



Land and Environment Court  
New South Wales

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Case Name: 117 O'Sullivan Pty Ltd (ACN 642 192 185) v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1583

Hearing Date(s): 17 October 2022

Date of Orders: 25 October 2022

Decision Date: 25 October 2022

Jurisdiction: Class 1

Before: Chilcott C

Decision: The Court orders that:  
(1) the appeal is upheld;  
(2) Modification Application 416/2020-4 is approved and development Consent No. DA-416/2020 is modified in the terms in Annexure A;  
(3) Development Consent No. DA-416/2020 as modified by the Court is Annexure B.

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders.

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 4.56, 8.9  
Environmental Planning and Assessment Regulation 2000, cl 121B  
Land and Environment Court Act 1979, ss 34, 34AA  
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004  
State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cl 4, 17, 24, 25, 26, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 50, Sch 3  
State Environmental Planning Policy 65 - Design Quality of Residential Flat Development

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6  
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005  
Woollahra Local Environmental Plan 2014, cll 4.3, 4.4, 5.10, 5.21, 6.1, 6.2, 6.3

Cases Cited: 117 O’Sullivan Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1426

Texts Cited: Land and Environment Court of NSW COVID-19 Pandemic Arrangements Policy (April 2021)  
NSW Department of Planning and Environment, Apartment Design Guide, 2015  
Woollahra Community Participation Plan 2019  
Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: 117 O’Sullivan Pty Ltd (Applicant)  
Woollahra Municipal Council (Respondent)

Representation: Counsel:  
A Boskovitz (Solicitor)(Applicant)  
J Hewitt (Solicitor)(Respondent)

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

File Number(s): 2022/54589

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** 117 O’Sullivan Pty Ltd (the Applicant) has appealed the refusal by Woollahra Municipal Council (the Respondent) of its Modification Application 416/2020/4 (the “MA”) seeking to modify the Court granted development consent 416/2020 and subsequent approved modifications DA416/2020/2 and DA416/2020/3 (the modified development).
- 2 The Court’s consent to development application 416/2020 (the consented development) was provided within the judgment of Acting Commissioner Pullinger in *117 O’Sullivan Pty Ltd v Woollahra Municipal Council* [2021]

NSWLEC 1426 published on 27 July 2021, following the Parties reaching agreement during a conciliation conference conducted pursuant to s 34 of the *Land and Environment Court Act 1979* (LEC Act), and in which the Acting Commissioner noted that:

- (1) in accordance with s 4.15 of the *Environmental Planning and Assessment Act 1979* (EP&A Act), he was satisfied that in considering and responding to submissions, the final amended proposal is in the public interest;
  - (2) the Applicant's final amended proposal and the Parties' agreed conditions of consent cumulatively serve to address and appropriately resolve a range of contentions;
  - (3) in accordance with the provisions of s 4.16(1) of the EP&A Act, the Parties agreed, and he was satisfied, that the Applicant's final amended proposal may be granted consent;
  - (4) having considered each of the preceding jurisdictional requirements, and having formed the necessary view required by s 34(3) of the LEC Act, he found it is appropriate to make the orders agreed to by the Parties and dispose of the proceedings.
- 3 The Subject Site is zoned R2 Low Density Residential pursuant to the provisions of Woollahra Local Environmental Plan 2014 (WLEP), and while residential flat buildings are a prohibited use of land in the R2 zone, the consented development is permissible with consent under cl 17 of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP).
- 4 The MA in this appeal seeks approval of various internal and external modifications to the approved seniors housing development (the 'Proposed Development'), on Lot 9 in Section 1 in Deposited Plan 5932, also known as also known as 117-119 O'Sullivan Road, Bellevue Hill NSW 2023 (the Subject Site).
- 5 The appeal is made under s 8.9 of the EP&A Act and falls within Class 1 of the Court's jurisdiction. The appeal is determined pursuant to the provisions s 4.56 of the EP&A Act.
- 6 The MA was notified in accordance with the provisions of Woollahra Community Participation Plan 2019 and 10 submission was received in response to the notification.

