are used to visually break-up the larger buildings into forms with a smaller scale.

Another design approach which is applied to the buildings, to assist in the creation of interesting, articulated forms, is the visual division of the building form both vertically and horizontally. Vertically the buildings are presented with a distinct base, middle and top.

The material treatment of the ILL buildings consists of a combination of:

- Rendered masonry
- F.C. weatherboards -
- Sheet F.C. cladding
- Paint finishes
- Louvre privacy screens
- Glazed balustrades

...Roof forms are generally expressed as flat cantilevered simple roof planes capping the buildings, with specific design expression of a sweeping, butterfly cantilevered roof above the street corner balcony, which provides a distinctive emphasis to the corner feature of the building and the street corner character.

The combination of horizontal and vertical facade articulation, varying materials and colour palette, balcony expression, distinct roof design elements and strong building form with a distinct base, middle and top to the apartment buildings presents an appropriate scale, rhythm and proportion to these buildings, responding to the building's use and intended contextual character

- 72 I find that the proposed development will be in the public interest as it is consistent with the height objective (a).

Objective (b) - *to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas.*

- 73 In relation to height objective (b), it was agreed between Mr Minto and Mr Barwick that the development acceptably minimises “the impact of overshadowing,, and loss of privacy on adjoining properties and open space areas” although Mr Barwick maintained that “visual impact” remained an issue. If “visual impact”, in the context of objective (b), is given a broader meaning, as suggested by Mr Barwick, than the more local context of the other matters in the objective (that is, ‘on adjoining properties’) I am satisfied that under both circumstances, the impact has been minimised through the height of the proposed development, the separation between the proposed development and the adjoining properties, the zoning of the site and the likely form of development anticipated by the zoning, the proposed landscaping and the design of the building.

- 74 I find that the proposed development will be in the public interest as it is consistent with the height objective (b).

Is compliance with the development standard is unreasonable or unnecessary in the circumstances of the case?

- 75 I accept evidence of Mr Minto that compliance with the height of building development standard would involve a measurement being made from the floor level of Basement Level B2 and which is already around 3 storeys below what was previously ground level prior to the Aldi development. The effect is that the 12 m height control is already breached. In my view, this makes compliance unreasonable, in the circumstances of the case.

Are there sufficient environmental planning grounds to justify contravening the development standard?

- 76 I accept the evidence of Mr Minto that there sufficient environmental planning grounds to justify contravening the development standard.
- 77 Having considered the requirements in cl 4.6, there are no reasons why the height of the proposed development should not be varied in accordance with that proposed in the development application.

Internal amenity

Cross ventilation

- 78 The Rules of Thumb in the RFDC (p87) for Natural Ventilation provides that 60% of residential units “should be naturally ventilated”. Mr Minto, in a supplementary joint report with Mr Barwick (Exhibit 6), acknowledges that the proposed development does not achieve 60% however with the combination of some units (resulting in 86 units rather than 90 units) the development could achieve 59.3% rather than the current rate of 55.5%. This also has the effect of increasing the number of 3 bedroom units from three to eight which more closely complies with the council’s unit mix requirements.
- 79 I accept that this is an appropriate response to increasing the number of units providing satisfactory cross ventilation and consequently, a more appropriate unit mix.

Solar access

- 80 The Rules of Thumb in the RFDC (p85) for Daylight Access provides that “living rooms and private open space for at least 70% of apartments in a development should receive a minimum of three hours direct sunlight between 9 am and 3 pm in mid-winter”. Mr Barwick calculates that only 48.8% of the units (based on 90 units) satisfy the RFDC requirement. As part of Exhibit 6, the joint report provides individual unit plans prepared by the project architect that identify where units comply or can be made to comply with the RFDC requirements, with some minor modifications. The units in question are units 101, 129, 131,201,230, 232,233, 309, 312-316,324, and 325. An explanation is provided by Mr Minto on how this is achieved for each of the units. With a greater explanation on the solar access or with minor modifications, Mr Minto calculates that 69.8% of the units would comply with the RFDC requirements.
- 81 Having considered the explanation for each of the units set out in Exhibit 6, I accept that this is an appropriate response to increasing the number of units providing satisfactory solar access.

Zone objectives

- 82 Clause 2.3(2) states:
- (2) The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone.
- 83 The B2 zone objectives are:
- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.

- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.

