



Land and Environment Court
New South Wales

Case Name: JCP Construction & Development Pty Ltd v Woollahra Municipal Council (No. 2)

Medium Neutral Citation: [2022] NSWLEC 1192

Hearing Date(s): 4 April 2022

Date of Orders: 22 April 2022

Decision Date: 22 April 2022

Jurisdiction: Class 1

Before: O'Neill C

Decision: The orders of the Court are:
(1) The appeal is upheld.
(2) Development Application No. 203/2021/1 as amended, for the change of use and fit out of an existing building as a funeral home, at 37 Ocean Street, Woollahra, is determined by the grant of consent, subject to the conditions of consent at Annexure A.
(3) The exhibits, other than Exhibits 1, 2, 6, A, B, C and D, are returned.

Catchwords: DEVELOPMENT APPLICATION – funeral home – resident objectors – orders by consent of parties

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 8.7, 4.15
Land and Environment Court Act 1979, s 34, 34C
Public Health Regulation 2012, Pt 8
Woollahra Local Environmental Plan 2014, cl 2.3, 5.10, 6.2, 6.3, 6.6, Pt 2 Sch 5

Cases Cited: JCP Construction & Development Pty Ltd v Woollahra Municipal Council [2022] NSWLEC 1204
Jeffrey v Canterbury Bankstown Council [2021] NSWLEC 73

Telstra Corp Ltd v Hornsby Shire Council (2006) 67
NSWLR 256; 146 LGERA 10; [2006] NSWLEC 133

Texts Cited: Land and Environment Court Practice Note, Class 1
Development Appeals.

Category: Principal judgment

Parties: JCP Construction & Development Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
C Shaw (Solicitor) (Applicant)
S Simington (Solicitor) (Respondent)

Solicitors:
Shaw Reynolds Lawyers (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2021/340406

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No. 203/2021/1 for the change of use and fit out of an existing building as a funeral home (the proposal) at 37 Ocean Street, Woollahra (the site) by Woollahra Municipal Council (the Council).
- 2 On 18 January 2022, the Applicant was granted leave by the Court to amend the application to rely on additional documents (Ex B). The amended application was then lodged on the NSW planning portal and filed with the Court. The amended proposal includes the deletion of a first floor residential component which is prohibited on the site, being the reason for the refusal of the development application by the Woollahra Local Planning Panel on 4 November 2021 (Ex A, tab 16).
- 3 On 18 March 2022, the Chief Judge revoked an order arranging a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) and made an order that the proceedings be dealt with under s 34C, fixing the proceedings for hearing on 4 April 2022.

- 4 On 1 April 2022, the Court dismissed an application made by the Woollahra R2 Residents Association to be joined as the Second Respondent in the proceedings (*JCP Construction & Development Pty Ltd v Woollahra Municipal Council* [2022] NSWLEC 1204).

Application for final orders by consent of parties

- 5 Following the amendment of the application and prior to the commencement of the hearing, the parties agreed on the content of the proposed orders and conditions of consent, which were filed with the Court on 17 March 2022.
- 6 The Respondent submitted that on 18 March 2022, the Respondent's solicitor wrote to the resident objectors advising them that the parties had filed consent orders to be considered by the Court at the hearing. The resident objectors were provided with a copy of the consent orders and conditions of consent (Ex 2). The conditions of consent were later amended to add condition C.1(c), as follows:

To mitigate additional overshadowing of the neighbouring property to the south, the design of the parking structure must be amended to decrease the height of the southern elevation and gutter by 500mm. The roof must be increased in pitch to correspond to the decrease in height of the southern elevation while maintaining a skillion form. This condition does not impact nor change the roller door, bulkhead or parapet on the eastern elevation of the parking structure.

- 7 Following an application for final orders by consent of the parties, the parties are required, by the terms of the Court's Practice Note Class 1 Development Appeals at cl 99, to present such evidence as is necessary to allow the Court to determine whether it is lawful and appropriate to grant the consent or approval having regard to the whole of the relevant circumstances, including the proposed conditions. The Respondent is required to demonstrate that relevant statutory provisions have been complied with and that any objection by any person has been properly taken into account.

The site and its context

- 8 The site is legally identified as Lot 37, DP 181112.