- 7 On 4 and 5 October 2022, the Parties participated in a s 34AA conciliation conference under the LEC Act and reached an in-principle agreement regarding the granting of consent to the Applicant's development application, subject to conditions.
- 8 The conciliation conference was convened in a manner consistent with the Land and Environment Court's COVID-19 Pandemic Arrangements Policy (the Policy). A site inspection was undertaken prior to the conciliation conference being convened.
- 9 Four objectors made submissions during the site view, including three from residences adjoining the Subject Site, and:
  - (1) identified concerns in relation to the potential amenity impacts arising from the bulk/scale of the Proposed Development; and
  - (2) drew the Court's attention to concerns they held related to consented excavation works required for the purposes of establishing basement spaces that would be used for parking and the provision of other services to the development.
- 10 At the conciliation conference, and following the site view, the Parties reached an agreement as to the terms of a decision in the proceedings that would be acceptable to the Parties. This decision involved the Court upholding the appeal and approving to the Applicant's modification application, subject to conditions.
- 11 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the Parties' decision if the Parties' decision is a decision that the Court could have made in the proper exercise of its functions.
- 12 There are jurisdictional matters that must be satisfied before the Court can exercise its power to grant consent to the Proposed Development, and those requirements have been satisfied as follows:
  - (1) section 4.56(2) of the EP&A Act requires the Court as consent authority to be satisfied that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified (if at all), and in relation to this:
    - (a) a Council officer's report dated 10 May 2022 to the Woollahra Local Planning Panel confirmed that the development to which the consent as modified relates is substantially the same

development as the development for which the consent was originally granted and before that consent as originally granted was modified;

- (b) in that report, the Office relied on the following reasons to confirm that the development to which the consent as modified relates is substantially the same development as the development for which the consent was originally granted and before that consent as originally granted was modified, with which I agree, and which reasons I adopt as follows:
  - (i) the proposed modifications do not radically change the original proposal;
  - (ii) the proposed modification would result in a development that is essentially and materially the same development.
  - (iii) the proposed modifications would not substantially change how the development is to be carried out.
  - (iv) subject to the recommended conditions, the proposed modifications do not alter any aspect of the development which was essential to the development when it was originally approved.
- (c) the Parties agree, and I am satisfied, that the MA is quantitatively and qualitatively the same as the development for which the consent was originally granted (see above at [2]), and before that consent as originally granted was modified;

(2) section 4.56 of the EP&A Act also requires, as a prerequisite to the modification of a development consent, that:

- (a) the MA be notified in accordance with the *Environmental Planning and Assessment Regulations 2000* (the EP&A Regulation) and a development control plan if the consent authority has made a development control plan that requires the notification or advertising of applications for modification of a development consent, and in relation to this;
  - (i) the MA, including the amended plans filed in the course of this appeal, was notified from 26 January 2022 to 10 February 2022 in accordance with both the requirements of the EP&A Regulation and the provisions of Chapter 6 of the Woollahra Community Participation Plan 2019;
  - (ii) the submissions received in relation to notification have been provided to the Court within documents filed on 7 October 2022;
  - (iii) the Court received further objector submissions during the site view undertaken prior to the commencement of the conciliation conference;
  - (iv) the MA has been notified to, or reasonable attempts have been made to notify, each person who made a

submission in respect of the relevant development application of the proposed modification by sending written notice to the last address known to the consent authority of the objector or other person; an

- (v) the Parties agree, and I am satisfied, that resident objections have been taken into account in determining to enter into their agreement under s 34 of the LEC Act.

(3) in relation to the provisions of WLEP:

- (a) clause 4.3 establishes a maximum height of buildings (HoB) development standard on the Subject Site of 9.5m, and the height of both the consented development, as modified under the MA, does not exceed the 9.5m HoB development standard;
- (b) clause 4.4 provides a floor space ratio (FSR) for development on land to which WLEP applies, and there is no floor space ratio development standard for development in the R2 Low Density Residential zone, noting that a floorplate control for development on the Subject Site is provided within Woollahra Development Control Plan 2015 (WDCP).
- (c) clause 5.10(4) concerns heritage significance and the Parties have confirmed, and I am satisfied, that the consented development, as amended by the MA, remains acceptable, subject to conditions agreed between the parties and which are not in contest;
- (d) clause 6.1 concerns acid sulfate soils, and in relation to this:
  - (i) the Subject Site is mainly within a Class 5 area as marked in the WLEP maps with a small strip of land within a Class 4 area;
  - (ii) a Preliminary Site Investigation (PSI) was prepared by Environmental Consulting Services, dated 8 October 2020, (the "PSI") was prepared in relation to the consented development and an assessment of acid sulfate soils undertaken;
  - (iii) pursuant to cl 6.1(3) of WLEP, an acid sulfate soils management plan is required unless pursuant to 6.1(4)(a) a preliminary assessment is prepared and confirms that a management plan is not required; and
  - (iv) the Applicant's PSI concluded that acid sulfate soils are not expected to be encountered or disturbed during the consented development, including as modified by the MA;
- (e) clause 6.2 concerns earthworks and in relation to which:
  - (i) the Applicant provided a geotechnical report prepared by JK Geotechnics dated 11 September 2020 in relation to the consented development, and which satisfies the

