



29 September 2021

NSW Department of Planning, Industry and Environment
Attention : Aditi Coomar, Team Leader
By email: Aditi.coomar@planning.nsw.gov.au

Re: Weigall Sports Complex, Sydney Grammar School (SSD-10421)

Comments on visual impacts issues in Draft Conditions V2.

Dear Ms Coomar

1 Purpose of this response

Richard Lamb and Associates (RLA) have been appointed by Sydney Grammar School (SGS), the Applicants for SSD-10421, to provide a peer review of visual impact assessment provided by Urbis that is specifically relevant to the document titled Weigall Conditions of Consent Version 2 – 20092021 (Draft Conditions V2).

Draft Condition B1(a) as prepared by DPIE lists five design amendment options for Building 1 (Options (i) to (iv)). The condition requires the application of a test of view impacts that relies on subjective qualitative assessment using the terminology from one step of the planning principle of *Tenacity Consulting v Warringah [2004] NSWLEC 140 - Principles of view sharing: the impact on neighbours (Tenacity)*. Draft Condition B1(a) Option (v) is for an alternative design agreed by the Planning Secretary that removes 'devastating' impacts. Draft Condition B1(b) prepared by DPIE requires the preparation of a post-approval Visual Impact Assessment including the qualitative rating of the view impact of the amended design adopting the same subjective qualitative criteria.

RLA have been requested to consider whether the assessment of view sharing with 8 Vialoux Avenue, which is the focus of the Draft Conditions in relation to Building 1 in SSD_10421 and which concluded in part that there were devastating impacts on views from some units was justified and to comment on the whether the use of terminology from *Tenacity* in the Draft Conditions of consent is appropriate.

RLA are specialist consultants on visual impacts, view loss and view sharing. The author of this advice, Dr Richard Lamb has over 30 years' experience in these fields, having undertaken over 2000 individual consultancies and appeared as an expert witness on visual impact, view sharing and heritage views in the Land and Environment Court of NSW on more



than 300 occasions. A full CV can be viewed or downloaded from the tab on the Home Page of the RLA website at www.richardlamb.com.au.

2 Peer review of the Urbis Visual Impact Assessment

I have carefully considered the VIA, prepared by Urbis for the SSDA. The VIA was carried out adopting a method that has been developed by me at RLA over many years, as acknowledged by Urbis. The VIA is comprehensive, explicit, logical and rational. The presentation is exemplary. The methodology for analysis of impacts on views in both the public and the private domains is clearly set out and the analyses based on both photomontages and Computer-Generated Images (CGIs) demonstrate best practice. In my opinion the VIA can be relied on to accurately and comprehensively present and analyse the visual impacts of the SSDA.

In relation to private domain views from 8 Vialoux Avenue, the VIA presents more than adequate conventional and accurate visual material on which to base a review of its findings. In relation to these private domain views, the VIA is conservative, erring on the side of caution, in particular in relation to assessment of the impact on view sharing, as opposed to simply view loss. In that regard, it is my opinion that in pursuing a very conservative approach, the extent of visual impact determined for some views in 8 Vialoux Avenue as devastating, is excessive and may have arisen from Urbis confounding the extent of visual effects on the views, with the importance and therefore the extent of impacts. I have set out my reasons for this conclusion below.

3 Attributes of the Tenacity planning principle

Tenacity, is planning principle most cited in judgements in the Land and Environment Court of NSW as noted on the LEC website. A planning principle as defined by the LEC is:

a statement of a desirable outcome from a chain of reasoning aimed at reaching, or a list of appropriate matters to be considered in making, a planning decision.

While planning principles are stated in general terms, they may be applied to particular cases to promote consistency. Planning principles are not legally binding and they do not prevail over councils' plans and policies.

Planning principles assist when making a planning decision, including:

where there is a void in policy

where policies expressed in qualitative terms allow for more than one interpretation

where policies lack clarity.

Tenacity is not case law and in many cases it has no work to do even when relevant to assisting in making cleared planning decisions. This is because, as noted in the definition, it is primarily a chain of reasoning, which also includes some appropriate matters to take into account. It is not a recipe to be slavishly followed as it is set out, in four steps. Although sometimes described as a four-part test, it's not a test, but a logical sequence that can be

followed, if thresholds are passed at various points justifying continuing to later steps. The chain of reasoning of *Tenacity* is deceptively simple, but the logic is quite intricate.

