



Land and Environment Court New South Wales

Medium Neutral Citation:

**Bureau SRH Pty Ltd v Woollahra Municipal Council
[2022] NSWLEC 1325**

Hearing dates:

Conciliation conference on 20 June 2022

Date of orders:

23 June 2022

Decision date:

23 June 2022

Jurisdiction:

Class 1

Before:

Walsh C

Decision:

The Court orders that:

- (1) The Applicant's written request pursuant to clause 4.6 of Woollahra Local Environmental Plan 2014 prepared by GSA Planning dated June 2022 is upheld.
- (2) The appeal is upheld.
- (3) Development Application No. DA18/2022/1, to amend Development Consent No. DA206/2019, involving a change of use from an approved 6 unit apartment building to a new single dwelling and associated works at 11 - 13 Buller Street, Bellevue Hill (Lots 10 and 11 in Deposited Plan 979515), is determined by the grant of consent, subject to the conditions of consent in Annexure A.

Catchwords:

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

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 4.15, 8.7
Environmental Planning and Assessment Regulation 2000, cll 55
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Resilience and Hazards) 2021, cl 4.6
Woollahra Local Environmental Plan 2014, cll 4.3, 4.6, 6.1, 6.2

Cases Cited:

Initial Action Pty Ltd v Woollahra Municipal Council (2018)
236 LGERA 256; [2018] NSWLEC 118
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007]
NSWLEC 827
Woollahra Municipal Council v SJD DB2 Pty Limited [2020]
NSWLEC 115

Texts Cited: Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Bureau SRH Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
N Eastman (Solicitor) (Applicant)
J Ede (Solicitor) (Respondent)

Solicitors:
Jaku Legal (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2022/82344

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 Woollahra Municipal Council's refusal of Development Application No. DA 18/2022/1 (DA).
- 2 The DA, with modifications incorporated into amending plans and documents (see [39]), seeks consent for a single dwelling at 11 and 13 Buller Street, Bellevue Hill (Lots 10 and 11 in DP 979515) (site). Approval of the DA would bring about amendments to a recently approved development on the site (DA206/2019). DA206/2019 approved a six-unit apartment building.
- 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 20 June 2022, at which I presided. Following the conciliation, the parties filed an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties.
- 4 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.
- 5 This decision involved the Court upholding the appeal and granting development consent to the development application subject to conditions.

- 6 There are certain jurisdictional pre-requisites which require attention before this function can be exercised. The parties outlined jurisdictional matters of relevance in these proceedings in an “agreed statement of jurisdictional requirements” dated 20 June 2022. To assist in responding to relevant jurisdictional matters, the parties also referred me to Council’s assessment report to the Woollahra Local Planning Panel dated 19 May 2022 (Council assessment report), which was provided behind Tab 5 to Council’s bundle of documents filed 3 June 2022.
- 7 Regarding jurisdiction, and noting this advice and previous oral advice, I am satisfied in regard to the matters listed below.

Woollahra Local Environmental Plan 2014

- 8 The site is located within the R3 Medium Density Residential Zone in Woollahra Local Environmental Plan 2014 (WLEP). The development is permissible in the zone.
- 9 The proposed development would contravene the height of buildings development standard in WLEP. The contravention is considered below.
- 10 In regard to cl 6.1 and acid sulfate soils, I accept the comments from the Council assessment report (p 273) and conclude there is no requirement for an acid sulfate soils management plan in this instance.
- 11 I have also given consideration to the required matters at cl 6.2(3) in regard to earthworks. I accept the comments from the Council assessment report (p 273) in regard to cl 6.2, the conclusions of which is that given that earthworks have essentially occurred (in association with DA206/2019), there is no concern on this front with the application before me here.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 12 I accept the advice in the Council assessment report that there are no former uses of the land, or other evidence, to suggest the land is contaminated. The requirements of cl 4.6(1) of State Environmental Planning Policy (Resilience and Hazards) 2021 are satisfied.

Contravention of development standards

- 13 The applicant is seeking an exception for the contravention of the building height development standards under cl 4.6(2) of the WLEP which provides relevantly as follows:
- (2) Development consent may, subject to this clause, be granted for development even though the development would contravene a development standard imposed by this or any other environmental planning instrument...
- 14 The permissive power in cl 4.6(2) is subject to the restrictions in subcll 4.6(3)- (5):
- (3) Development consent must not be granted for development that contravenes a development standard unless the consent authority has considered a written request from the Applicant that seeks to justify the contravention of the development standard by demonstrating—

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard.

