



## Land and Environment Court New South Wales

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**Case Title:** Boston Blythe Fleming Pty Ltd v Pittwater Council

**Medium Neutral Citation:** TBA

**Hearing Date(s):** 17-18 December, 2013

**Decision Date:** 24 December, 2013

**Jurisdiction:** Class 1

**Before:** O'Neill C

**Decision:**

1. The appeal is dismissed.
2. Development Application No. N0021/13 for alterations and additions to an existing building for continued use as a restaurant, cafe, motel and retail shop is refused.
3. The exhibits, other than exhibits 10, A and D, are returned.

**Catchwords:** DEVELOPMENT APPLICATION: 'Pasadena' restaurant, cafe, motel and retail; existing use; whether the proposal can be characterised as alterations and additions; whether the proposal is an intensification of use; impact of an increase in the height, bulk and scale and impact on views; impact on nearby heritage items; whether provision of parking is adequate; whether public access way should be provided over the site.

**Legislation Cited:** Environmental Planning and Assessment Act 1979  
Land and Environment Court Act 1979

**Cases Cited:** Tuite v Wingecarribee Shire Council (No 2) [2008] NSWLEC 321  
Stromness Pty Ltd v Woollahra Municipal Council [2006] NSWLEC 587  
Coorey v Municipality of Hunters Hill [2013]

NSWLEC 1187  
Fodor Investments v Hornsby Shire Council  
[2005] NSWLEC 71  
Tenacity Consulting v Warringah [2004]  
NSWLEC 140  
Romeo, Guiseppe and Anna Maria v  
Pittwater Council [2007] NSWLEC 15  
Mary Romeo and Joe Romeo v Pittwater  
Council 10261 of 1997

Texts Cited:

Category: Principal judgment

Parties: Boston Blyth Fleming Pty Ltd (Applicant)  
Pittwater Council (Respondent)

Representation

- Counsel: Mr Michael Staunton Barrister (Applicant)  
Ms Marion Carpenter Barrister  
(Respondent)

- Solicitors: Brook Worthington (Applicant)  
King & Wood Mallesons (Respondent)

File number(s): 10588 of 2013

Publication Restriction:

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## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s97 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No. N0021/13 for alterations and additions to an existing building for continued use as a restaurant, cafe, motel and retail shop (the proposal) by Pittwater Council (the Council), at 1858 Pittwater Road, Church Point (the site) and adjoining Crown land (Lot 3 in DP 1148738).

- 2 The appeal was subject to mandatory conciliation on 30 September 2013, in accordance with the provisions of s34 of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached, the conciliation conference was terminated on 30 September 2013 pursuant to s34(4) of the LEC Act.

## Issues

- 3 The Council's contentions in the matter can be summarised as:
- the proposal is for demolition and new development and not for alterations and additions;
  - the proposed intensification of use of the site would have excessive, unjustified and unacceptable cumulative impacts on the character and amenity of the locality and on nearby residential properties on-shore and off-shore;
  - the proposal results in unacceptable height, bulk and scale which would have unreasonable impacts on the scenic quality and amenity of the surrounding public domain and results in an unacceptable impact on views from the property at 2195 Pittwater Road, Church Point;
  - the proposal has unacceptable detrimental impacts on the setting of adjoining heritage items;
  - The proposal fails to provide adequate on-site car parking;
  - the proposal results in the continuance of an encroachment on the foreshore and shoreline and does not provide a land-based pedestrian access along the foreshore;
  - the proposal is not in the public interest as the Council received over 130 submissions regarding the proposal.
- 4 The parties disagreed on how best to deal with the granting of an approval for the portion of the proposal on Crown land, Lot 3 in DP 1148738, held by the owner of the Pasadena under lease from the Crown (Lot 3). The

parties agreed during the hearing that they would confer further on this matter following the hearing and that if I am minded to approve the proposal, I could hand down appropriate findings and directions and the matter of an approval for the works on Crown land could then be dealt with.

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

- 5 The site is located at the apex of the Church Point promontory, on the northern side of the intersection of McCarrs Creek Road and Pittwater Road. The site is bounded from the north-west to the north-east by the Pittwater foreshore and has panoramic views across Pittwater, including Scotland Island, West Head and the northern beaches peninsula.
- 6 The site, Lot 142 in DP 752046, known as 1858 Pittwater Road, Church Point (Lot 142) is freehold land and rectangular in shape and contains the existing Pasadena building, a two storey masonry building with a lightweight, partial third storey. The site has an area of 634.4 sq m. The site is surrounded to the north (of Lot 3), east and west by Crown land, zoned for recreation. The Pasadena building occupies most of the site and is setback 2.4m from its western boundary shared with Thomas Stephens Reserve. The Pasadena building is in a dilapidated state and has remained unused for the past five years (Mr Boston, oral evidence).
- 7 To the north and east of the site is Lot 3, held by the owner of the Pasadena under lease from the Crown. Lot 3 is irregular in shape and has an area of 811.9 sq m. (exhibit 10, p3). While Lot 3 does form part of the site of this proposal, I have distinguished Lot 142 as 'the site', from Lot 3, in this judgment, only for the sake of clarity.
- 8 Adjoining the site to the west is Thomas Stephens Reserve. It is predominately hard paved, with trees, picnic tables, seats and bollards and it is a busy pedestrian hub and embarking point for the off-shore community, as the commuter ferry wharf is adjacent to the northern side of

Thomas Stephens Reserve. Thomas Stephens Reserve is central to the Church Point village and provides a communal area where locals meet and socialise (exhibit 9, pp 12, 18). There are panoramic views of Pittwater from Thomas Stephens Reserve as well as across the reserve, from the hill on the southern side of the junction of McCarrs Creek Road and Pittwater Road.