- 9 The existing building on the site is a two storey late Victorian era building that is paired with the building occupying 39 Ocean Street. The site has a primary frontage to Ocean Street, and a rear frontage to Kilminster Lane.
- 10 The current approved land use of both the ground and first floor levels of the building on the site is a commercial premises. To the rear of the building, the site is occupied by landscaping and parking.
- 11 The site has an area of 231.3m².

The proposal

- 12 The proposal includes internal fit out of the existing ground floor level, as follows:
 - Office space including a reception, waiting room and a spare room;
 - A viewing room, and
 - Installation of a blind on the front door, and non-transparent partition on the opening between the reception and waiting room.
- 13 The Plan of Management outlines the proposed funeral home will be used as follows:
 - Private viewings for a maximum of 10 attendees for up to 30 minutes;
 - Base hours of operation area 8am to 10pm Monday to Sunday, in addition to unspecified additional operating hours at certain times;
 - The funeral home will operate with 2 full time staff, and
 - No storage, dressing, or preparation of deceased persons is proposed to occur on site.
- 14 Alterations and additions at the rear of the property include:
 - The provision of a covered parking structure/loading bay and lift for the funeral home with garage door structure to Kilminster Lane;
 - An uncovered parking space;
 - A replacement roof for the existing shed;
 - Privacy screens for Decks 1 and 2 on the first floor level; and
 - Landscaping, fencing and site works.

Planning framework

- 15 The site is zoned R2 Low Density Residential pursuant to Woollahra Local Environmental Plan 2014 (LEP 2014). Business premises is a nominate permissible use in the R2 zone and the definition of business premises in the dictionary to LEP 2014 includes funeral homes. The objectives of the R2 zone, to which regard must be had, are:
- To provide for the housing needs of the community within a low density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.
 - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.
- 16 The site is within the Woollahra Heritage Conservation Area (HCA) (Part 2, Sch 5 to LEP 2014). The consent authority, or the Court exercising the functions of the consent authority, is to consider the effect of the proposal on the heritage significance of the HCA, before granting consent under cl 5.10, at sub-cl (4).
- 17 Development consent is required for earthworks, at cl 6.2(1) of LEP 2014. In deciding whether to grant development consent for earthworks, the consent authority must consider the matters listed under cl 6.2(3) of LEP 2014.
- 18 Clause 6.6 of LEP 2014 applies to the proposal because the proposal is for the use of an existing non-residential building in a residential zone. Clause 6.6 is in the following terms:

6.6 Use of existing non-residential buildings in residential zones

- (1) The objective of this clause is to enable buildings and land in a residential zone to be developed for non-residential purposes only in certain circumstances.
- (2) This clause applies to development on land in a residential zone.
- (3) Despite any other provision of this Plan, development consent must not be granted to development to which this clause applies for the purposes of business premises, a community facility, an information and education facility, office premises, a public administration building or a shop unless—
- (a) the whole or part of the development has a history of a lawfully commenced non-residential use, whether or not that use has been discontinued, abandoned or interrupted, and

(b) the whole or part of the development was originally lawfully carried out with a non-residential design or was lawfully altered or adopted to a non-residential design, and

(c) the consent authority is satisfied that the development—

(i) will not adversely affect the enjoyment by an occupier of the land adjoining or in the neighbourhood of the land on which the development is situated, and

(ii) if located in a heritage conservation area—will not adversely affect the heritage significance of the building in which, or the land on which, the development is situated, or the heritage conservation area.

Public submissions

- 19 The application was notified from 9 June 2021 to 24 June 2021, and to a wider geographical coverage from 7 July 2021 to 22 July 2021.
- 20 In response to the notification, 197 submissions by way of objection were received, including a Change.org petition with 471 signatures and 1 submission providing neutral public commentary (Ex 1).
- 21 Five resident objectors, or their representative, gave evidence at the commencement of the hearing, and their concerns can be summarised as:
 - The proposal will have a negative impact on the residents of the adjoining residential property because the occupiers of the residence will be living in proximity to dead people and will be a constant reminder of death.
 - The proposal will impact upon the sunlight reaching the courtyard of the adjoining residential property.
 - The proposal is for excessive hours of operation.
 - The jurisdictional thresholds pursuant to cl 6.6(3)(c) of LEP 2014 are not met by the proposal.
 - The proposal will have detrimental social and economic impacts in the locality contrary to s 4.15(1)(b) of the EPA Act.
 - The proposal is incompatible with the village precinct, which includes the site, because death is confronting and sad; and the proposal will have a negative impact on the village precinct because residents will be reminded of death every time they walk past the site. The proposal is not compatible with the character and amenity of the locality.
 - The proposal represents bad Feng Shui for a nearby household, and it will unreasonably affect their enjoyment of their home.
 - The proposal will have a devastating impact on the adjoining restaurant because local residents do not want to dine near a funeral home.
 - The Court should view the site.

