



Land and Environment Court New South Wales

Medium Neutral Citation:

**Reid v Woollahra Municipal Council [2024] NSWLEC
1299**

Hearing dates:

Conciliation conference on 27 May 2024

Date of orders:

12 June 2024

Decision date:

12 June 2024

Jurisdiction:

Class 1

Before:

Horton C

Decision:

The Court orders that:

(1) The appeal is upheld.

(2) Development Application 54/2023/1 for the demolition of the existing attached dual occupancy, construction of a new attached dual occupancy, swimming pool, parking at street level and associated site works and landscaping at 54 New Beach Road, Daring Point NSW being Strata Plan 33166 is determined by the grant of consent subject to conditions contained in Annexure B.

Catchwords:

DEVELOPMENT APPLICATION: attached dual occupancy development in R3 Medium Density Residential zone – height of building standard exceeded – conciliation conference – agreement between parties - orders

Legislation Cited:

Coastal Management Act 2016

Environmental Planning and Assessment Act 1979, ss 4.46, 8.7

Land and Environment Court Act 1979, ss 34, 34AA

Water Management Act 2000

Environmental Planning and Assessment Regulation 2021, s 38

State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chs 2, 6, ss 6.6, 6.7, 6.8

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

State Environmental Planning Policy (Resilience and Hazards) 2021, ss 2.10, 2.11, 4.6

State Environmental Planning Policy (Sustainable Buildings) 2022, s 4.2

Woollahra Local Environmental Plan 2014, cl 4.1A, 4.3, 6.2

Cases Cited:

Initial Action Pty Ltd v Woollahra Municipal Council [2019] NSWLEC 1097

Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115

Texts Cited:

Woollahra Development Control Plan 2015

Woollahra Community Participation Plan

Category:

Principal judgment

Parties:

Molly Patricia Reid (First Applicant)

Tobias Partners Pty Ltd (Second Applicant)

Woollahra Municipal Council (Respondent)

Representation:

Counsel:

M Seymour SC (Applicants)

P Rigg (Solicitor)(Respondent)

Solicitors:

Boskovitz Lawyers (Applicants)

Peter Rigg Solicitor and Barrister (Respondent)

File Number(s):

2023/157515

Publication restriction:

Nil

JUDGMENT

- 1 **COMMISSIONER:** Properties along New Beach Road in Darling Point generally face west north west over Rushcutters Bay before rising sharply to the east.
- 2 Development is proposed on No 54 New Beach Road, in the form of demolition, excavation, and construction of a new five storey attached dual occupancy development.
- 3 Development application DA 54/2023/1 (the DA) was initially lodged with Woollahra Municipal Council (the Respondent) on 17 February 2023, and was notified from 8 March – 7 April 2023 in accordance with the Woollahra Community Participation Plan, in response to which 14 public submissions were received.
- 4 The DA was amended, and notified once more before the Applicants in these proceedings, Ms Molly Reid and architecture practice Tobias Partners Pty Ltd, filed an appeal in Class 1 of the Court's jurisdiction on 17 May 2023, under s 8.7 of the

Environmental Planning and Assessment Act 1979 (EPA Act).

5 The proceedings commenced with an onsite view at which the Court, in the company of the legal representatives, the Applicants and experts, heard oral submissions from residents and their representatives.

6 Following the onsite view, the Court facilitated conciliation discussions in accordance with s 34AA of the *Land and Environment Court Act 1979* (LEC Act).

7 During the conciliation conference, at which I presided, the Applicant agreed to certain amendments that, in the view of the Respondent, addressed the matters in contention.

8 On the basis of the amended plans and agreed conditions of consent, the parties reached agreement as to the terms of a decision in the proceedings that was acceptable to the parties. To this end, the Respondent approved the amending of the application by the Applicant, in accordance with s 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation).

9 A signed agreement prepared in accordance with s 34(10) of the LEC Act was submitted with the Court on 27 May 2024.

10 The parties ask me to approve their decision as set out in the s 34 agreement before the Court. In general terms, the agreement approves the development subject to amended plans that were prepared by the Applicant, and noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s 34 agreement.