- 9 On the western side of Thomas Stephens Reserve is the historic Church Point post office and general store, a one and two storey timber clad building which accommodates the post office, the general store and a cafe (exhibit 9, p12). To the north-east of Thomas Stephens Reserve is the old Church Point ferry wharf.
- 10 On the south-eastern side of the site is the Church Point Reserve. 80% of the Church Point Reserve is used for car parking (exhibit 9, p 13) and contains approximately 300 parking spaces (Mr Edgar, oral evidence). The Church Point Reserve contains mature trees and a public amenities building. Bennett's Beach, a small sandy bay, forms the southern extend of the Church Point Reserve (exhibit 9, p. 13).
- 11 On the southern side of the intersection of McCarrs Creek Road and Pittwater Road is the historic cemetery and an unmade section of Quarter Sessions Road, which provides pedestrian access to and from Quarter Sessions Road and Eastview Road, further up the hill. There are two parcels of vacant land to the east of the unmade section of Quarter Sessions Road, which front Pittwater Road and are owned by the Council.
- 12 2195 Pittwater Road is on the south-western, high side of Pittwater Road, to the south-east of the vacant blocks owned by Council and to the south of the Pasadena building. It is a steep site, falling to the road and contains a two storey house with a balcony running the full length of the first floor on the north-eastern side, overlooking Church Point Reserve, the site to the north-west and Pittwater beyond.

## Background

- 13 By the late 1920s, the first Pasadena building stood on the site and included a store and residence (exhibit 9, p16).
- 14 The current building on the site dates from 1961. The approved development consisted of a two and three storey building, accommodating three shops, a restaurant, 13 motel rooms and a caretaker's flat (exhibit 10, p5).
- 15 In 1990, an extension to the restaurant and kitchen and a covered outdoor eating area was approved, with a condition imposed to limit the dining area to 120 sq m by requiring a landscaped area within the restaurant of 70 sq m (90/393). A modification consent was later granted by the Court (*Mary Romeo and Joe Romeo v Pittwater Council* 10261 of 1997) to modify the landscaped area within the restaurant. The modification consent imposed a condition requiring the seating of the restaurant to be limited to 138 persons, consistent with the relevant liquor licence restriction on the premises that had been granted by the Liquor Licensing Board in January 1990, as an alternative and more precise means of limiting the operation of the restaurant.
- 16 In 2007, the Court granted development consent to demolition of the existing building and construction of a two and three storey, shop-top housing development with basement parking, designed by Peter Stutchbury Architecture (*Romeo, Guiseppe and Anna Maria v Pittwater Council* [2007] NSWLEC 15) (Stutchbury proposal, exhibit K). The Court imposed deferred commencement conditions requiring the removal of one apartment at the western end of the third storey and a requirement that the parapet level be lowered to the height of the existing building to respect the views of the nearby residents. The consent included a condition requiring that seating at the restaurant, including the bar, terrace and any additional outdoor seating, must not exceed 138 persons (exhibit K, condition D42). This consent lapsed on 24 October 2013 (exhibit 10, p 7).

## **The proposal**

- 17 The proposal, designed by Gatner Trovato Architects, is to refurbish the shell of the existing building (exhibit A), as follows:

### **Ground Floor**

- restaurant 125 sq m, kitchen 58 sq m, bar, cafe 96 sq m and toilets and reception and foyer to the restaurant accessed from the southern side of the building;
- raise finished floor level of the ground floor 350mm;
- an outdoor terrace extension accessed from the cafe and stairs to Thomas Stephens Reserve, on the western side of the building, within the 2.4m setback from the shared boundary with Thomas Stephens Reserve;
- retail store 58 sq m;
- separate foyer, lift and stair to upper floors accessed from the southern side of the building;
- outdoor covered areas on the northern side of the building on Lot 3;
- loading dock, garbage area and 10 parking bays, on the eastern side of the building on Lot 3.

### **First Floor**

- 8 motel rooms; including two studios, three 1 bedroom with living room suites, three 2 bedroom with living room suites and public toilets;
- raise the existing single storey masonry wall at the eastern end of the southern elevation to near the top of the parapet to create a two storey solid wall with 'Pasadena' sign;
- raise the single storey colonnade masonry columns on the southern elevation to near top of the parapet to make them two storeys high, new roof over existing southern balconies.

## Second Floor

- 3 motel rooms; including one studio, one 1 bedroom with living room suite and one 2 bedroom with living room suite, each with an outdoor terrace on the northern side;
- raise finished floor level of the second floor by 490mm;
- raise masonry parapet on the southern side of the second floor building element by approximately 200mm;
- all new structure and roof to the second floor.

## Planning Framework

- 18 The parties agreed that the development benefits from existing use rights. CI 41 of the *Environmental Planning and Assessment Regulation 2000* (EPA Regulation) states in relation to existing use rights, the following:

- (1) An existing use may, subject to this Division:
  - (a) be enlarged, expanded or intensified, or
  - (b) be altered or extended

- 19 CI 43 of the EPA Regulation states the following in relation to existing use rights:

- (1) Development consent is required for any alteration or extension of a building or work used for an existing use.
- (2) The alteration or extension:
  - (a) must be for the existing use of the building or work and for no other use, and
  - (b) must be erected or carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.

- 20 The site is zoned 3(c) Neighbourhood Business, pursuant to *Pittwater Local Environment Plan 1993* (LEP 1993). The Church Point Reserve and Thomas Stephens Reserve are zoned 6(a) Existing Recreation and the road reserve on the southern side of the site is zoned 9(d) Arterial Road Reservation.



- 21 The objectives for the 6(a) zone, at Schedule 11 of LEP 1993, are as follows:
- (a) to provide a range of open space and recreational land, and
  - (b) to ensure that development on such land:
    - (i) is for a purpose that promotes or is related to the use and enjoyment of open space, and
    - (ii) is consistent with the purposes for which the land was reserved or otherwise set aside for public use, and
    - (iii) does not substantially diminish public use of, or access to, open space, and
    - (iv) does not adversely affect the natural environment, the heritage significance of any heritage items or heritage conservation areas or the existing amenity of the area.
- 22 The Church Point post office and general store, the Church Point wharf and the Church Point graveyard and site of the former Methodist Church are heritage items listed in Schedule 9 of LEP 1993. The objectives for the protection of heritage items and heritage conservation areas includes, at cl 32 of LEP 1993, 'to conserve the heritage significance of heritage items and heritage conservation areas including associated fabric, setting and views'.
- 23 *Pittwater Development Control Plan 21* (DCP 21) relevantly includes the following in relation to the Church Point and Bayview Locality, at Section A4.4;

#### Context

The locality is serviced by neighbourhood retail facilities at Church Point, which remains an important link to the off-shore communities. The locality also contains a school, the Pasadena restaurant and function centre and several reserves.