- provisions of cl 6.2(3) in relation to the consented development;
- (ii) the provisions of cl 6.3(2) of WLEP were amended on or around 2 September 2022 and the Applicant has provided further reports prepared by JK Geotechnics and Lindsay and Associates Engineers dated 12 October 2022, responding to those amended provisions;
  - (iii) the Respondent has confirmed, and I am satisfied, that consented development, as amended by the MA, and notwithstanding amendments to the provisions of cl 6.3 of WLEP, continues to satisfy the provisions of cl 6.2(3); and
  - (iv) the Applicant's final plans in relation to the MA in this appeal do not change in any substantial manner the plans originally submitted with the MA and thus continue to satisfy the provisions of cl 6.2(3) of WLEP;
- (f) clause 5.21 (replacing the former and now repealed cl 6.3) concerns flood planning and the Parties have confirmed, and I am satisfied that the Subject Site is not included in the flood maps in the WLEP, and the Parties note that, notwithstanding this fact, the Parties have agreed the imposition of conditions of consent to mitigate risks associated with potential flooding;
- (4) the Proposed Development is subject to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX), and in relation to this the Applicant has provided BASIX Certificate number 1135670M\_05 dated 10 December 2021 in compliance with the relevant provisions of SEPP BASIX, and which remains applicable to the consented development, subject to the MA in these proceedings;
- (5) in relation the provisions of cl 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP R&H), the Parties advise, and I am satisfied, that consented development, as amended by the MA, does not involve a change in use of the Subject Site and the Respondent's records confirm that the past and current use of the Subject Site for residential purposes such that the provisions of cl 4.6 of SEPP R&H are satisfied;
- (6) in relation to the provisions of State Environmental Planning Policy 65: Design Quality of Residential Flat Development (SEPP 65) and the Apartment Design Guide (ADG):
- (a) the Applicant has provided a Design Verification Statement dated 11 October 2022 and prepared by Roselli Architects in respect of the Applicant's final plans in its MA;
  - (b) the Applicant's Design Verification Statement confirm that the Applicant's final plans are consistent with the provisions of SEPP 65;

- (c) the MA final plans do not change the consented development in any way that would contravene the design quality principles in SEPP 65; and
  - (d) in respect of the ADG, the Applicant's final plans do not result in a development which is substantially different to the plans for the consented development, and the parties have confirmed, and I accept, that the consented development, as amended by the MA, satisfies the relevant objectives, design criteria and design guidance contained in the ADG;
- (7) the Applicant's development application for its consented development was made pursuant to the provisions of Seniors SEPP and in relation to this:
- (a) the consented development satisfied the provisions of Seniors SEPP, and the Applicant's MA final plans do not result in any contravention of the relevant considerations therein;
  - (b) the Parties have submitted that for the purpose of the Applicant's MA the provisions of the Seniors SEPP do not apply, but for an abundant caution have provided the following in response to its provisions:
    - (i) in relation to the provisions of cl 4(1) the development is on land which is land zoned primarily for urban purposes and thereby satisfies the clause, and no other provisions of Ch 1 of the Seniors SEPP prohibits or excludes the Subject Site from being developed for the purpose of a seniors living development;
    - (ii) in relation to the provisions of cl 26 concerning location and access to facilities the Parties submit, and I am satisfied, that the residents of the consented development, as amended by the MA, will have access to facilities listed in cl 26(1) of Seniors SEPP in compliance with this clause, and a public transport service is available to the residents in satisfaction of cl 26(2)(b);
    - (iii) in relation to the provisions of cl 28 concerning water and sewer services, the consented development, as amended by the MA, will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage;
    - (iv) in relation to the provisions of cl 29 that requires a consent authority, or the Court on appeal, to consider certain site compatibility criteria for development applications to which cl 24 does not apply, and the Parties agree, and I am satisfied, that the criteria referred to in subcll 25(5)(b)(i), (iii) and (v) have been considered noting that the consented development was determined to be compatible with the surrounding land uses and the MA



does not change outcomes in relation to the criteria in subcll 25(5)(b)(i), (iii) and (v);

