



Land and Environment Court New South Wales

Medium Neutral Citation:

Halepa Holdings Pty Limited v Woollahra Municipal Council [2022] NSWLEC 1237

Hearing dates:

Conciliation conference on 2 May 2022

Date of orders:

17 May 2022

Decision date:

17 May 2022

Jurisdiction:

Class 1

Before:

Walsh C

Decision:

The Court orders that:

- (1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of the development application pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 in a sum as agreed or assessed.
- (2) The Applicant's amended written request under clause 4.6 of the Woollahra Local Environmental Plan 2014 (LEP), prepared by Brett Daintry Associates dated 29 April 2022, seeking a variation of the development standard for height under clause 4.3 of the LEP, is upheld.
- (3) The appeal is upheld.
- (4) Development Application DA449/2020/1, for the demolition of an existing terrace and the construction of a new 5 storey shop top development at 14 Bay Street, Double Bay is approved subject to the conditions at 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, 8.15

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, Sch 1, cl
28, 30

State Environmental Planning Policy (Resilience and
Hazards) 2021 s 4.6

Sydney Regional Environmental Plan (Biodiversity and
Conservation) 2021

Woollahra Local Environmental Plan 2014, cl 2.7, 4.3, 4.4,
4.6, 5.21, 6.1, 6.2

Cases Cited:

Baron Corporation Pty Limited v Council of the City of
Sydney (2019) 243 LGERA 338; [2019] NSWLEC 61
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007]
NSWLEC 827

Texts Cited:

NSW Department of Planning and Environment, Apartment
Design Guide, (July 2015)

Woollahra Development Control Plan 2015

Category:

Principal judgment

Parties:

Halepa Holdings Pty Limited (Applicant)

Woollahra Municipal Council (Respondent)

Representation:

Counsel:

J Smith (Applicant)

S Puckeridge (Solicitor) (Respondent)

Solicitors:

Sparke Helmore Lawyers (Applicant)

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File Number(s):

2021/282845

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. DA449/2020/1 (DA).
- 2 The DA, with modifications incorporated into amending plans, seeks consent for demolition of an existing terrace building and construction of a shop top housing development at 14 Bay Street, Double Bay (site).

The matter was initially listed before me as a contested hearing on 2 May 2022 and a site inspection was undertaken as a precursor to the hearing. During this site inspection there was the opportunity to hear from an objector. The submissions of this objector arise later.

- 4 Soon after the commencement of the contested hearing in-Court proceedings, the parties advised that they had reached an agreement and that they made an application that the hearing be adjourned, and the matter be listed for conciliation under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act). In turn, the Court arranged a conciliation conference under these provisions which was also held on 2 May 2022, and at which I was delegated to preside. At the conference, the parties confirmed an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties.
- 5 This decision involved the Court upholding the appeal and granting development consent to the DA subject to conditions.
- 6 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.
- 7 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 a document entitled "Jurisdictional Statement" handed to the Court on 2 May 2022 (jurisdictional statement). Regarding jurisdiction and noting the advice in the jurisdictional statement from the parties, I am satisfied in regard to the matters listed below.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 8 In relation to cl 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021, I accept the agreed advice of the parties that the historical use of the site does not include uses otherwise triggering a site investigation process. No further detail site investigations are required and cl 4.6 is satisfied (reference Class 1 Application Tab 08 Heritage Impact Statement and Demolition Report which details the site history).

Sydney Regional Environmental Plan (Biodiversity and Conservation) 2021

- 9 I accept the advice of the parties that the land is within the Sydney Harbour catchment but is outside the Foreshores and Waterways Area and therefore there are no specific matters for consideration.

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

State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65) applies. 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 both the applicant's architect and Council's urban design specialists. 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)). Here I am mindful, generally, of the findings of the urban design and planning experts in their joint expert report filed with the Court on 26 April 2022. There is discussion on some particular design points when a contravention of a development standard under Woollahra Local Environmental Plan 2014 (WLEP) is considered below.