#### Desired Character

Future development will maintain a height limit below the tree canopy, and minimise bulk and scale. Existing and new native vegetation, including canopy trees, will be integrated with the development. Views from the buildings shall be maintained below the tree canopy level capturing spectacular views up the Pittwater waterway. Contemporary buildings will utilise facade modulation

and/or incorporate shade elements, such as pergolas, verandahs and the like. Building colours and materials will harmonise with the natural environment. Development on slopes will be stepped down or along the slope to integrate with the landform and landscape and minimise site disturbance. Development will be designed to be safe from hazards.

The locality is visually prominent particularly from Scotland Island, Bilgola Plateau and the Pittwater waterway. Therefore, a balance will be achieved between maintaining the landforms, landscapes and other features of the natural environment and the development of land. as far as possible, the locally native tree canopy and vegetation will be retained and enhanced to assist development blending into the natural environment and to enhance wildlife corridors.

Church Point will remain an important link to the offshore communities.

## **Public submissions**

24 132 written submissions received by Council during its consideration of the application were in evidence (exhibit 2) and a number of objectors provided evidence at the commencement of the hearing on site. Seven of the submissions were in support of the proposal and the rest, in summary, expressed the following concerns:

- the overwhelming issue articulated by the submissions is the current inadequacy of parking at Church Point, particularly experienced by off-shore residents, who use the Church Point Reserve parking area overnight and a concern that the proposal would further exacerbate this existing problem;
- the proposal uses parking not on its own site but on Crown land and the parking in the road reserve, to the south of Pasadena, is not part of the development;
- the proposal represents a significant shortfall in parking spaces, particularly when compared to the Stutchbury proposal which provided 17 car spaces including 10 in a basement carpark;
- the reduction of retail space is undesirable, as the Stutchbury proposal had a greater proportion of retail, which would have been

likely to create a much reduced demand on parking when compared to the restaurant and cafe;

- the proposal should not increase the existing height of the building;
- the proposal represents an unacceptable enlargement and intensification of the existing building and use;
- increasing the height and bulk of the development will impact on adjoining neighbours and the outlook from the cemetery and Quarter Sessions Reserve;
- the operating hours are excessive;
- the proposal creates a mean access point on a prominent waterfront walkway, exacerbating the pinch point along the waterfront pathway at the north-western corner of the building and by extending towards the shared boundary with Thomas Stephens Reserve;
- by extending towards the shared boundary with Thomas Stephens Reserve the proposal reduces the proximity of the existing building to the heritage items;
- the proposal seeks to privatise the public domain by providing an entry to the cafe directly from Thomas Stephens Reserve;
- with regard to the design of the proposal: the proposal represents a lost opportunity to provide a building worthy of this iconic site; the proposal falls well short of the demands of the site; there are no elements vaguely relating to a 'strong coastal vernacular' as stated in the SEE; the rooftop addition lacks any contextual interpretation and diminishes the landmark significance;
- the proposal does not offer any trade off for its expansion and it represents an overdevelopment of the site; and
- some submissions were generally supportive of refurbishing the building as it is currently an eyesore however they expressed concern regarding the issues listed above with the current proposal, including that the proposal to further increase the envelope of the existing building, as this is undesirable.

## **Evidence**

25 The hearing commenced on site with a view. The view included Thomas Stephens Reserve, the heritage items, the first floor balcony and living areas of 2195 Pittwater Road and a view of the site from a boat on Pittwater.

26 The Applicant relied on expert evidence provided by Mr John Coady (traffic), Mr Greg Boston (planning) and Mr Peter Romey (heritage). The Council relied on expert evidence provided by Mr Tim Rogers (traffic) and Mr Gordon Edgar (planning and heritage).

## **Consideration**

### **Is the proposal appropriately characterised as alterations and additions?**

#### *Contention particulars*

27 The Council's contends that the proposal is for the substantial demolition of the existing building on the site and a new development and it should be treated as such. The proposal includes the demolition of a significant proportion of internal walls at ground and first floor levels, the demolition of significant portions of the external walls at ground and first floor levels, the complete demolition of the existing second floor and the construction of a new ground floor level. The Council considers that the proposal is not for the adaptive re-use of the existing building, but for a substantially new proposal.

#### *Submissions*

28 The Applicant submits that as the proposal benefits from existing use rights and as such there are no numerical constraints that apply to the proposal. The purpose of submitting an application as being for alterations and additions, instead of a new development, is generally to benefit from

an existing footprint or height that exceeds the current controls for the site. As there are no numerical constraints that apply to the proposal, there is no advantage to the Applicant in characterising the development as alterations and additions.

### *Findings*

- 29 The Senior Commissioner found, in *Coorey v Municipality of Hunters Hill* [2013] NSWLEC 1187 par 56 (the demolition planning principle) that the first question to ask in determining whether an application is properly characterised as alterations and additions, is '*what is the purpose for determining whether this application should be characterised as being for additions and/or alterations to an existing structure rather than an application for a new structure? The answer to this fundamental question will frame the approach to be undertaken to the analytic framework set out [in the planning principle].*' The answer in this matter, as submitted by the Applicant, is that there is no purpose or advantage to the Applicant in characterising this proposal as alterations and additions, when compared to having the application assessed as a new development, because the proposal benefits from existing use rights.
- 30 If the proposal is assessed as a new development, the building envelope of the existing building would still be a relevant consideration (*Stromness Pty Ltd v Woollahra Municipal Council* [2006] NSWLEC 587 par 88). This is evident in the Stutchbury proposal, as the new building proposed by that application clearly took the existing building envelope as a basis for the proposal (*Romeo, Guiseppe and Anna Maria v Pittwater Council* [2007] NSWLEC 15 par 1), including the proximity of the north-western corner of the building to the shoreline (exhibit K).
- 31 The assessment under s 79C of the EPA Act would be the same whether this proposal is for alterations and additions or for a new development. On that basis, I am satisfied that the proposal can be characterised as alterations and additions.