In some instances, proceeding to the next step or part of the step is conditional, meaning that proceeding to further steps may not be required if the conditions for satisfying the preceding threshold is not met in each view or residence considered.

Step 1: Views to be affected

The first step quoted from the judgement in *Tenacity* is as follows:

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

Prior to undertaking Step 1 however, an initial threshold, or pre-condition, in the preamble to *Tenacity* is whether a proposed development takes away part of the view and enjoys it for its own benefit. If it does, the other steps in the planning principle, beginning with Step 1, may need to be undertaken. The views from 8 Vialoux Avenue are proposed to be taken away by the proposed development and proceeding with Step 1 is justified.

The reason for the examples given in the quote from Step 1 in *Tenacity* of a hierarchy of views that are highly valued as distinct from those are less, or possibly not valued, is an underpinning concept in *Tenacity*.

The logical framework of what follows later in Steps 3 and 4 if appropriate to proceed to those steps, which assess the extent of impact and the reasonableness of the proposed development respectively, depend on the ranking of the value of the view and items within it, in Step 1. If there could be no substantive view loss, or if the items lost are not considered to be valued in *Tenacity* terms, the threshold to proceed beyond Step 1 is not met and there is no justification for proceeding to Step 2, or other steps beyond Step 2. By the same token, if the items in the view or the composition of the view affected are not highly valued, are low on the scale of scenic quality, or have not been identified for specific consideration in planning instruments or policies in relation to view protection, for example, it is not logical or valid to arrive at a high view impact later in Step 3 of *Tenacity*. It is in other words not logically possible in *Tenacity* to conclude in Step 3 that loss of view of low value items identified in Step 1 is a high impact.

Therefore, identifying the views to be affected is not simply making a list of anything that might be lost or blocked by the proposed development. Views to be affected, the heading to Step 1, are views that are relevant to the assessment of visual impacts, not just any item in the view. *Tenacity* also makes no reference to sky views and as such the note attached to Draft Condition B1 (a)(v) has no basis and is also unworkable, as it cross-references to subjective and qualitative assessment criteria for extent of impact that are considered in more detail in relation to Step 3, below. The note makes no sense and should be ignored.

This is not to say that views to be affected may not be valued by private viewers for other reasons, for example because they are the only view available, or are pleasant but not scenic. In the case of 8 Vialoux Avenue it would appear that the view to be lost is almost



totally constructed, dominated in the foreground by tennis courts and in the middle distance by level grass, all private, school land. The conclusion below in this regard by Urbis, appears to be justified:

Features of the northerly views whilst providing a pleasant outlook are not considered iconic, scenic and highly valued in Tenacity terms.

As noted above, it is not logical or valid for the extent of visual impact to be assessed later in Step 3 as devastating, which is the highest level on the subjective scale of impacts, when the attributes of the views that were identified in Step 1 are below the highly valued level.

I accept of course that the views that are currently available would be largely lost and replaced with built form and landscape, the closest part of which would be Building 1. It is a very substantial change to the character of the view, however the impact rating in Step 3 is a rating of the importance of the effect (this what impact is), as distinct from the extent of the change (how much of a visual effect there is). The impact rating depends on the importance of the change in the quality and the quantum of the view. This is explained in the general methodology of the VIA by Urbis.

Making a distinction between the extent of change and the importance of the impact is a fundamental characteristic of the VIA methodology that I created and which was used by Urbis. *Tenacity* does not clearly distinguish between these and tends to equate view loss with impact, whereas whether a view lost is significant is a matter of judgement and giving weight to relevant factors. It is important not to conflate the extent of change with importance of the impact.

Step 2: From where are views available?

This step considers from where the affected views are available in relation to the orientation of the building to its land and to the view in question. The second step, quoted, is as follows:

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

Views are obtained from 8 Vialoux Avenue across the side boundary, a view orientation more difficult to protect as noted in *Tenacity*, giving less weight to the importance of the impacts that will be determined in Step 3. Although it might be said to be a minor down-weight factor, it also suggests that a maximal view impact in Step 3, of devastating, would not be a valid outcome.