- The proposal does not include refrigeration and the presence of dead bodies at the site may produce foul odours. This issue is not adequately dealt with by the Plan of Management for the operation of the business.
- The traffic report is based on a B99 vehicle, whereas a hearse is larger than a B99 vehicle, and will not be able to manoeuvre in the rear laneway and in and out of the onsite parking area.
- The dead bodies may have infectious diseases.
- There may be a future application for refrigeration on the site.

Expert evidence

- 22 The town planning experts, Jeremy Swan for the Applicant and Ryan White for the Respondent, prepared a joint report with respect to the concerns raised by the objectors in their submissions (Ex 6). As directed by the Chief Judge on 18 March 2022, the planning experts in their joint report addressed each of the concerns raised by the resident objectors, and concluded that the amended proposal, subject to the agreed conditions of consent, is appropriate and capable of being granted development consent.

Consideration

The proposal is permissible with consent

- 23 It is uncontentionous that the proposal is properly characterised as a funeral home within the defined meaning under LEP 2014. A funeral home is explicitly included as a “business premises”, a nominate permissible use in the R2 zone, in the definition of business premises under LEP 2014.

The proposal is consistent with the R2 zone objectives

- 24 The consent authority must have regard to the objectives for development in a zone when determining a development application in respect of land within the zone, at cl 2.3(2) of LEP 2014. The relevant objectives of the R2 zone are:
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.
 - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

To enable other land uses that provide facilities or services to meet the day to day needs of residents.

- 25 A funeral home, being one type of business premises, is a land use that does provide facilities or services to meet the day to day needs of residents (*Jeffrey v Canterbury Bankstown Council* [2021] NSWLEC 73 (*Jeffrey*) at [59]. The word “residents” is not confined to the residents of the particular zone, but instead refers to a generic category of persons (*Jeffrey* at [58]). For this reason, the Chief Judge’s construction of the R4 zone objective, “*To enable other land uses that provide facilities or services to meet the day to day needs of residents*”, equally applies to an objective with the same wording for the R2 Low Density Residential zone in LEP 2014. There is no necessary change to the generic group of residents whose day to day needs are being met by other land uses in the zone, because the residents, the focus of the objective, are not confined to those who reside within any particular area, including those that reside in the applicable zone (*Jeffrey* at [58]). The land uses that provide facilities or services for the day to day needs of the generic group of residents may not be the same in any R2 zone as in any R4 zone, depending on the permissible uses in the zone (*Jeffrey* at [62]). In this case, the funeral home is permissible with consent in the R2 zone, creating the presumption that the use *may be* compatible with the objectives of the zone (*Jeffrey* at [61]).

To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.

- 26 I accept the agreement of the planning experts that the proposal will not result in a dead body or dead bodies being able to be seen outside of the site.
- 27 I accept the agreement of the planning experts that the proposal’s hours of operation and maximum capacity are consistent with the existing character and amenity of the surrounding neighbourhood.
- 28 I accept the uncontested conclusion of the Traffic and Parking Impact Assessment prepared by McLaren Traffic Engineering and Road Safety Consultants (Ex B, tab 7) that the parking arrangements and traffic generation of the proposal are acceptable.
- 29 I accept the agreement of the planning experts that the proposal is compatible with the character and practical and tangible aspects of the amenity of the

surrounding neighbourhood, following the addition of condition C.1(c) to mitigate additional overshadowing of the neighbouring property to the south.

To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

30 The minor alterations and additions proposed at the rear of the existing building do not impact on the existing building or its contribution to the existing (and desired future) character of the neighbourhood.