- 32 'Adaptation' is defined by the *Australia ICOMOS Charter for the conservation of places of cultural significance* (the Burra Charter) as 'modifying a place to suit proposed compatible uses' (Burra Charter, Article 1.9). Adaptive re-use is defined by the on-line dictionary as, 'adaptive reuse refers to the process of reusing an old site or building for a purpose other than which it was built or designed for'. The proposal is to continue the existing use and not to find a new, compatible use for a building designed for a different use. The planning experts variously referred to the proposal as being for the 'adaptive re-use of the existing building' (exhibit E, pp 12, 14, 32, 33). Describing the proposal as 'adaptive re-use' is, in my view, misleading, because the proposal is for alterations and additions to an existing building for an existing use.

### **Intensification of use**

#### *Contention particulars*

- 33 The Council contends that the proposal represents an unacceptable intensification of use and that this will have unacceptable cumulative impacts of the character and amenity of the locality and nearby residential properties, including off-shore properties. The Council bases this contention on the following:
- the proposal includes a likely increase in the capacity of the site in relation to the number of patrons for the restaurant, cafe and bar uses, than historically existed, including substituting two former shops for additional dining area; and
  - the proposal includes extended trading hours for the restaurant, cafe and bar uses and the Police do not agree with the proposed trading hours.

#### *Evidence*

34 The proposed hours are as follows (exhibit E, p 45):

	Monday to Saturday	Sunday
Cafe	6am - 11pm	6am - 10pm
Restaurant	6am - 12 midnight	6am - 10pm
Motel	24 hours, 7 days a week	
Retail use	7am - 10.30pm	

35 According to Mr Boston, the proposal maintains the long established restaurant and motel uses of the site; provides for a reduction in the intensification of the motel use by reducing the number of rooms from 13 to 11 and maintains the 138 maximum seating capacity of the restaurant and cafe (exhibit E, p 16).

#### *Submissions*

36 The Council submits that the *Metric Handbook, Planning and Design Data* is used by architects as a guide for spatial planning (exhibit 14). The area recommended for 'fine dining, traditional 80 seats' is 2 - 2.4 sq m per seat and the proposal provides 2.94 sq m per seat.

37 The Applicant submits that the proposal represents an improvement in the operation of the motel and restaurant/cafe and a reduction in the intensity of the use for the following reasons:

- there is currently no restriction on trading hours in any of the previous development consents, the only restriction is on the hours alcohol can be served due to the liquor licensing requirements (exhibit E, annexure 2);
- the previous operation had 13 motel rooms and the proposal has 11 motel rooms; and
- the transport initiatives of the proposal are an improvement when compared to the existing operation (exhibit E, f 47).

- 38 The Applicant further submits that the letter from the Police to Pittwater Council regarding the proposal (exhibit 1, tab 17, ff 192-209) requested approval of 'standard trading hours [as] set out in the Liquor Act 2007' (exhibit 1, tab 17, f 200). An approval of the proposal for the cafe to open at 6am on Sunday would not be an approval for alcohol to be served at this time, as the liquor licence prohibits alcohol from being served until 10am on Sundays (exhibit E, annexure 2).

### *Findings*

- 39 The number of motel suites in the proposal has been reduced from 13 motel rooms in the 1961 approved motel to 11 and the Applicant submits that this represents a reduction in the intensification of the operation of the motel. The proposal includes three 2 bedroom with living room suites, five 1 bedroom with living room suites and three studio rooms. I do not have the 1961 plans and later modifications in evidence, so it is not possible to compare the proposal to the layout and size of the motel rooms in the previous operation and how many guests could be accommodated in those motel rooms when the Pasadena was operating. However, I note that the three 2 bedroom suites will provide accommodation for a greater number guests than the equivalent number of studio rooms. It is conceivable, therefore, that there is not necessarily a reduction in the number of motel guests proposed even though there is a reduction in the number of suites proposed when compared to the previous operation. For this reason, I am not satisfied that the reduction in the overall number of suites necessarily represents a reduction in the intensification of the operation, although I accept that the 11 suites proposed is comparable to the 13 motel rooms when the Pasadena was operating.
- 40 I accept that the proposal maintains the cap on 138 seats in the restaurant, cafe and bar, notwithstanding the generous floor space provided by the proposal to accommodate the 138 seats and I accept that there have previously not been any constraints on the trading hours of the Pasadena, other than a restriction on the hours that alcohol may be served (exhibit E,



annexure 2, liquor licence details 30 October 2013). I accept the submission of the Applicant in regard to the letter from the Police, that a consent would not permit alcohol to be served between 6am and 10am on Sundays.

- 41 I am satisfied that the proposal does not represent an intensification of the use, because the 11 suites of the motel is comparable to the original 13 motel rooms; the proposal maintains the cap on 138 seats in the restaurant, cafe and bar; and there have previously not been any constraints on trading hours, other than a restriction on the hours that alcohol may be served.

#### **Height, bulk and scale**

##### *Contention particulars*

- 42 The Council contends that the proposal will have an excessive and unacceptable height, bulk and scale for the locality generally and compared to surrounding development. The proposal has a maximum building height of RL12.785 at the roof ridge and RL13.1 to the top of the lift stack and the existing building has a maximum building height of RL11.85 to the roof ridge (exhibit A, dwg 07). The second floor of the proposal has a larger floor plate and a reduced setback to the northern, southern and western external walls, when compared to the existing building. The impact of the height, bulk and scale of the proposal is as follows:

- the proposal is not consistent with the desired future character of the locality;
- the proposal does not compliment the landscape character of the locality;
- there is no justification for increasing the overall bulk and scale of the existing building whilst maintaining the footprint;

- three storey buildings are not typical along the natural foreshore area;
- the proposal results in highly visible bulk when viewed from Pittwater Road, compared to the existing building.