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. The parties prepared a jurisdictional statement to assist the Court in understanding how the requirements of the relevant environmental planning instruments have been satisfied in order to allow the Court to make the agreed orders at [48].

12 I formed an opinion of satisfaction that each of the pre-jurisdictional requirements identified by the parties have been met, for the reasons that follow.

13 The site is within the R3 Medium Density Residential zone, according to the Woollahra Local Environmental Plan 2014 (WLEP) in which development for the purpose of dwelling house development is permitted within consent, where consistent with the objectives of development in the R3 zone as follows:

- To provide for the housing needs of the community within a medium density residential environment.
- To provide a variety of housing types within a medium density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

- To ensure development conserves and enhances tree canopy cover.

- 14 The height standard applicable to the site at cl 4.3 of the WLEP indicates a height of 19.5m on the relevant map. However, cl 4.3(2A) of the WLEP provides that that development for the purpose of dual occupancy development house in the R3 zone is limited to 9.5m. The proposed development exceeds the 9.5m height standard.

The height is exceeded

- 15 A written request authored by GSA Planning in accordance with cl 4.6 of the WLEP accompanies the DA as amended, dated February 2024.
- 16 The written request identifies an exceedance of the height standard by the existing building on the site of 5.9m and a reduced exceedance of 5.62m by the proposal now before the Court.
- 17 The written request states that requiring compliance with the height standard is unreasonable or unnecessary in the circumstances of this case as the proposal achieves the objectives of the height standard notwithstanding the non-compliance with the height standard.
- 18 The objectives of the height standard are as follows:
- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,
 - (b) to establish a transition in scale between zones to protect local amenity,
 - (c) to minimise the loss of solar access to existing buildings and open space,
 - (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,
 - (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.
- 19 The written request asserts consistency with the objectives above for reasons summarised as follows:
- (1) In respect of objective (a), the desired future character with which heights should be consistent is understood in terms set out in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 where the desired future character is shaped not only by the provisions of the WLEP, but also approved development that contravenes the development standard. Assessment of the proposal against the height of adjoining development at Nos 55 and 53 New Beach Road demonstrates consistency, and when considered against the natural ground level in the area, is virtually compliant. Assessment against the

objectives for development in the Darling Point Precinct, at Part B1 of the Woollahra Development Control Plan 2015 (WDCP), likewise demonstrates these objectives are achieved.

- (2) In respect of objective (b), the height standard applicable to the site permits a height of 10.5m for dwelling houses, adjacent to a zone in which a height of 13.5m applies, and where the proposal is below the height of Nos 53 and 55 which adjoin.
- (3) In respect of objective (c), the proposal imposes no additional shadow to neighbouring private open space for a period of 6 hours, and increases solar access which can be said to minimise loss of solar access.
- (4) In respect of objective (d), the assessment of views identifies no impact on properties nearby including the properties located at a higher level behind the subject site at No 11 Yarranabbe Road. Likewise, privacy impacts are minimised by there being only highlight windows, or windows to non-habitable rooms within the height exceedance, and solar access is also minimised for reasons stated above. Finally, the degree of visual impact within the area of the exceedance results largely from an existing area of excavation that causes a 'step down' in the height plane. When the built form is understood alongside adjoining properties, the proposal is lower.
- (5) In respect of objective (e), the proposal will protect the public views of the harbour by reducing the overall height of development on the site in the vicinity of a public view corridor obtained from Yarranabbe Road to the rear of the site.