Woollahra Local Environmental Plan 2014

- 11 The site is zoned B2 Local Centre under WLEP, and the proposal is a permissible use in this zone. Demolition is permissible under cl 2.7.
- 12 The proposal contravenes the maximum height of building control under cl 4.3. However, the applicant is seeking approval, notwithstanding this contravention, under the relevant provisions of cl 4.6. I attend to this issue separately below.
- 13 The proposal complies with the floor space ratio standard provided at cl 4.4.
- 14 In relation to flood planning and cl 5.21, the parties drew my attention to the Flood Management Report prepared by Tonkin, dated 26 August 2020, located at Tab 4 of the Class 1 Application filed 5 October 2021. I was also advised that Council's flood planning officer has formed the view that the requirements of cl 5.21 are met subject to the imposition of proposed Condition C.13. Having been so informed, I am satisfied that the proposal, including with proposed conditions, meets the requirements of cl 5.21(2). In coming to this position of satisfaction, I have considered the matters listed at cl 5.21(3).
- 15 In relation to acid sulfate soils and cl 6.1, I am advised that the site is located partly within Class 5 and partly within Class 2 land as specified by WLEP's Acid Sulfate Soils Map. A Preliminary Acid Sulfate Soil Assessment and Acid Sulfate Soil Management Plan has been prepared by Douglas and Partners (dated 30 September 2021), and provided to the consent authority in accordance with the requirements of cl 6.1(3). This plan is appropriately referenced in proposed consent conditions.
- 16 In relation to cl 6.2, the proposed development involves minor excavation works to accommodate a new lift shaft. I note the proposal has been found to be satisfactory on this front by Council's Technical Services Engineer, subject to the agreed conditions of

consent (in particular C.4 'Geotechnical and Hydrogeological Design, Certification and Monitoring'). I have considered the matters at cl 6.2(3) and find no reason to disagree with these findings.

Maximum building height contravention

17 Clause 4.3 specifies a maximum height of buildings development standard of 14.7m for the site, which is contravened by the proposal. The applicant is seeking an exception to compliance with the development standard under cl 4.6. The parties are satisfied the proposal warrants approval notwithstanding this contravention and that the pathway provided under cl 4.6 should be used in the circumstances. A request seeking to justify the contravention of the development standard was provided on behalf of the applicant in a letter from Daintry Associates and dated 29 April 2022 (written request). The written request describes three elements of the proposed building as contravening the height of buildings standard (recognising the site gradient), as follows:

- (1) Top of a steel framed pergola of Apartment 3.01 to Bay Street would have a height of buildings of 16.29m, a maximum variation of 1.59m (or 10.82%).
- (2) Top of the parapet above Apartment 3.01 to Bay Street having a height of buildings of 16.58m, a maximum variation of 1.88m (or 12.79%).
- (3) Top of the roof of the western wing of the building having a height of buildings of 16.32m, a maximum variation of 1.62m (or 11.02%).

18 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.

Whether compliance with the development standard is unreasonable and unnecessary

19 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 argues the first "*Wehbe* way" (among others), seeking to show how, otherwise, the development achieves the objectives of cl 4.3, which are cited below:

- (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.

20 I accept the written request's argument that the proposal assists in achieving the first height of buildings objective in that it would be generally consistent in height with other existing buildings in the site vicinity and the recently approved adjacent development (294 New South Head Road and 2-10 Bay Street, Double Bay). As such, the written request shows that the proposal would help in the establishment of building heights

consistent with the desired future character of the neighbourhood. I also agree with the written request that the proposal in its setting, and in particular the separation provided by Brooklyn Lane, provides for an effective and appropriate transition in scale between the B2 and R3 zones further west. I agree that this acts as a means of protecting local amenity, as does the design's distribution of floor area to the centre and eastern portion of the site.