84 It was argued that as residential uses are not identified in the objectives then they cannot be consistent with the first objective. While this is an argument that on the surface has some merit; it is necessary to go beyond the objectives to understand the question posed by cl 2.3(2). In *BGP Properties Pty Limited v Lake Macquarie City Council* [2004] NSWLEC 399, McClellan CJ makes the following relevant comments:

117 In the ordinary course, where by its zoning land has been identified as generally suitable for a particular purpose, weight must be given to that zoning in the resolution of a dispute as to the appropriate development of any site. Although the fact that a particular use may be permissible is a neutral factor (see *Mobil Oil Australia Ltd v Baulkham Hills Shire Council (No 2)* 1971 28 LGRA 374 at 379), planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted. The more specific the zoning and the more confined the range of permissible uses, the greater the weight which must be attributed to achieving the objects of the planning instrument which the zoning reflects (*Nanhouse Properties Pty Ltd v Sydney City Council* (1953) 9 LGR(NSW) 163; *Jansen v Cumberland County Council* (1952) 18 LGR(NSW) 167). Part 3 of the *EP&A Act* provides complex provisions involving extensive public participation directed towards determining the nature and intensity of development which may be appropriate on any site. If the zoning is not given weight, the integrity of the planning process provided by the legislation would be seriously threatened.

118 In most cases it can be expected that the Court will approve an application to use a site for a purpose for which it is zoned, provided of course the design of the project results in acceptable environmental impacts.

119 However, there will be cases where, because of the history of the zoning of a site, which may have been imposed many years ago, and the need to evaluate its prospective development having regard to contemporary standards, it may be difficult to develop the site in an environmentally acceptable manner and also provide a commercially viable project.

- 85 *BGP Properties* makes it clear that “planning decisions must generally reflect an assumption that, in some form, development which is consistent with the zoning will be permitted” – the critical words are “in some form” and “results in acceptable environmental impacts”. The appropriateness of the form of the building proposed and any impacts has been considered as part of the consideration of the variation to the height development standard, earlier in the judgment, and has been found to be acceptable.
- 86 Having had regard to the zone objectives, pursuant to cl 2.3(2), there are no matters that would warrant the refusal of the application.

Retail hierarchy

- 87 Mr Barwick states that the proposal is not consistent with council's *Centre's Direction 2009 – Planning, Protection and Management of the Shires Centres* (the Centres Direction). The Centre's Direction categorises the site as a Stand Alone Centre which has a typology of an internalised retail centre layout and design which serves local residents' weekly shopping needs subject to height and FSR being reflective of the character of the surrounding residential area.

Mr Barwick further states that the proposal does not in any meaningful way augment, support or improve the functionality or amenity of the centre. The development in appearance and function is a residential building that is proposed to be grafted onto the shopping centre. The proposal also increases the managerial complexity of the shopping centre proposing the introduction of convoluted access paths to resident and resident visitor car parking in Basement Level B2. These compromises are reflective of the compromised outcomes that arise from attempting to convert and internalise a shopping centre with a mix of retail, business and commercial uses into a mixed use residential development.

89 Mr Minto states that the proposal will provide for a development outcome that will continue to satisfy the objectives of the B2 Local Centre Zone. Importantly, the proposed residential development will have a floor area which equates to 24% of the total floor area provided upon the site, meaning that the vast majority of the floor area of the site (76%) will continue to be provided as predominantly retail floor area. In addition, it is noted that a further 4127 sq m of floor area remains available and which is capable of being utilised for the future expansion of the retail centre, if required. For these reasons, the proposal will not diminish the role that the Mall plays in its locality and level of services provided.

90 I agree with the conclusions of Mr Minto on this matter. The approval of the residential flat building does not stop further retail and commercial development on the site given the planning controls that currently exist, such as FSR. It is actually more likely that any additional retail and commercial development contemplated for the site would occur at an earlier time, given the new population generated by the proposed development and its close proximity to the retail and commercial facilities at the Mall.

91 I am also satisfied that the councils Centre's Direction is not a document that should be given any significant weight in determining the application. While the Court may have regard to a range of documents in the public interest (*Terrace Tower Holdings Pty Ltd v Sutherland Shire Council* (2003) NSWCA 289), *Centre's Direction* cannot be a document that displaces LEP 2012 and DCP 2012.

92 The aims and objectives of the Centre's Direction are set out at p10. The aim is:

To provide an overall strategic context for the planning and management of centres and their development and growth in the Shire to 2031

93 Objective d relevantly states:

Inform the drafting of Council's Local Environmental Plan, Development Control Plan, Contributions Plans and other Council projects with regard to centres; and

94 While *Centre's Direction* provides a range of findings and recommendations; the role in the context of this application is to inform the preparation councils planning controls. The *Centre's Direction* predates LEP 2012 and (at p28) states that it "provides guidance for the preparation of LEP 2010" which I understand was the precursor to LEP 2012. Presumably, the Centre's Direction informed LEP 2012 to the extent that was possible.