### *Evidence*

- 43 The planning experts agreed that the new second floor has a larger floor plate and reduced setbacks to the lower floors to the northern, southern and western elevations and the roof ridge is 935mm higher than the existing roof ridge (exhibit 4, p 3).
- 44 The planning experts agreed that the site is visually prominent (exhibit 4, p 3).
- 45 The planning experts disagreed over whether the height, bulk and scale of the proposal is compatible with the immediate built form context and its natural setting when viewed from the public domain (exhibit 4, p 3).
- 46 Mr Edgar considers that the existing Pasadena building is already bulky and uncharacteristically large (quoting from *Romeo, Guiseppe and Anna Maria v Pittwater Council* [2007] NSWLEC 15 par 48) and the proposal results in a three storey appearance, further emphasising the disparity between the Pasadena building and its context (exhibit 4, p 4). In his view, the proposal would not ameliorate the impacts of the bulk and scale of the existing Pasadena building (exhibit 3, p 11) and the proposal extends the existing envelope of the building (exhibit 3, p 13). Because there is no development around the building, it will always be viewed in the round and be highly visible due to the prominent position of the site (exhibit 3, p 13).
- 47 According to Mr Boston, the proposal adopts the maximum ridge and lift over-run heights and the second floor building width of the Stutchbury proposal approved in 2007 (exhibit K). Mr Boston describes the proposal

as having a 'distinctly coastal vernacular' (exhibit E, p 12) and that the proposal 'acknowledges the important urban design function served by the existing landmark building' (exhibit E, p 14) and that 'the redevelopment of the site reinforces the immediate precinct as an important gateway link to the off-shore communities' (exhibit E, p15).

### *Findings*

48 The proposal benefits from existing use rights and the consequence of preserving existing use rights is that zone objectives and planning controls that limit the size of a proposal (including floor space ratio, height and setback) have no application (*Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71 par 15). The Court's Fodor planning principle (*Fodor Investments v Hornsby Shire Council* [2005] NSWLEC 71 par 17) uses the relevant planning controls that apply to surrounding sites as an indication of the kind of development that can be expected if and when surrounding sites are redeveloped. However in this matter, the unique position of the site (including Lot 3), surrounded on three sides by Crown land (exhibit 9, p 22) and with the only other nearby development being the heritage items, means the development controls are irrelevant. The only relevant consideration is the desired character statement (A4.4 of DCP 21, exhibit 1, tab 2, f 134) and a merit assessment of the proposal, pursuant to s 79C of the EPA Act.

49 My obligation in this matter is to determine the particular application before the Court and not to use the building envelope of the previously approved Stutchbury proposal as the baseline for this proposal (*Tuite v Wingecarribee Shire Council* (No 2) [2008] NSWLEC 321 par 55). To justify the proposal on the basis that it simply adopts the maximum ridge height and lift over run height and the width second floor addition of the Stutchbury proposal is inappropriate, because it selectively chooses the aspects of the Stutchbury proposal that are most beneficial to the Applicant and dispenses with other features that are less attractive to the Applicant. The Stutchbury proposal provided a landmark building of high

architectural merit, a sensitive response to the setting and the treatment of the interface with the public domain, as well as a basement carpark. The approval of the Stutchbury proposal does not establish a right to a building envelope and this proposal must be determined on its own merits.

50 I accept and prefer the evidence of Mr Edgar that the proposal extends the existing bulky and uncharacteristically large envelope of the building and results in a building with a three storey appearance when viewed from the south-east, the south and the south-west, by adding the following elements to the existing envelope:

- on the ground floor, western facade - the western outdoor seating and the stair access to Thomas Stephens Reserve and roof over for the full length of the western facade and the raised planter boxes on the north-western corner;
- on the first floor, southern facade - the extension of the masonry columns to the near the top of the parapet and the addition of a roof over those balconies effectively 'fills in' the existing setback of the first floor from the ground floor on the southern side;
- the extension of the single storey wall on the southern boundary at the eastern end of the southern elevation to near the top of the parapet will also 'fill in' the first floor setback on the southern side of the existing building;
- the substantial increase in the envelope of the second floor, with the lift shaft in the south-western corner, 1.25m higher than the existing ridge of the second floor skillion roof and a roof ridge 935mm higher.

51 The existing second floor is a low and small structure, located roughly in the middle of the flat roof, clad in timber boarding with a metal skillion roof falling to the south and looks like a 'shed'. It was used as a laundry and storage area. The proposal increases the building envelope of the second floor structure to make it much more substantial, with virtually no setback

from the facade on the southern side. The proposal would read as a three storey building from the Pittwater Road and McCarrs Creek Road approaches, as well as from the southern side of the building, as the built form of the second floor aligns vertically with the existing southern facade of the building; the roof of the second floor is much higher on the southern side when compared to the low side of the skillion roof of the existing 'shed'; and it extends almost to the southern boundary. This is further exacerbated by the position of the lift shaft on the south-western corner of the second floor, which also aligns vertically with the existing southern facade and extends above the proposed roof edge by 700mm (exhibit A, Section A).

- 52 The southern elevation of the existing building reads as being the face of the masonry wall, with a single storey colonnade structure added along the southern side and filled in at the eastern end. The proposal, for the reasons described in the previous paragraph, extends the southern elevation to the southern face of the existing colonnade for the three levels, as the roof overhand of the second floor on the southern side extends almost to the southern boundary. This results in transforming the existing two storey building setback from the southern boundary, with a single storey colonnade and a shed on the roof, to a three storey building positioned right on the southern boundary.
- 53 For these reasons, I conclude that the proposal significantly extends the existing envelope of the Pasadena building. I agree with the Council's contention that there is no justification for the increase in the building bulk of the proposal, given my finding that there is no intensification in the use of the building.
- 54 In my view, there is no evidence for the claims that this proposal has a 'distinctly coastal vernacular'; that the proposal 'acknowledges the important urban design function served by the existing landmark building' and that 'the redevelopment of the site reinforces the immediate precinct as an important gateway link to the off-shore communities'.

