



Land and Environment Court
New South Wales

Case Name: Group Architects Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1217

Hearing Date(s): Conciliation conference on 11 April 2022

Date of Orders: 22 April 2022

Decision Date: 22 April 2022

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders that:
(1) The request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP) in relation to the development standard at clause 4.1A of the WLEP (minimum lot size for dual occupancies, manor houses, multi dwelling housing and residential flat buildings) prepared by GSA Planning dated September 2021 is upheld.
(2) The Appeal is upheld.
(3) Development application number DA399/2021, lodged on 14 September 2021, for demolition of the existing dwelling and construction of a three-storey residential flat building at 18 Boronia Road, Bellevue Hill, is approved subject to the conditions in Annexure 'A'.

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

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7
Environmental Planning and Assessment Regulation 2000, cl 55
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy No 65—Design

	Quality of Residential Apartment Development, cll 2, 28, 30, Sch 1 State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 2, cll 2.8, 2.9, 2.10, 2.11, 2.12, 4.6 Woollahra Local Environmental Plan 2014, cll 2.3, 2.7, 4.1A, 4.6, 5.21, 6.1, 6.2
Cases Cited:	Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827
Texts Cited:	Apartment Design Guide Woollahra Development Control Plan 2015
Category:	Principal judgment
Parties:	Group Architects Pty Ltd (Applicant) Woollahra Municipal Council (Respondent)
Representation:	Counsel: M Staunton (Applicant) S Patterson (Solicitor) (Respondent) Solicitors: Hartley Solicitors (Applicant) Wilshire Webb Staunton Beattie Lawyers (Respondent)
File Number(s):	2021/364653
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by Woollahra Municipal Council (Council) of Development Application No. DA399/2021/1 (DA).
- 2 The DA, with modifications incorporated into amending plans, seeks consent for demolition of the existing dwelling and construction of a three-storey residential flat building at 18 Boronia Road, Bellevue Hill (site).
- 3 The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), which was held on 11 April 2022, and at which I presided. After the conference, the parties filed

an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties.

- 4 This decision involved the Court upholding the appeal and granting development consent to the DA subject to conditions.
- 5 Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, provided it is a decision that the Court could have made in the proper exercise of its functions.
- 6 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the DA. There are certain jurisdictional requirements warranting attention before this function can be exercised. The parties outlined agreed jurisdictional matters of relevance in these proceedings, and agreed responses, in an email communication dated 13 April 2022 (jurisdictional note). Regarding jurisdiction, and noting the advice in the jurisdictional note from the parties, I am satisfied in regard to the matters listed below.

Woollahra Local Environmental Plan 2014

- 7 The Land is zoned R3 Medium Density Residential under Woollahra Local Environmental Plan 2014 (WLEP) and the proposal meets the definition of 'residential flat building', a permissible use in this zone. Demolition is permissible under cl 2.7 WLEP.
- 8 I have had regard to the R3 zone objectives, as required under cl 2.3 of WLEP.
- 9 In relation to flood planning and cl 5.21, I have had regard to Council's assessment report dated 3 March 2022, a copy of which was emailed to the Court on 13 April 2022 (Assessment Report) and having regard to it, I have considered the relevant matters at cl 5.21(3) and am satisfied in regard to the matters at cl 5.21(2) (reference: Assessment Report p 28).
- 10 In relation to acid sulfate soils and cl 6.1, the site is located within the Class 5 area as specified by WLEP's Acid Sulfate Soils Map. Council is satisfied that the proposed development is not likely to lower the water table below 1m Australian Height Datum on any land within 500m of a Class 1, 2 or 3 land

classification. I accept this advice. Accordingly, the proposed development is acceptable in respect of cl 6.1 (reference: Assessment Report p 27).

- 11 In relation to cl 6.2, the proposed development involves excavation works to accommodate the proposed basement level and swimming pool. I have considered the matters at cl 6.2(3), and having regard to the Assessment Report (p 27) accept the advice of the parties that the proposal would not result in unacceptable earthworks-related impacts.

Minimum lot size for residential flat buildings

- 12 Clause 4.1A(2) of WLEP specifies a minimum lot size of 700m² for residential flat buildings. The subject site has a lot size of 696.8m². The applicant is seeking an exception to compliance with the development standard under cl 4.6 of WLEP. A written request seeking to justify the contravention of the development standard was provided by the applicant as part of the DA (Class 1 Application filed 23 December 2021 Tab 5). I have reviewed the written request and other matters related to whether the permissive powers of cl 4.6 of WLEP should be available. I am satisfied in regard to the matters listed below, as explained.
- 13 The written request seeks to demonstrate that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case (cl 4.6(3)(a) of WLEP). It does so mindful of Preston CJ's finding in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (*Wehbe*). The written request adopts the first "*Wehbe* way", seeking to show how, otherwise, the development achieves the objective of cl 4.1A, which is cited below:

The objective of this clause is to achieve planned residential density in certain zones consistent with the desired future character of the neighbourhood.

- 14 The written request shows how the proposed development would help achieve the planned residential density and desired future neighbourhood character given the fact that it provides a height, bulk and scale that is generally consistent with that otherwise envisaged in applicable planning controls. Among other points of justification, the written request works through the desired future character provisions for the applicable Bellevue Hill South

Precinct under Woollahra Development Control Plan 2015 (WDCP Section B17) outlining how the development would successfully relate to each. On this basis, the written request adequately demonstrates the objective of cl 4.1A is achieved notwithstanding the contravention of the development standard. The written request adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case through satisfying the requirements of the first *Wehbe* way.