Car parking/access

- 95 Traffic engineers Mr Craig McLaren, for the applicant and Mr Chris Hallam, for the council provided a joint report (Exhibit 4) that addressed the contentions raised by the council. In relation to the amount of car parking, the joint report states that the Table below sets out calculations by Mr Hallam of parking spaces required under DCP 2012 and under the *RMS Guide Rate for Medium Density Residential Flat Building* (the RMS Guide). In the absence of survey data on similar developments in The Hills local government area, Mr Hallam considers that the use of the RMS Guide rates is appropriate. In the Table below, Mr Hallam has undertaken a sensitivity analysis with the RMS parking rates. For the "High" figures, Mr Hallam has taken the addition of a study to be equivalent to an additional bedroom, while the "Low" figures ignore the Study:

Type	Number	DCP Rate	DCP Spaces	RMS Low Rate	RMS Low Spaces	RMS High Rate	RMS High Spaces
One-bedroom	23	1.0	23	1.0	23	1.0	23
One-BR + Study	20	1.0	20	1.0	20	1.2	24
Two-bedroom	28	2.0	56	1.2	33.6	1.2	33.6
Two-BR + Study	16	2.0	32	1.2	19.2	1.5	24
Three bedroom	3	2.0	6	1.5	4.5	1.5	4.5
Sub-total	90		137		100		109
Visitor parking		0.4	36	0.2	18	0.2	18

- 96 The proposed parking supply is 125 spaces in the proposed residential parking level, plus up to 20 spaces in the existing parking area for visitors. Mr Hallam considers that the RMS Medium Density parking rates are more appropriate than the DCP 2012 rates. At the RMS "High" rate, the resident spaces calculated are 109, less than the proposed supply of 125 spaces. With the visitor parking, Mr Hallam considers that the DCP 2012 rate is excessive, and that the RMS rate is more appropriate. Mr Hallam concludes that

the provision of 125 spaces in the new parking level, all dedicated to residents, plus 20 spaces for residential visitors, located on Basement Level B2 of the Mall will be sufficient for the proposed development. Mr McLaren generally agrees with these conclusions.

- 97 Mr Hallam did not attend the hearing as he was overseas at the time although he was in communication during the hearing. Not all matters could be properly addressed because of Mr Hallam's absence and it was agreed that the traffic engineers should continue to discuss any outstanding matters and if any matters could not resolved then each expert was to identify the area of disagreement, the reasons for the disagreement and an appropriate condition to reflect their particular position. The details of the disagreement were filed on 11 March 2016. Notwithstanding the general agreement over the amount of car parking in Exhibit 4, Mr McLaren and Mr Hallam disagreed on the amount of car parking (condition 5) and queuing time to access the car park (condition 16(v)).
- 98 On the amount of car parking, the difference between Mr McLaren and Mr Hallam now centres on the inclusion or not, of areas designated as a study in the units as a bedroom in some of the 1 and 2 bedroom units, for the purposes of calculating car parking. Mr McLaren maintains that the study is not of sufficient proportions to be used for a bedroom and given the location at a large shopping centre with good public transport accessibility, 108 spaces for the occupiers of the 86 units and 17 spaces for visitor spaces are an appropriate number of spaces. The 125 spaces can all be accommodated in the new parking level.
- 99 On this matter, I accept that the previously agreed position of 125 spaces in the new parking level, all dedicated to residents, plus 20 spaces for residential visitors, located on Basement Level B2 of the existing shopping centre parking area is the correct amount of car parking. This figure is consistent with the RMS Medium Density parking rates and the Census data. To adopt the approach suggested by Mr McLaren would, in my view, need a more detailed and comprehensive parking survey which was not available at the time of the hearing. While there are clearly benefits in having both resident and visitor parking on the same level; this convenience is not a sufficient reason to reduce the parking numbers to those suggested by Mr McLaren.
- 100 The other matter in dispute is the queuing time to access the car park. I accept Mr McLarens conclusions that a door opening sped of 11 seconds will result in an adequate opening time that will not result in a queue beyond the single vehicle at the intercom at the 98th percentile assessment threshold based on AS2890. 1:2004.

SEPP 65 – Design Quality Principles

- 101 For the reasons set out in the preceding paragraphs, I am satisfied that in accordance with cl 30 of SEPP 65, having considered the design quality principles in Part 2, particularly, Principle 1 (Context), Principle 2 (Scale), Principle 3 (Built Form), Principle 7 (Amenity), Principle 8 (Safety and Security) and Principle 9 (Social Dimensions) that

there are no matters that would warrant the refusal or amendment of the application.

Amended plans and conditions

102 The judgment identifies a number of matters that require further attention by the applicant by way of amended plans and conditions. These are:

- (1) conditions 5 and 16(v) as per pars 89 to 94 of the judgment, and
- (2) the adjustment of the number of rooms to address the natural ventilation and solar access as per pars 72 to 75 of the judgment and Exhibit 6.

103 On the filing of agreed amended plans and conditions, by 29 April 2016, that reflect the findings in the judgment; the following final orders will be made in Chambers:

- (1) The appeal is upheld.
- (2) DA 1410/2015/JP for the erection of a residential flat building at the Winston Hills Shopping Mall 180-192 Caroline Chisholm Drive Winston Hills is approved subject to the conditions in Annexure A.
- (3) The exhibits are returned with the exception of exhibits 1, A, B, and E.

G T Brown

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.

Decision last updated: 15 April 2016