



Land and Environment Court
New South Wales

Case Name:	Bellevue Road Holdings Pty Ltd v Woollahra Municipal Council
Medium Neutral Citation:	[2022] NSWLEC 1105
Hearing Date(s):	Conciliation Conference 13 October 2021, 23 February 2022
Date of Orders:	04 March 2022
Decision Date:	4 March 2022
Jurisdiction:	Class 1
Before:	Dickson C
Decision:	<p>The Court orders that:</p> <p>(1) The written request prepared by Planning Ingenuity and dated 21 December 2021 pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 to vary the development standard in clause 4.4, Floor Space Ratio, is upheld;</p> <p>(2) The appeal is upheld;</p> <p>(3) Consent is granted for Development Application no. DA216/2021/1, for the alterations and additions to the approved residential flat building (under Development Consent DA344/2019) including the provision of additional units, the provision of 2 car lifts, the removal of a swimming pool and ancillary works at 142, 142a and 142b Bellevue Road, Bellevue Hill, subject to the conditions contained in Annexure A.</p>
Catchwords:	DEVELOPMENT APPLICATION – alterations to a residential flat building – amended plans – conciliation conference – agreement between the parties – orders.
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7</p> <p>Environmental Planning and Assessment Regulation</p>

2000, cl 49, 50, 55,
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Building
Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 55—
Remediation of Land, cl 7
State Environmental Planning Policy No 65 (Design
Quality of Residential Flat Development)
Woollahra Local Environmental Plan 2014, cl 2.3, 2.7,
4.1A, 4.3, 4.4, 4.6, 5.21, 6.2

Cases Cited: HP Subsidiary Pty Ltd v City of Parramatta Council
[2020] NSWLEC 135

Category: Principal judgment

Parties: Bellevue Road Holdings Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Boskovitz (Solicitor) (Applicant)
S Patterson (Solicitor) (Respondent)

Solicitors:
Boskovitz Lawyers (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2021/215500

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** The proceedings are an appeal pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act) by the Applicant against the deemed refusal of Development Application No. DA 216/2021/1 by Woollahra Municipal Council (the Respondent). The development application seeks approval for alterations and additions to an approved residential flat building on the subject site (under Development Consent DA344/2019). The alterations and additions include the addition of 8 units, the provision of 2 car lifts, the removal of the approved swimming pool, and other ancillary works. The development is proposed at 142, 142A and 142B Bellevue Road, Bellevue Hill (Lot 1, Lot 2 DP 506650, Lot 3 DP 411692).

- 2 Prior to the listed hearing on 23 February 2022, the parties advised the Court that the applicant had prepared amended plans and documents, and on that basis, the parties had reached an in-principle agreement as to the terms of an agreement that would be acceptable to the parties. Accordingly, the matter was reallocated to me under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), and the conciliation conference was held on 23 February 2022, at which I presided.
- 3 At the conciliation conference, the parties reached agreement as to the final terms of a decision in the proceedings that would be acceptable to them. This decision involved the Court upholding the appeal and granting development consent to the development application, as amended, subject to conditions. The agreement was filed on 23 February 2022. The amended plans were also lodged on the NSW Planning Portal with the agreement of the Council, as required by cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation).
- 4 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' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application, as amended. The decision agreed upon is for the grant of development consent subject to conditions of consent pursuant to s 4.16(1) of the EPA Act. There are jurisdictional prerequisites that must be satisfied before this function can be exercised: *HP Subsidiary Pty Ltd v City of Parramatta Council* [2020] NSWLEC 135.
- 5 As the presiding Commissioner, I am satisfied that the decision to grant development consent to the amended application subject to conditions of consent is a decision that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I formed this state of satisfaction, as each of the jurisdictional preconditions identified by the parties are met, for the following reasons:
 - (1) The Applicant has declared they have the consent of the owners of the site and, therefore, were able to lodge the DA pursuant to cl 49 of the EPA Regulation.