- 55 The proposal's extensions beyond the existing building envelope results in a proposal that does not compliment the landscape character of the locality and that it is not consistent with the desired future character of the locality, because the proposal fails to minimise the bulk and scale of the building and fails to achieve a fair balance between blending into the natural environment and the development of the land.

#### **Impact on views from 2195 Pittwater Road**

##### *Contention particulars*

- 56 The Council contends that the increase in the height and bulk of the second floor will have an unacceptable view loss impact from the property at 2195 Pittwater Road, Church Point and that the proposal is inconsistent with the view sharing principles set out in *Tenacity Consulting v Warringah* [2004] NSWLEC 140 (the Tenacity planning principle).

##### *Evidence*

- 57 Mr Boston considers that a valuable view corridor from 2195 Pittwater Road exists over the western side and eastern edge of the existing Pasadena building (exhibit E, p 19). For this reason, the second floor element of the proposal has been located in the centre of the building and this results in a better architectural outcome as the building is symmetrical (Mr Boston, oral evidence). Using the Tenacity planning principle steps, Mr Boston has determined that the impact of the proposal on the views from the living areas and balcony of 2195 Pittwater Road are minor and that the proposal will result in a loss of water views across the western edge of the site and over the roof of the existing building (exhibit E, p 23). Mr Boston considers, in accordance with the last step of the Tenacity planning principle, that the proposal is reasonable and therefore the impact is justified (exhibit E, pp 23-24).

- 58 Mr Edgar considers that the view impact, also using the Tenacity planning principle steps, is moderate to severe, as the proposal will result in the land and water interface being obscured from a seated position in all living areas (exhibit 3, p 19). Mr Edgar considers, in accordance with the last step of the Tenacity planning principle, that the proposal is not reasonable and therefore the impact is not justified (exhibit 3, p 19).

### *Findings*

- 59 I consider that the impacts of the proposal on the views from the living areas and balcony of 2195 Pittwater Road are appropriately characterised as minor to moderate, as the proposal would obscure the land and water interface from a seated position in the dining room when looking north over the balcony and would further encroach on existing water views from the balcony in a standing position, without obscuring the land and water interface. The impacts on the views from a seated position in the dining room are somewhat ameliorated by the fact that the best views from the dining room are the filtered water views to the north-west, out the window in the side elevation, over the Council owned vacant lots.
- 60 The lift shaft, which is the highest point of the proposal, is poorly positioned when considering the views from 2195 Pittwater Road, as it is in the foreground on the western side, where it would arguably have the greatest impact. The proposal is not symmetrical when viewed from the south and in any case, there is no architectural theoretical basis, nor is it even desirable, to have a symmetrical building. I disagree with Mr Boston's evidence that having equivalent east and west setbacks on the second floor provides the best outcome for the outlook from 2195 Pittwater Road and results in a superior architectural outcome.
- 61 For reasons set out elsewhere in the judgment, the proposal results in an increased building envelope which does not compliment the landscape character of the locality and that it is not consistent with the desired future character of the locality. In my view, the proposal is therefore

unreasonable and consequently, the view impacts on 2195 Pittwater Road are unjustified.

### **Provision of car parking**

#### *Contention particulars*

62 The Council contends that the proposal fails to provide adequate on site car parking to service the proposed uses, for the following reasons:

- lack of parking in the locality is a significant existing problem;
- the proposal will generate peak demand for parking overnight and weekends, when the existing parking supply is already saturated;
- Council received 133 objections, all of which raised the lack of sufficient car parking in the locality as a significant concern;
- the proposal fails to adequately meet the parking demand it will generate;
- as the existing building has not been used for many years, there is currently no demand on the public carpark by the Pasadena;
- a less intense use should be proposed that is more consistent with the parking able to be provided on the site.

#### *Evidence*

63 The traffic experts agree on the following (exhibit 6):

- that lack of parking in the locality is a significant existing problem;
- that Mr Coady's traffic study demonstrates that parking in Church Point is saturated during the evenings after 6pm and on weekends from lunchtime onwards;
- that the building has been vacant for many years and the parking generated by the proposal is in addition to the current parking demand;



- that the 10 car spaces proposed will adequately accommodate the parking requirements of the motel/retail components of the development and that the only dispute relates to parking for the patrons of the restaurant and cafe;
- that the parking initiatives of the proposal are a positive step to reduce parking demand (exhibit 5, p 8);
- that an amendment to the layout can be made to add two parking spaces at the northern end of the proposed parking bay by making two lots of two tandem parking spaces instead of two parking spaces, to be used by staff and this increases the parking to 12.

64 The *RTA Guide to Traffic Generating Developments* (exhibit 1, tab 3, ff 138-139) at Section 5.8.2 defines a restaurant as being a refreshment room where food is served to customers and can be either licensed or unlicensed. The definition includes cafes, tea rooms, eating houses etc. For developments with a gross floor area greater than 100 sq m, the recommended car parking provision should be the greater of 15 spaces per 100 sq m or 1 space per 3 seats.

65 In Mr Roger opinion, around 35% of patrons of the restaurant, bar and cafe will drive and given the cap of 138 patrons, this would result in a requirement of 48 parking spaces (exhibit 5, p 8).

66 In Mr Coady's opinion, the parking demand for the restaurant, bar and cafe is likely to be 12-15 spaces during lunchtime on weekends, 15 spaces on Thursday, Friday and Sunday evenings and 18 spaces on Saturday evenings (exhibit F, p 11). Mr Coady considers the restaurant, bar and cafe will draw patrons from the motel guests, the local community and from boats and the proposal will therefore have a reduced requirement for parking when compared to a typical restaurant (exhibit 6, p 1).

- 67 Mr Edgar's oral evidence in relation to parking was that there are 550 parking permits issued to off-shore residents and only 300 parking spaces in the Church Point Reserve carpark.