20 Next the written request advances environmental planning grounds it asserts are sufficient to justify the contravention of the standard. These grounds include:

- (1) The existing excavated topography results in an artificial ground level that does not reflect the intent of the height standard, evidenced by the appropriate visual relationship between the proposed built form and existing adjoining development. To require strict compliance would be to require the removal of two storeys that would be much lower than adjoining development.
- (2) The proposal is consistent with the character of surrounding development and with the desired future character of the area in terms understood in *Initial Action Pty Ltd v Woollahra Municipal Council* [2019] NSWLEC 1097, in which the contravention of a standard was deemed an environmental planning ground where such departure created opportunities to achieve a good design outcome in context with the form of the immediate built environment.
- (3) The proposal is lower in height than the existing built form, will present as a two storey form from the rear and steps down the site with the sloped topography.

21 Finally, the written request asserts consistency with the objectives of the zone, at [13], because the development retains the dual occupancy use so that housing needs of the community are provided for in the R3 zone, that itself provides a degree of variety in

housing types, and where the bulk and scale of the proposal is consistent with the desired future character of the neighbourhood.

- 22 I note here that the Respondent is satisfied that the written request adequately addresses the matters required to be demonstrated by cl 4.6(3) of the WLEP, and that the proposed development, as amended, will be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development in the R3 Medium Density Residential Zone.
- 23 Furthermore, the Respondent does not contend that the contravention of the development standard raises any matter of significance for State or regional environmental planning, or that there is any public benefit in maintaining the development standard, pursuant to cl 4.6(5) of the WLEP.
- 24 Accordingly, the Respondent raises no issue regarding cl 4.6 and accepts that a variation of the height development standard under cl 4.3 is justified.
- 25 I am satisfied under cl 4.6(4) that the height request has adequately addressed the matters required to be demonstrated by subcl (3) and that the proposed development will be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development within the R3 Medium Density Residential Zone, for the reasons given in the request, summarised above.
- 26 In forming this opinion of satisfaction, I accept that the proposed development displays a built form that is consistent with existing buildings either side, and with similar if not identical presentation to the street frontage when viewed from New Beach Road. To the extent that the proposal differs from those buildings either side, the proposed development does not reach the height of those adjoining buildings.
- 27 I have also considered whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP and I find no grounds on which the Court should not uphold the height request.
- 28 The proposal is for dual occupancy development that is permitted, by cl 4.1A of the WLEP, on site with an area that is equal to or greater than 460m². As the site has an area of 668.8m², the proposal complies with the minimum lot size for dual occupancy development.
- 29 The site is identified within an area of Class 5 Acid Sulfate Soils (ASS), and is within 500m of land identified as Class 2 ASS. On the basis of the conclusion reached in the Preliminary ASS Assessment prepared by JK Environments dated 10 May 2024 (ASS Assessment), that although the western portion of the site is below 5m AHD, the proposed development works will not involve lowering the watertable below 1m AHD on adjacent Class 2 land. This is because the excavation proposed at the front of the site

is shallow and is not expected to encounter groundwater when seepage levels recorded in boreholes are considered. As such, the ASS Assessment concludes an ASS Management Plan is not required.

30 The proposed development includes substantial excavation that is the subject of mandatory consideration in accordance with cl 6.2 of the WLEP, and subject to certain provisions at Part B3.4 of the WDCP. Planning experts engaged by the parties to assist the Court agree in a joint expert report filed with the Court on 21 May 2024, that the reduced volume of excavation is now reasonable, notwithstanding the volume exceeding the excavation volume control at Part B3.4 of the WDCP, Control C1.

31 I have also considered the following plans and other documents, on the basis of which I have formed an opinion that those matters at cl 6.2(3) of the WLEP have been adequately addressed:

- (1) Stormwater Services Plans, prepared by Partridge dated February 2024;
- (2) Geotechnical Investigation Report prepared by JK Geotechnics dated 6 February 2024;
- (3) Structural Report and Construction Methodology Statement prepared by Partridge dated 7 February 2024;

32 Additionally, I note agreed conditions of consent address geotechnical and hydrogeological investigation, ground anchors, vibration monitoring, support for adjoining land and buildings, and the like.

State Environmental Planning Policy (Biodiversity and Conservation) 2021

33 Chapter 2 of State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) applies to the site and the development application seeks consent for the removal of a Council street tree and trees within the site. The proposed tree removals are supported by the Respondent.