Step 3: Extent of impact

The next step in the principle is to assess the extent of impact, considering the whole of the property and the locations from which the view loss occurs. Step 3 as quoted is:

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

Step 3 also contains a threshold test. If the extent of impact is negligible or minor for example, there may be no justification for proceeding to Step 4, because the threshold for proceeding to considering the reasonableness of the proposed development may not be met. In that case the reasonableness question in Step 4 does not need to be asked and the planning principle has no more work to do.

As noted above, *Tenacity* does not clearly distinguish between the quantum of visual effects, (how much change or view blocking) and the extent of impact. This can lead to overestimation of the extent of the impact, if the quantum of visual effects (how much change) and the extent of the impact (the importance of the impact) are equated. In the case of the Urbis assessment in relation to 8 Vialoux Avenue, in my opinion, the quantitative extent of the view to be lost has been given undue weight and has resulted in an exaggerated and unjustified extent of impact assessment, as devastating. In my opinion, the impact on the views assessed would be better characterised as moderate to severe.

This also illustrates another feature of *Tenacity*. This is that Step 3 calls for the assessment of the extent of impact using what is both a qualitative and subjective scale. The terminology in *Tenacity* was borrowed from a method for landscape assessment. The main reason for the use of a subjective scale was to counter the quantification of visual effects, for example by calculating percentages of view loss. The example given illustrates that loss of view of part of an iconic feature like the Opera House (a small quantum of visual effect) could be assessed to be a high impact (a level of impact higher than the quantum of visual effect). Again, the importance or value placed on the view in Step 1 is critical in determining the extent of visual impact in Step 3. It is not possible to get to the highest level of impact of devastating if the starting point of value of the view is either low or moderate, as is the case in the views from 8 Vialoux Avenue.

Step 3 of *Tenacity* of course, is not the conclusion of application of the planning principle. Another threshold has to be passed before proceeding to the ultimate goal of *Tenacity*, which is determining the reasonableness of the proposal. In my opinion, the extent of impact of moderate to severe justifies proceeding to Step 4 where the reasonableness question is to be answered.

Before leaving Step 3 however it is important to point out that the assessment criteria in Step 3 of *Tenacity* are simply tools to elucidate extent of visual impacts. They are not quantitative and they are not objective. They are not facts such as might be found in case law, they are mutable (have different values in different circumstances) and are open to interpretation. They are also based on an individual judgement that may be refuted or its significance



modified at any time. Planning principles are modified and sometimes removed at times, for example by the Chief Judge of the Land and Environment Court.

The qualitative subjective criteria do not lend themselves to being incorporated into Conditions of Consent. Condition B1(a) Option (v) for example is meaningless and inoperable, as there can be no certainty that a particular design would achieve the condition or even if it did, that it would continue to do so in the future. It is in my opinion not valid to pick the subjective terms out of a step in a sequence of logical propositions that are about view sharing. In addition, even if the view impacts were devastating, they could still be reasonable, as is stated in *Tenacity* itself. The condition to take away devastating impacts would then have no function, it would not be possible to know if the design was complying with the condition as a result of the inherently subjective and qualitative criterion, and the condition would be inoperable as it is unable to be determined whether it would or could be achieved.

In my many years of preparing expert reports and giving testimony to the Land and Environment Court on view impacts, I have never seen *Tenacity* or selected terminology, taken out of the appropriate context in one of the steps in the principle, used in the way stated in Draft Conditions. In my opinion reference to *Tenacity* or extents of view impact such as devastating should be deleted from the Draft Conditions.

Step 4: Reasonableness

The planning principle states that consideration should be given to the causes of the visual impact and whether they are reasonable in the circumstances. As stated in the preamble to the four-step process in *Tenacity*, a development that takes the view away from another may notwithstanding be considered reasonable.

This is important because it also means that a severe or devastating level of impact can nevertheless be reasonable.

Step 4 is quoted below:

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

Tenacity has a special focus on the compliance of proposed developments with planning controls. Relative to State Significant Development (SSD) however, *Tenacity* is also of somewhat limited application, as it ultimately relies on an assessment of the reasonableness of a proposal, in the context of what the existing planning controls are intended to or have produced, when implemented. The SSD, made under the Education SEPP, is not subject to LEP controls and in effect seeks approval for site-specific controls. The control most directly

implicated in one aspect of visual impact, being view blocking, is building height. There are no development standards for heights of buildings under the SEPP. In addition, the future public benefits of the proposal are critical to the justification for the site-specific controls proposed. *Tenacity*, which is specific to private views and to the assessment of view sharing under the contemporary planning controls has a limited contribution to make in that regard. As *Tenacity* is of more limited relevance to the SSD than for a development application, the use of terminology derived from *Tenacity* is of doubly limited relevance to conditions of consent such as in Draft Condition B1.