- 15 The written request also outlines certain environmental planning grounds seen as justifying the contravention. The planning grounds include the fact of the proposal's compliance with built form controls of itself, and difficulties with amalgamation. I am satisfied that the written request adequately demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard.
- 16 Together the above findings mean the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3) of the LEP. It follows that the test of cl 4.6(4)(a)(i) is satisfied. I now turn to the test at cl 4.6(4)(a)(ii) of the LEP.
- 17 I rely on the written request's demonstration that the proposed development is consistent with the objectives of the applicable development standard.
- 18 The zone objectives are 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..
- 19 I find the proposed development consistent with the objectives of the R3 Medium Density Residential zone in WLEP. This is because the proposed development provides medium density residential accommodation to meet varying community needs in regard to housing, consistent with the first and second zone objective. The proposed development accords with relevant

height and scale controls and (as explained in the written request) achieves the desired future character, consistent with the fourth objective. The third zone objective is not relevant.

- 20 The proposed development would be in the public interest because it is consistent with the objectives of the minimum lot size for residential flat buildings standard and the objectives for development within the R3 zone. On this basis, I am satisfied that the requirements of cl 4.6(4)(a)(ii) of the LEP are met.
- 21 I do not need the concurrence of the Planning Secretary under cl 4.6(4)(b) of WLEP but note that I have considered the matters in cl 4.6(5) in coming to my conclusions in regard to the contravention. I find nothing of significance arises in regard to those matters.
- 22 The states of satisfaction required by cl 4.6 of WLEP have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the minimum lot size for residential flat buildings control.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 23 I accept the advice of the parties that the site is not identified as a 'coastal use area', a 'coastal vulnerability area' or 'coastal wetlands and littoral rainforest area' pursuant to Chapter 2 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards). In turn cll 2.8, 2.9, 2.10, 2.11 and 2.12 of Chapter 2 of SEPP Resilience and Hazards do not apply in the circumstances.
- 24 In relation to cl 4.6 of the SEPP Resilience and Hazards, Council has considered whether the site is contaminated. I accept Council's advice that the historical use of the site for residential purposes ensures that contamination is unlikely. Clause 4.6 is satisfied (reference Assessment Report pages 7-8).

State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development

- 25 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65) applies.

- 26 The DA was accompanied by a Design Verification Statement prepared by a registered architect. An assessment of the DA, as amended, against the design quality principles in Sch 1 of SEPP 65 has been undertaken by Council's Urban Design Officer. Council is satisfied that the proposed development, as amended, is consistent with the aims of the Policy provided in cl 2(3) (reference Assessment Report pages 11 to 21). I too have taken into consideration the design quality of the proposed development (as amended), when evaluated in accordance with the design quality principles, and the Apartment Design Guide (as required by cl 28(2)). I am satisfied that the proposed development demonstrates that adequate regard has been given to the design quality principles and the objectives specified in the Apartment Design Guide for the relevant design criteria (as required by cl 30(2)).

Woollahra Development Control Plan 2015

- 27 Mindful of s 4.15(1)(a)(iii) of the EPA Act, Council advises (jurisdictional note p 8) that the proposed development is satisfactory having regard to the applicable objectives of WDCP.

Submissions

- 28 Mindful of s 4.15(1)(d) of the EPA Act, I have been advised of submissions made in regard to the proposed development. It is evident to me that these submissions have been taken into consideration, noting the amendments to the proposed development. In turn, I can note that I have also given consideration to these submissions.

Other matters

- 29 Mindful of other relevant provisions of s 4.15(1) of the EPA Act, I have taken into consideration, the likely impacts of the proposal, site suitability and the public interest.

Conclusion

- 30 With the above findings, I am satisfied that the jurisdictional pre-requisites have been met and the parties' decision is one that the Court could have made in the proper exercise of its functions. In turn, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.

31 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. The LEC Act also required me to “set out in writing the terms of the decision” (s 34(3)(b)). The final orders have this effect.

32 The Court notes:

- (1) that the Applicant has amended Development Application No DA399/2021 with the agreement of Woollahra Municipal Council (pursuant to clause 55(1) of the Environmental Planning and Assessment Regulation 2000) as the relevant consent authority to incorporate the following amended plans and additional information:

Site Plan and Roof	GA2021-027-A100	11.04.2022
Garage and Ground Floor Plans	GA2021-027-A101	11.04.2022
First Floor and Second Floor Plans	GA2021-027-A102	11.04.2022
Elevations	GA2021-027-A200	11.04.2022
Elevations	GA2021-027-A201	11.04.2022
Sections	GA2021-027-A300	11.04.2022
Landscape Concept Plan	GA2021-027-L001	11.04.2022
Specification Plant List	GA2021-027-L002	11.04.2022

Landscaping Details	GA2021-027-L003	11.04.2022
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- Arboricultural Impact Assessment, Revision A, prepared by Graham Brooks dated 21 March 2021.
- Letter from PDC Consultants dated 23 March 2022.
- Drawing 1679 Details prepared by GeoStrata dated 23 May 2021 (“Amended Development Application”).

(2) that the Applicant has filed the Amended Development Application with the Court on 12 April 2022.

(3) that the Amended Development Application has been lodged on the NSW planning portal on 13 April 2022, portal reference number PEH-1077. 3

33 The Court orders that:

(1) The request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP) in relation to the development standard at clause 4.1A of the WLEP (minimum lot size for dual occupancies, manor houses, multi dwelling housing and residential flat buildings) prepared by GSA Planning dated September 2021 is upheld.

(2) The Appeal is upheld.

(3) Development application number DA399/2021, lodged on 14 September 2021, for demolition of the existing dwelling and construction of a three-storey residential flat building at 18 Boronia Road, Bellevue Hill, is approved subject to the conditions in Annexure ‘A’.

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P Walsh

Commissioner of the Court

(Annexure A) (706281, pdf)

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