34 The site is located within the Sydney Harbour Catchment as identified by the Sydney Harbour Catchment Map, to which Chapter 6 of the Biodiversity SEPP applies. However, the parties agree the site is not within the Foreshores and Waterways Area, is not a strategic foreshore site, a heritage item or land within a wetlands protection area.

35 Section 6.6 of the Biodiversity SEPP precludes the grant of consent unless the Respondent, or the Court on appeal, is satisfied that the proposed development ensures that, firstly, the effect on the quality of water entering a natural waterbody will be as close as possible to neutral or beneficial, and secondly, that the impact on water flow in a natural waterbody will be minimised.

36 I accept that conformity with s 6.6 of the Biodiversity SEPP is achieved by providing filtration and sediment control in the onsite detention tank, and that post development flows are reduced from pre-development flows so that a neutral or beneficial effect on

the water quality and water flow into the harbour results. Furthermore, for reasons similar to those at [29], I accept the excavation will not disturb the level or quality of the water table.

37 For similar reasons I have also considered those matter at s 6.7 of the Biodiversity SEPP and am satisfied that the retention of water and post development flows will keep any direct, indirect or cumulative impact on terrestrial, aquatic or migratory animals or vegetation to a minimum, and will not have an adverse impact on aquatic reserves, or in terms of erosion.

38 I do not understand the site to be subject to periodic flooding such that the considerations at s 6.8 are invoked.

State Environmental Planning Policy (Resilience and Hazards) 2021

39 While Chapter 2 of State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience SEPP) gives effect to the objectives of the *Coastal Management Act 2016* by specifying how development proposals are to be assessed if they fall within the Coastal Zone, I note the subject site is located wholly outside of the Coastal Environment Area (s 2.10) and the Coastal Use Area (s 2.11).

40 On the basis of the detailed historical assessment of the site that appears in Section 2.2 of the Demolition Report and Heritage Impact Statement prepared by Mr Zoltan Kovacs dated November 2022, I accept the site is unlikely to be contaminated and is suitable for the purpose for which development is proposed to be carried out, pursuant to s 4.6 of Resilience SEPP.

Water Management Act 2000

41 The proposed development is integrated development, pursuant to s 4.46 of the EPA Act. Under the *Water Management Act 2000*, a permit is required for development which involves water use, water management work and water activity. The proposal requires a Water Supply Work approval for the dewatering of the site.

42 I note Water NSW has issued General Terms of Approval that are incorporated into the agreed conditions of consent.

State Environmental Planning Policy (Building sustainability Index: BASIX) 2004

43 The application is accompanied by a BASIX certificate (Cert No 1371365M_02 dated 15 May 2024) prepared by Taylor Smith Consulting in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (BASIX SEPP 2004).

44 The Court notes the repeal of the BASIX SEPP 2004 on 1 October 2023, and the savings and transitional provisions at s 4.2 of State Environmental Planning Policy (Sustainable Buildings) 2022 (Sustainable Buildings SEPP) that have the effect of saving the Amended DA from the provisions of Sustainable Buildings SEPP.

Conclusion

- 45 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 46 In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.
- 47 The Court notes that:
- (1) The Respondent, Woollahra Municipal Council, as the relevant consent authority, has approved, under section 38(1) of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending Development Application No 54/2023/1 to rely on the documents as outlined in Annexure A.
 - (2) The Applicant has filed the plans and documents listed in Annexure A on 27 May 2024.

Orders

- 48 The Court orders that:
- (1) The appeal is upheld.
 - (2) Development Application 54/2023/1 for the demolition of the existing attached dual occupancy, construction of a new attached dual occupancy, swimming pool, parking at street level and associated site works and landscaping at 54 New Beach Road, Daring Point NSW being Strata Plan 33166 is determined by the grant of consent subject to conditions contained in Annexure B.

T Horton

Commissioner of the Court

[Annexure A](#)

[Annexure B](#)

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Decision last updated: 12 June 2024