- (2) The DA was notified and publicly exhibited between 5 and 20 May 2021 in accordance with the EPA Act. I am satisfied that the submissions made by the public have been considered in the determination of the development application.
- (3) Consideration has been given as to whether the subject site is contaminated as required by cl 7(1) of State Environmental Planning Policy No 55—Remediation of Land. No change of use is proposed by the development application. The Statement of Environmental Effects filed with the development application notes that the current, and previous use of the land is for a residential purpose. I accept that the site will be suitable for the proposed development.
- (4) State Environmental Planning Policy 65 (Design Quality of Residential Flat Development) (SEPP 65) applies to the development application. Pursuant to the provisions of the EPA Regulation, the Applicant's architect, Aleksandar Jelcic (registered architect 7167), has prepared a Design Verification Statement dated 12 October 2021, fulfilling the requirements of cl 50(1AB) of the EPA Regulation. I am satisfied that the amended development has given adequate regard to the Schedule 1 Design Quality Principles and Apartment Design Guide design criteria objectives.
- (5) The development application is subject to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. Consistent with the requirements of the instrument, an updated BASIX certificate has been provided which accords with the amended architectural plans.
- (6) Woollahra Local Environmental Plan 2014 (WLEP) applies to the site. Pursuant to the WLEP, the site is zoned R3 Medium Density Residential. Development for the purposes of residential flat buildings is permitted in the R3 Zone. Demolition is permissible with development consent pursuant to cl 2.7 of the WLEP. In determining the development application, I have had regard to the objectives of the zone: cl 2.3(2) of the WLEP.
- (7) The proposed development complies with the minimum lots size standard and maximum height development standard, cll 4.1A and 4.3 of the WLEP respectively.
- (8) The amended plans do not comply with the provisions of cl 4.4: Floor space ratio (FSR) in the WLEP. The WLEP prescribes a maximum FSR for the site of 0.65:1, the development application seeks an FSR of 1.058:1. The amended plans are accompanied by a written request pursuant to cl 4.6 of the WLEP prepared by Planning Ingenuity and dated 21 December 2022. I am satisfied that the written request demonstrates firstly, that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and secondly, that there are sufficient environmental planning grounds to justify contravening the development standard. In the first matter the written request does so by demonstrating that the objectives of the FSR standard are met despite the variation to the standard. Secondly, the

written request proffers grounds to support the variation that I am satisfied are environmental planning grounds and are sufficient. Finally, I am satisfied that the development is in the public interest because it is consistent with the objectives of the FSR standard and the objectives of the R3 zone. The requirements of cl 4.6(4) of the WLEP are satisfied.

- (9) The subject site is mapped as Class 5 acid sulfate soils pursuant to the WLEP. However, the site is not within 500m of Class 1,2,3 or 4 land. Clause 6.1 - Acid sulfate soils - of the WLEP has been adequately addressed.
- (10) Clause 6.2: Earthworks of the WLEP applies to the proposed development. The Applicant has prepared and filed Geotechnical Reports with Morrow Geotechnics Pty Ltd dated 23 June 2021, and 5 October 2021. Further a structural engineering report was prepared by Acroyali Engineers on 13 October 2021. Following a review of this information, I have given consideration to the matters listed at cl 6.2 of the WLEP and I am satisfied that they do not warrant the refusal of the development application.
- (11) In relation to cl 5.21 of the WLEP, on the basis of the flood impact assessment undertaken by Barker Ryan Stewart in July and October 2021, I find that the requirements of sub cl (2) and (3) are satisfied.
- (12) The application was notified in accordance with the relevant development control plan, and I am satisfied that the submissions have been considered in the determination of the development application: s 4.15(1)(d) of the EPA Act

6 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).

7 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

8 The Court notes that:

- (1) Woollahra Council as the relevant consent authority has agreed, under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending the development application DA216/2021/1.
- (2) That the amended development application is uploaded onto the NSW planning portal.

- (3) That the applicant filed the amended development application with the Court on 19 January 2022.

9 The Court orders that:

- (1) The written request prepared by Planning Ingenuity and dated 21 December 2021 pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 to vary the development standard in clause 4.4, Floor Space Ratio, is upheld;
- (2) The appeal is upheld;
- (3) Consent is granted for Development Application no. DA216/2021/1, for the alterations and additions to the approved residential flat building (under Development Consent DA344/2019) including the provision of additional units, the provision of 2 car lifts, the removal of a swimming pool and ancillary works at 142, 142a and 142b Bellevue Road, Bellevue Hill, subject to the conditions contained in Annexure A.

D M Dickson

Commissioner of the Court

Annexure A (887544,

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