- 21 The written request effectively shows that the proposal would minimise the loss of solar access to existing buildings and open space through reference to the accompanying shadow diagrams. Emphasis is also given to the separation distance provided by Brooklyn Lane and the lowered roof form proposed to the western portion of the site.
- 22 The fourth objective is concerned with minimising impacts on nearby properties, with three factors nominated. In relation to disruption of views, the property of immediate concern was Unit 4.1 (located at levels 4 and 5 of) No.16-22 Bay Street. This property adjoins the site to the north and thus the view disruption would be to the south and across the site (from roof terrace). The owner of this property made oral submissions during the site inspection prior to the s 34 conciliation conference listing for this matter, objecting to the disruption of views. The written request provides a view loss analysis arguing effectively that there are no views across the side boundary of the subject site of determinative significance. There would be an impact on the general outlook from Unit 4.1. However, I accept the written request's arguments that the view disruption would be minimised given the relatively low value of the particular view lost and design details, such as the offsetting of the terrace on the upper level of proposed unit 3.01, which minimises this loss. There is no effect on a limited Sydney Harbour view available from this property.
- 23 In relation to loss of privacy, the written request successfully shows how this impact is minimised through use of design features directly aimed at effecting both acoustic and visual privacy across the side boundaries (recessive balconies with blade walls, translucent glass walls). I agree that the distance mitigation available from the intervening road reservations are effective in regard to east and western neighbours.
- 24 In relation to overshadowing impacts, the written request indicates that there is very limited additional overshadowing, referencing the shadow diagrams accompanying the application. I accept the argument that this result is unavoidable given the density of development permitted in the Double Bay town centre, but also noting the reference to the lower and recessive built form at the western end of the site, with taller elements set back from the side boundaries. I also note here that the written request is in general alignment with the findings of Joint Expert Report prepared by the planner and urban design specialists appointed by the parties (filed 26 April 2022 p 3).
- 25 The final point in the fourth objective to the height of buildings control at cl 4.3 of the WLEP is concerned with minimising visual intrusion impacts of new development. It is fair to say that this was the matter of greatest concern in regard to the oral submissions made by the owner of Unit 4.1 of No.16-22 Bay Street. According to the objector, the

key impact would be an overbearing visual presence of the proposal, to the south, when one was seated or standing on the western outdoor terrace of this adjoining property. The Court had some opportunity to physically appreciate and thus understand this concern as this area was attended during the site inspection. As things stand, Unit 4.1 has considerable hedging along both the (east-west) common boundary and, in a perpendicular direction, along the Brooklyn Lane boundary (north-south). The proposal would be around the height of the existing tall east-west hedge for a 6m setback to Brooklyn Lane (although there would be a considerably lesser apparent distance when one is experiencing the roof terrace area of Unit 4.1 due to Unit 4.1's own setback and the thick, although less tall, hedge along Brooklyn Lane boundary). From the 6m offset point along the common boundary, and for much of the current open area of the western terrace, the proposed new building massing would increase more or less one level, to well above the hedge (nearing 3m in additional height, albeit depending on how recent the pruning of the hedge). It was obvious to me that this visual bulk would bring an impact of some significance to the enjoyment of this western terrace space, with the owner of Unit 4.1 noting that the aforementioned hedging was all provided within his property with the apparent intention of assisting in creating an amenable space there.

- 26 The written request accepts that the occupants of Unit 4.1 would experience an increase in visual bulk and scale from the proposal. The principal arguments raised to suggest the proposal would nonetheless be consistent with the objective of minimising visual intrusion impacts were that (written request p 15-16):

“...any building consistent with the existing and desired future character under the LEP and any reasonable development of the site would likely have a similar impacts.

The rear (western portion) of the proposed roof is splayed to the west to reduce any visual intrusion to the south and south west from the immediately adjoining apartments. The wall height of the façade to Brooklyn Lane is compliant with the HOB.

The side walls at the rear are recessive, setback from the boundary.

...

The impacts of the proposed development in terms of visual intrusion, are minimised as a result of the proposal's compliant GFA distributed where it minimises such intrusion. The gap in the two tower elements of the proposal minimises visual intrusion upon Apartment 5.1 at 16-22 Bay Street.”

- 27 I find that the written request's arguments are successful in demonstrating that the proposal would be consistent with the objective of minimising visual intrusion impacts on neighbours. There are two overlapping points of reasoning for my conclusion. The first part of my reasoning is concerned with local character. The required minimising of impacts needs to occur while a proposal also attends to the various other planning objectives and controls which apply in the circumstances. In this instance, the zone objectives are concerned (among other things) with ensuring that development is of a height and scale that achieves the desired future character of the neighbourhood. The written request is correct that development of the general form of the proposal is

consistent with the existing and desired future character. There are many other examples of contraventions of building height standards in this locality which are itemised in the written request. But the most apposite example is the tall building form within 16-22 Bay Street itself, already visible, and quite adjacent, when sitting or standing on the western terrace of Unit 4.1. The second part of my reasoning is concerned with the scale of impact. I agree with the written request that given the site setting (in the midst of Double Bay centre) with other tall building elements in the surrounds existing or proposed, and with the other amenable features of this terrace space remaining (eg relating to privacy), the extent of visual intrusion impact would be on the lesser side of the scale. The written request has demonstrated that the fourth of the height of buildings standard objectives is achieved notwithstanding the contravention.