### *Submissions*

- 68 The Applicant submits that the proposal includes a number of initiatives to cope with the parking demand, including the following in the Operational Plan of Management (exhibit E, p 47):
- a free shuttle bus serve to transport patrons between the site and the public car parks at Rowland Reserve or Kitchener Park, available by appointment between 11am and closing Saturdays, Sundays and public holidays and 6.30pm and closing Mondays to Fridays;
  - a service agreement with a local ferry/water taxi service provided with patrons encouraged to utilise such services at time of booking;
  - alternative transportation services on the Pasadena website and advice to patrons at the time of booking and arrival at the motel that there is limited public car parking at Church Point.
- 69 The Applicant submits that Council recently adopted a proposal to pursue Option 2 of the Church Point Plan of Management, for a single deck carpark for 120 cars for Precinct 1 (McCarrs Creek Road). This will provide an additional 120 car spaces, probably by 2016.
- 70 The Applicant submits that the Church Point Reserve car park for 300 cars is a public car park, for use by all of the public, including the patrons of Pasadena. When the Pasadena patrons use the Church Point Reserve car park, they will pay a greater amount than the off-shore residents who pay for an annual permit.

## Findings

- 71 The Council received 132 submissions (exhibit 2), not all of which were objections, and of those 132 submissions (of which at least two people sent more than one submission), 124 raised the issue of parking. The concern expressed in the 124 submissions regarding parking can be summarised as a concern that the proposal would further exacerbate the existing and significant problem of an inadequate number of parking spaces at Church Point.
- 72 I appreciate, from the site view, the evidence of objectors at the site view, the experts' evidence and from reading the submissions, that the inadequate number of parking spaces, when compared to the existing demand created particularly by the off-shore community, is a significant problem in this location, particularly during the evenings and on weekends.
- 73 As I have found that the proposal does not represent an intensification of the use, I have adopted the recommended car parking provision of the *RTA Guide to Traffic Generating Developments* (exhibit 1, tab 3, ff 138-139) of 1 space per 3 seats, which results in a total of 46 parking spaces recommended for the restaurant, bar and cafe use, being a lesser requirement than a calculation based on floor area, which would be unfair to the Applicant in my view because it is established that a generous amount of floor space is provided by the proposal to accommodate the maximum 138 seats.
- 74 I prefer and accept Mr Roger's evidence, that 138 patrons would generate a requirement for 48 parking spaces, because this number approximately concurs with the *RTA Guide to Traffic Generating Developments*. I accept, as stated by Mr Coady, that this demand may be lessened, as the motel guests (for whom parking is provided) will be patrons of the restaurant, bar and cafe and some patrons will arrive by foot or by boat. I also accept that some of the demand may be accommodated in alternative car parks and those patrons may avail themselves of the shuttle bus service, however I

also prefer and accept Mr Roger's evidence that the transport initiatives will not be sufficient to ensure that the proposal does not result in adverse parking impacts. It is inevitable that a portion of the parking spaces needed, none of which are provided on the site, will be accommodated in the Church Point Reserve carpark and surrounding streets, further exacerbating the existing parking problems in the area.

- 75 In my view, the proposal must deal with the particular constraints of this site, just as it benefits from the considerable opportunities of this site. It is established by the agreement of the traffic experts that a lack of parking in the locality is an existing problem and this is a significant constraint that the proposal must go some way to addressing.
- 76 Even if I accepted Mr Coady's estimates of the parking demand, I would not be satisfied that the proposal adequately deals with this issue, as it does not provide any parking for patrons of the restaurant, bar and cafe. The lack of parking for the restaurant, bar and cafe patrons would have a detrimental impact on the amenity of the locality, particularly for the Church Point and off-shore community.

### **Impact on the setting of the heritage items**

#### *Contention particulars*

- 77 The Council contends that the proposal will have unacceptable detrimental impacts on the setting of adjoining heritage items, including the Church Point post office and general store and the Church Point ferry wharf for the following reasons:

- the Pasadena building comprising part of the visual setting of the heritage items;
- the proposal includes highly visible bulk which will exacerbate and extend the overbearing scale of the existing building;

- the masonry supporting columns are wider in the proposal and two storeys high and the high stone walls to raised planter boxes and these elements will further impose on the setting of the heritage items.

### *Evidence*

- 78 The heritage/planning experts agreed that there is no impediment to the redevelopment of the existing building in terms of any heritage value. They agreed that the existing building has some adverse impact on the setting of the heritage items. The planning experts agreed that the proposal has no visual impact on the cemetery and open space to the south of Pittwater Road (exhibit 10, p3).
- 79 The heritage/planning experts disagreed on whether the impact of the proposal on the setting of the heritage items is acceptable or reasonable.
- 80 Mr Edgar considers that the additional building elements of the proposal, including the outdoor areas on the western side (the stairs, seating, balustrade and the roof cover over the outdoor seating of the cafe), the masonry columns and the second floor additions, would encroach on the vista of the water when viewed from the southern side of the intersection of McCarrs Creek Road and Pittwater Road (exhibit 7, p 3). Mr Romey considers that the additions on the western side of the proposal are suitably minimal to have little effect on the vista from across the road.
- 81 In Mr Romey's opinion, the substantial separation of 16m between the Pasadena building and the heritage items means that the existing building does not visually overwhelm the heritage items (exhibit H, pp 7, 8) and the situation will be improved somewhat by the articulation of the Pittwater Road elevation, which will diminish the apparent bulk of the existing building (exhibit 7, p 4). In his view, any impact would need to be in addition to the existing impact of the Pasadena building and it would need

to be a substantive adverse impact to warrant a finding of adverse impact on the heritage items (exhibit 7, p4).

- 82 Mr Romey considers that the heritage value of both heritage items is historic and social significance and not aesthetic significance, under the Heritage Significance Criteria (*Assessing Heritage Significance*, NSW Heritage Manual), on the basis that the State Heritage Inventory forms for both heritage items are incomplete (exhibit H, p5).