Notwithstanding there are no development standards for height of buildings for the SSD, as a conservative approach, the likely impact of Building 1 on views was assessed as though the R3 zone applied equally to 8 Vialoux Avenue and the site of the buildings in the SSD and in particular Building 1. As is validly and correctly determined by Urbis, loss of northerly views from north-facing units at all levels of 8 Vialoux Avenue would be caused by the construction of any building with an envelope fully compliant with the controls for the adjacent R3 zone. Therefore, in terms of Step 4 of *Tenacity*, the visual effects of Building 1 on views from 8 Vialoux Street would not be substantially different from the result of implementation of the existing development controls. That is, the visual effects of the SSD would be no greater than that which is contemplated by the existing LEP controls.

It is also notable that in that context, the setbacks proposed between 8 Vialoux Avenue and Building 1 are significantly in excess of compliance and also exceed the recommended Apartment Design Guide (ADG) building separation distances. These matters are of special relevance to the merits of the application in terms of the reasonableness of the design of Building 1, as they provide along with the proposed intervening landscape scheme, an acceptable outlook rather than retaining existing views for 8 Vialoux Avenue north-facing apartments.

As noted above, there are no quantitative development standards for the height of buildings to which Building 1 can comply. Therefore, the question as to whether there is a more skilful design solution to building form that would retain the development potential and amenity of the building and reduce the impact on neighbours cannot be addressed, as this is only valid for a complying development. Instead, further amendments are proposed in the form of a refined Condition B1.

3 Proposed amended plans

Amendments to the architectural design that further address visual effects of the building form comprise increasing the setback distances between 8 Vialoux Avenue and the Multi-Purpose Sports Halls (MPSH) 02 and 03 by a further 4.0m and 3.0m respectively to a total minimum separation distance of 14.2m and 18.5m, respectively. As the building is oblique to the north face of 8 Vialoux Avenue, the maximum separation distance to MPSH 02 would be 18m and to MPSH 03 would be 22.5m.

Rooftop planting that is intended to also cascade down over the upper faces of the three levels that present to 8 Vialoux Avenue is proposed on the non-trafficable terraces produced by the changed and reduced massing of the building at the first and second floor levels. The form of the building seen in axonometric view from the south-east shows the increased



setbacks and the stepping in the building form produced by the proposed amendments to the massing of the building. The building viewed from the south-east has a cascading form, significantly reduced bulk and a lower profile when seen from standing views in 8 Vialoux Avenue. The stepped building form, receding upper levels and lowered view angle toward the leading edges of the landscaped terraces of MPSH 02 and 03, will result in a significant increase in sky space visible above the building.

4 Draft Conditions

In my opinion, in relation to the refined Condition B1 wording proposed by SGS, the extent of visual impacts of Building 1 on 8 Vialoux Avenue the reasoning for which is set out above would be moderate to severe.

Condition B1(b) is a requirement to prepare a revised and updated Visual Impact Assessment Report. This is an invalid and unnecessary condition. In my opinion the impact on views has been satisfactorily dealt with in the Urbis Visual Impact Assessment. The refined Condition B1 wording proposed by SGS would in my opinion lead to a conclusion, adopting the same methodology, that the visual impacts are acceptable. This letter of advice by RLA would be all that is necessary to satisfy the Planning Secretary. Preparation of an amended Visual Impact Assessment post-approval is invalid, as others who might be charged with undertaking the assessment could come to different conclusions, given the subjective and qualitative nature of such assessments. Should this occur, the consent would be inoperable.

Please do not hesitate to call me if there are any other matters on which I can be of assistance or if you require further clarification of any points,

Sincerely,

A handwritten signature in black ink, which appears to read 'Richard Lamb'. The signature is fluid and cursive, with a large, stylized 'L' at the end.

Richard Lamb and Associates

29 September, 2021