- 28 The written request also demonstrates that the amenity of the public domain is protected by providing public views of the harbour and surrounding areas. This is by demonstrating that public domain views to the harbour and surrounding areas views will not be impeded.
- 29 The written request demonstrates that despite the contravention, the proposal achieves the objectives of the height of buildings development standard. Through the first *Wehbe* way, this has demonstrated that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case.

Whether sufficient environmental planning grounds

- 30 The written request also outlines certain environmental planning grounds seen as justifying the contravention. Through a detailed examination of context, the written request relates the proposal to other existing and proposed development in the site vicinity, demonstrating the regularity of contravention of this height control and that the proposal would not be as tall as much of the surrounding development. The written request also shows how the proposal has sought to provide for a reasonable balancing of gross floor area and building massing, noting that the proposal's careful distribution of massing to minimise impact. These grounds are sufficient to justify the contravention.
- 31 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 WLEP. 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 WLEP.

Whether in the public interest because of consistency with development standard and zone objectives

- 32 I rely on the written request's demonstration that the proposed development is consistent with the objectives of the applicable development standard.
- 33 The zone objectives are as follows:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To attract new business and commercial opportunities.
- To provide active ground floor uses to create vibrant centres.
- To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

- 34 I find the proposed development consistent with the objectives of the R3 Medium Density Residential zone in WLEP. The proposal would directly add to the range of retail and/or business uses, and assist in attracting new business and commercial opportunities through provision of floor space for this purpose, at the same time encouraging employment opportunities. The locality is accessible and provision of a mixed use development in this setting would therefore assist both in maximising public transport patronage and encouraging walking and cycling. The proposed layout provides for active ground floor uses which can assist in creating vibrant centres. Based on my conclusions in regard to the building height objectives and the agreement of the experts in regard to this matter, I find that the proposal would provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
- 35 The proposed development would be in the public interest because it is consistent with the objectives of the height of buildings standard and the objectives for development within the B2 zone. On this basis, I am satisfied that the requirements of cl 4.6(4)(a)(ii) of WLEP are met.
- 36 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.
- 37 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 height of buildings development standard.

Other provisions of s 4.15(1) of the EPA Act

- 38 Section 4.15(1) requires a consent authority to take into consideration certain other matters as relevant. Woollahra Development Control Plan 2015 was considered in the expert report referenced above, in particular Chapter D5 Double Bay Centre. I have considered the provisions relevantly and in turn believe the requirements of s 4.15(1)(a) (iii) of the EPA Act, have been met.

The parties advise the proposal was notified in accordance with requirements and objecting submissions were received in regard to the proposal. I note I also heard from one objector on site, as discussed above. I have regard to these objecting submissions in accordance with the requirement of s 4.15(1)(d)(iii) of the EPA Act.

40 I have also given attention to the likely impacts of the proposal, site suitability and the public interest, mindful of the requirements of subss 4.15(1)(b), (c) and (e) of the EPA Act.

Conclusion

41 Based on the material outlined above, I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions. It follows that I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision. I note that I have had no direct regard to the merits of the application in coming to this position, other than indicated explicitly above.

42 In coming to this position, certain amendments were made to the application originally filed. In that regard, the Court notes the following advice from the parties:

- (1) Council has agreed under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the applicant amending the DA to rely on the documents specified in Annexure B.
- (2) The applicant has lodged the amended development application, comprising the documents listed in Annexure B, on the NSW Planning Portal.
- (3) The parties have provided evidence that the amended development application has been lodged on the NSW Planning Portal to the Court.

43 The Court orders that:

- (1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendment of the development application pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 in a sum as agreed or assessed.
- (2) The Applicant's amended written request under clause 4.6 of the Woollahra Local Environmental Plan 2014 (LEP), prepared by Brett Daintry Associates dated 29 April 2022, seeking a variation of the development standard for height under clause 4.3 of the LEP, is upheld.
- (3) The appeal is upheld.
- (4) Development Application DA449/2020/1, for the demolition of an existing terrace and the construction of a new 5 storey shop top development at 14 Bay Street, Double Bay is approved subject to the conditions at Annexure A.

P Walsh

Commissioner of the Court

[Annexure A.pdf](#)

[Annexure B.pdf](#)

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Decision last updated: 17 May 2022