### *Submissions*

- 83 The Applicant submits that Mr Edgar is a planner and does not have appropriate qualifications or experience in heritage matters and that consequently, I should give his evidence on the heritage impact of the proposal no weight.

### *Findings*

- 84 I accept the agreement of the experts that the existing Pasadena building has some adverse impacts on the heritage items, the Church Point post office and general store and the ferry wharf.
- 85 I prefer Mr Romey's evidence that the significant separation between the existing Pasadena building and the heritage items means that the proposal will not have a substantive additional impact on the historic and social significance of the heritage items. In my view, the proposal does not improve the impact of the existing Pasadena building on the setting of the heritage items, however I accept that there is no substantive additional impact on the setting, because the addition to the western side of the Pasadena building is lightweight and fairly transparent, allowing views through the outdoor cafe area to Pittwater from across the road.

## **Proximity to the shoreline**

### *Contention particulars*

- 86 The Council contends that the proposal continues the encroachment of the existing building on the foreshore and shoreline and that the proposal should be refused because it prevents the provision of land-based pedestrian access for the public along the foreshore.

### *Evidence*

- 87 Mr Edgar considers that the proposal should provide land-based pedestrian access along the foreshore, similar to that provided in the Stutchbury proposal and superfluous planter boxes and outdoor dining should not obstruct the potential to enhance access to the foreshore (exhibit 4, p 9).
- 88 Mr Boston notes that the proposed building works are located within the boundaries of the site (Lot 142) and the leased Crown land (Lot 3), the proposal does not prevent the implementation of the Church Point Plan of Management (exhibit 9) and foreshore access is provided along the timber jetty directly adjacent to the planter boxes.

### *Submissions*

- 89 The Applicant submits that if the intention was to provide a land-based pedestrian foreshore access way, then the boundary of the leased Crown land (Lot 3) would have terminated at the north-western corner of the existing wall of the Pasadena building and not, as it does, at the north-western corner of the site. The boundary of Lot 3 at the far western corner sits approximately on the stone retaining wall at the foreshore.
- 90 The Applicant submits that if I am minded to accept Mr Edgar's proposition that a land-based pedestrian foreshore access should be provided in

association with the development, then this should not be a reason for refusal of the application and could be dealt with by amending the proposal, to delete the planter and provide a 1.5 m wide pathway between the timber jetty and the existing north-western corner of the Pasadena building (exhibit L).

### *Findings*

- 91 This contention most likely arises because the Stutchbury proposal incorporated an elevated platform to artfully distinguish the public space (the Thomas Stephens Reserve and the foreshore promenade) from the private outdoor space of the development, which terminated at the southern end by tapering to a seat and stair in the side of the raised platform, for public access and the use of locals in Thomas Stephens Reserve. The platform is setback from the shoreline, to create an on-land public pathway linking the Thomas Stephens Reserve and the foreshore to the public land around the Pasadena site. The north-western corner of the building in the Stutchbury proposal juts into the public promenade, in order to maintain the existing proximity of the building to the foreshore and not to compromise the development potential of the site. I presume that the platform on which the proposal sits was an initiative of the architect in his design and that now such a lovely resolution of the interface between the Pasadena grounds and the public domain has been envisaged, the Council and a number of the local residents, as expressed in their submissions, would like to retain this feature of the Stutchbury proposal in the current proposal. What is so successful about this aspect of the Stutchbury proposal is the change in level to denote the transition from the public domain to the commercial premises and the creation of a public promenade along the foreshore, without compromising the development potential of the site. The platform in the Stutchbury proposal ignores the title boundaries and instead focuses on a design solution to distinguish an edge for this unique site, which is surrounded by public land, while enhancing public access to the foreshore.



92 I assume that for this reason, the on-land foreshore access would not have been envisaged at the time the boundary for Lot 3 was created and that may be the reason why the eastern corner aligns with the north-western corner of the site and a setback from the foreshore was not provided.

93 The Applicant has nominated to fully occupy their freehold and leased land, by proposing raised planter boxes at the north-western corner of the building to contain an outdoor eating area and entry for the cafe to the north of the building and to provide some separation between the outdoor eating area and the passing public.

94 I would not describe the proposal as an encroachment on the foreshore, because it is legitimately located within the boundaries of the site and Lot 3. However, in my view, the alternative shown in exhibit L, to provide land-based pedestrian access along the foreshore, is preferable to the proposal (exhibit A) and its use for a public promenade could be described as a generous gesture by the Applicant.

## **Conclusion**

95 For the reasons given in the judgment, I am satisfied of the following:

- the proposal can be characterised as alterations and additions;
- the proposal does not represent an intensification of the use; and
- the significant separation between the Pasadena building and the heritage items means that the proposal will not have a substantive additional impact on the setting or the historic and social significance of the heritage items.

96 The proposal is legitimately located within the boundaries of the site and the leased Crown land (Lot 3), however, in my view, the alternative shown in exhibit L, to provide land-based pedestrian access along the foreshore, is preferable to the proposal.

- 97 For the reasons set out in the judgment, I conclude that the proposal significantly extends the existing envelope of the Pasadena building and the additional bulk and scale of the proposal would have unreasonable impacts on the scenic quality and amenity of the surrounding public domain and on the views from 2195 Pittwater Road and that the additional bulk and scale of the proposal is not consistent with the desired future character of the locality.
- 98 For the reasons set out in the judgment, I conclude that the proposal to provide no on-site car parking for the patrons of the restaurant, bar and cafe will have a significant detrimental impact on the amenity of the surrounding area.
- 99 The impact of the additional bulk and scale of the proposal and the lack of on-site parking for the restaurant patrons are both, in my view, of such consequence, that the application should be refused.

## Orders

100 The orders of the Court are:

1. The appeal is dismissed.
2. Development Application No. N0021/13 for alterations and additions to an existing building for continued use as a restaurant, cafe, motel and retail shop is refused.
3. The exhibits, other than exhibits 10, A and D, are returned.

A handwritten signature in cursive script, reading "Susan O'Neill", with a horizontal line underneath the name.

**Susan O'Neill**

**Commissioner of the Court**

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