31 *“There is a presumption that development for a purpose that is classified as being permitted with consent in the zone will be compatible with the objectives of the zone. The presumption applies to development for a purpose as a type of development, not to any proposed development for a particular purpose.”* (Jeffrey at [62]). The presumption is that a funeral home, depending on how it is carried out, will be compatible with the objectives of the zone. The proposed funeral home is limited to a reception area and a viewing room. The viewing room will not be able to be seen from the street or the reception area, as the view is obstructed by a privacy screen (condition 1.C(b)). No other mortuary activities, other than a viewing, can be carried out on the site (condition I.3). The total number of patrons permitted on the premises for a viewing cannot exceed 10 at any time (condition I.2). The hours of use are limited to Monday to Sunday 8am to 9.30pm (condition I.4). Deliveries will be made via the onsite parking accessed from the rear laneway and the deliveries are concealed from view by privacy screens (condition C.1(a)). I am satisfied that the use of the proposed funeral home, as restricted by the Plan of Management and the conditions of consent, is consistent with the R2 zone objectives.

The proposal does not impact on the heritage significance of the HCA

32 The site is within a heritage conservation area and the proposal will not adversely affect the contribution the existing building makes to the collective heritage significance of the HCA, on the basis of the conclusions of the Heritage Impact Statement (Ex B, tab 4) and the agreement of the Council's Heritage Officer, Ms Shona Lindsay, in her referral response (Ex C, Annexure 6). There are no changes proposed to be made to the overall form and presentation of the existing building. The alterations and additions are modest and confined to the rear courtyard, including the addition of a carport.

Minor excavation is required for a retaining wall within the rear courtyard

- 33 I am satisfied that the excavation required for the construction of a footing for a retaining wall to accommodate the external lift are minor and do not impact on the matters identified for consideration under cl 6.3(3) of LEP 2014.

Clause 6.6 of LEP 2014

- 34 Clause 6.6 of LEP 2014 applies to the proposal because the site is within a residential zone, R2, and the proposal is for a non-residential purpose.
- 35 The existing building has a history of lawfully commenced non-residential use, pursuant to cl 6.6(3)(a) of LEP 2014, as evidenced by the most recently commenced development consent for the site, 215/2013/1 dated 25.6.13, for a change of use from a shop to a gallery at ground floor level and associated internal alterations (Ex 6, par 64; Ex 3, tab 5 and Ex 1, pars 1.1 and 2.6). It is uncontroversial that the building is currently used as a commercial premises.
- 36 The ground floor of the existing building was originally lawfully carried out with a non-residential design. The existing building is one of five commercial properties on the eastern side of Ocean Street (Ex B, tab 4, pars A1.2 and A2).
- 37 I accept the agreed evidence of the planning experts that the proposal will not adversely affect the enjoyment by an occupier of the land adjoining or in the neighbourhood of the land on which the development is situated, within the meaning of cl 6.6(3)(c)(i) of LEP 2014, for the following reasons:
- The proposal is consistent with the R2 zone objectives.
 - The proposal as amended (including the conditions of consent) is compatible with the character and practical and tangible aspects of the amenity of the surrounding neighbourhood.
 - The proposal will be operated according to the Plan of Management (Ex D) and must comply with the requirements of Pt 8 of the Public Health Regulation 2012.
 - I accept that the residents' concerns regarding the presence of dead bodies on the site genuinely affects their perception of the amenity impacts of the proposal, however, their concerns about dead bodies are in fact a fear or concern without justification in objective, observable, likely consequences (*Telstra Corp Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256; 146 LGERA 10; [2006] NSWLEC 133 at [196]).

- 38 I am satisfied that the jurisdictional thresholds pursuant to cl 6.6 of LEP 2014 are met by the proposal.

Conclusion

- 39 On the basis of all of the evidence before me, including the conditions of consent (Ex 2), I am satisfied that it is lawful and appropriate to grant consent to the development application. I am satisfied that the relevant statutory provisions have been complied with and that the concerns of the resident objectors have been properly taken into account.

Orders

- 40 The orders of the Court are:
- (1) The appeal is upheld.
 - (2) Development Application No. 203/2021/1 as amended, for the change of use and fit out of an existing building as a funeral home, at 37 Ocean Street, Woollahra, is determined by the grant of consent, subject to the conditions of consent at Annexure A.
 - (3) The exhibits, other than exhibits 1, 2, 6, A, B, C and D, are returned.

Susan O'Neill

Commissioner of the Court

Annexure A (1121427, pdf)

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