- (v) in relation to the provisions of cl 30, the Parties have confirmed, and I am satisfied, that the matters in cl 30 of the Seniors SEPP were considered in the design of the consented development, and the MA does not change the site analysis prepared in relation to the development, nor the consequential outcomes in relation to the provisions of cl 30;
- (vi) in relation to the provisions of cl 31 of Seniors SEPP, these only apply in relation to the determination of a development application, and so do not apply to the MA that is the subject of the current appeal;
- (vii) in relation to the provisions of cl 32 of the Seniors SEPP, and the principles set out in Div 2, the Parties confirm, and I am satisfied, that the consented development was designed having regard to the principles set out in Pt 3, Div 2 of the Seniors SEPP, and the MA does not change outcomes in relation to these principles in cl 33-39 of Seniors SEPP; and the planning experts agree that the amendments sought will ensure that the privacy of adjoining neighbours is not compromised;
- (viii) the Parties have confirmed, and I am satisfied, that the Applicant's final plans under the MA do not change the consented development in a way which would result in any non-compliance in respect of the provisions of cl 40 beyond those that have been approved as part of the consented development, and as previously modified, and prior the MA that is the subject of the current appeal;
- (ix) in relation to the provisions of cl 41 concerning standards for hostels and self-contained dwellings, the Parties have confirmed, and I am satisfied, that the consented development, as amended by the MA, complies with the set out in Sch 3 (Pts 1 and 2) of Seniors SEPP;
- (x) in relation to the provisions at cl 50 of the Seniors SEPP and the standards that cannot be used to refuse development consent for self-contained dwellings the Parties have confirmed that the consented development, as amended by the MA, complies with subcll (c), (d), (e), (f) and (h) of cl 50, and;
- (xi) in respect of subcl 50(a), the Parties have confirmed that there is no change to the height of the building against that approved in the consented development;
- (xii) in respect of subcl 50(b), the Parties have confirmed that there is a minor increase to the FSR of the consented development and the relevant consideration in respect of

those design principles at Div 2 of Pt 3 of the Seniors SEPP have been considered on merit when determining a reasonable bulk and scale noting that the FSR of the Applicant's final plans remains at 1.05:1;

- (8) in relation to the provisions of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SH SEPP), the Parties have confirmed, and I am satisfied, that:
    - (a) the Subject Site falls within land marked on the maps associated with the SH SEPP; and
    - (b) there are no jurisdictional pre-requisites precluding approval of the MA under the SH SEPP;
  - (9) the Parties have confirmed that the relevant provisions of WDCP have been considered in relation to the consented development, as amended by the MA, and the MA is acceptable on its merits having regard to provisions of the WDCP and section 4.15(1)(a)(iii), and I am satisfied that there is no provision of WDCP that would form a basis for refusal of the MA;
  - (10) the Proposed Development is acceptable having regard to the provisions of s 4.15(1) of the EP&A Act including in relation to the submissions of the objectors which is a relevant consideration under section 4.15(1)(d) of the EP&A Act.
- 13 Having considered the advice of the Parties, provided above at [12], I agree that:
- (1) the Applicant's Development Application can be approved having regard to the matters in s 4.15(1)(b) – (e) of the EP&A Act; and
  - (2) the jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 4.16 of the EP&A Act have been so satisfied;
  - (3) approval of the Proposed Development is in the public interest.
- 14 Further, I am satisfied that the Parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act.
- 15 As the Parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required to dispose of the proceedings in accordance with the Parties' decision.
- 16 In making the orders to give effect to the agreement between the Parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the Parties.

17 The Court notes that:

- (1) Woollahra Municipal Council as the relevant consent authority for the purposes of cl 121B of the Environmental Planning and Assessment Regulation 2000 agrees to the Applicant amending Modification Application no. DA-416/2020/4 by the provision of the following documents (hereinafter called the 'further documents'):
  - (a) the Design Verification Statement prepared by Luigi Rosselli Pty Ltd and dated 11 October 2022;
  - (b) Geotechnical Advice Letter prepared by JK Geotechnics dated 12 October 2022;
  - (c) Structural Report prepared by Lindsay and Associates dated 12 October 2022;
  - (d) LEC\_31 Plan Ground - Services, Luigi Rosselli Pty Ltd, 17 October 2022,
- (2) the further documents noted above (at 1(a) to (c)) were uploaded to the NSW Planning Portal on Friday 14 October 2022 and an amended application filed in the Court on 14 October 2022, with the document in 1(d) above uploaded to the NSW Planning Portal on 17 October 2022.

## Orders

18 The Court orders that:

- (1) the appeal is upheld;
- (2) Modification Application 416/2020-4 is approved and development Consent No. DA-416/2020 is modified in the terms in Annexure A;
- (3) Development Consent No. DA-416/2020 as modified by the Court is Annexure B.

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**M Chilcott**

**Commissioner of the Court**

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Annexure A

Annexure B

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