(4) Development consent must not be granted for development that contravenes a development standard unless—

(a) the consent authority is satisfied that—

(i) the Applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Planning Secretary has been obtained.

(5) In deciding whether to grant concurrence, the Planning Secretary must consider—

(a) whether contravention of the development standard raises any matter of significance for State or regional environmental planning, and

(b) the public benefit of maintaining the development standard, and

(c) any other matters required to be taken into consideration by the Planning Secretary before granting concurrence.

- 15 Thus, the Court must form two positive opinions of satisfaction under cl 4.6(4)(a) to enliven the permissive power under cl 4.6(2) to grant development consent notwithstanding a development standard contravention (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [14]).
- 16 The first opinion is in regard to a written request from the applicant seeking to justify the contravention of the development standard and, specifically, whether it has adequately addressed the two matters required to be demonstrated at cl 4.6(3). The second opinion requires me to make my own finding of satisfaction that the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objective of the zone in which the development is proposed to be carried out.
- 17 The applicant has opened the door to application of cl 4.6(2) with a written request seeking to justify the contravention. The written request was prepared by GSA Planning and is dated June 2022.
- 18 The height of buildings standard applying to the site is 9.5m. The DA would have a building height up to 12.83m, as defined under WLEP. This is measurement from the highest point of the building to the now excavated basement level immediately below.
- 19 Mindful of cl 4.6(3)(a) of WLEP, the written request initially seeks to demonstrate that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case. 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 uses the first "*Wehbe way*", seeking to show how, otherwise, the development achieves the objectives of cl 4.3 of WLEP.
- 20 I reproduce the list of objectives of cl 4.3 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.

- 21 In regard to building height objective (a), the written request refers to the evolving character of the surrounding neighbourhood, providing certain particulars of historical development approvals in the site vicinity where contraventions of the height control had been approved. The suggestion is that the approved and developed buildings create the character of the neighbourhood and that the building is consistent with this character. The written request notes the interpretation of the phrase “desired future character of the neighbourhood”, as framed in cl 4.3(a) of WLEP, in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, which the written request essentially follows. The written request also works through the objectives for the Bellevue Hill South Precinct in Part B1 of Woollahra Development Control Plan 2015 (WDCP), showing a good degree of alignment.
- 22 In regard to building height objective (b), the proposal references the height controls applying to the adjoining R2 Low Density Residential zone to the north where a maximum 9.5m building height applies, and the B1 Neighbourhood Centre zone to the south noting the building height controls of 11m and 20.5m as applying. It argues that the proposal’s presentation as, essentially, a 9.5m tall building (ie to surrounding surface level rather than to the basement level) provides an appropriate transition while clearly protecting local amenity.
- 23 In regard to building height objective (c), the written request refers to the fact that the proposal reduces the overshadowing, including to the neighbouring property to the south, when compared to the recent approval (DA206/2019) and, in that sense, minimises loss of solar access.
- 24 In regard to building height objective (d), it is demonstrated that there are no significant views or vistas available from nearby properties or public areas. It is also demonstrated that impacts in relation to loss of privacy, overshadowing and visual intrusion have been minimised. Convincing here was the drawing out of relativities with the approved residential flat building (DA206/2019) which was itself deemed acceptable.
- 25 Objective (e) is concerned with protecting the amenity of the public domain by providing public views of the harbour and surrounding areas. It is argued that there are no significant public domain views and that the moderate scale of the amenity of the public domain is protected.
- 26 I find these arguments convincing. The written request adequately demonstrates that compliance with the development standard relating to building height is unreasonable or unnecessary in the circumstances of the case through satisfying the requirements of

the first *Wehbe* way.

Sufficient environmental planning grounds

- 27 Here the written requests suggests that the contravention of the building height control is entirely “technical”, in that it is due to “the recently approved, excavated basement and not a result of any additional works”. This fact is clear enough. It is reasonable to perceive the building height control as bearing a relationship to perceived ground surface levels. The written request, with this argument, establishes that there are sufficient environmental planning grounds to justify the contravention of the development standard.
- 28 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 WLEP. It follows that the test of cl 4.6(4)(a)(i) is satisfied in regard to the height of buildings contravention.

Public interest

- 29 I now turn to the test at cl 4.6(4)(a)(ii) of WLEP, and whether 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 R3 zone.
- 30 I agree with and rely on the written request’s demonstration that the proposed development is consistent with the objectives of the applicable height of buildings standard.
- 31 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.
- 32 The proposed development provides residential accommodation within the existing medium density residential environment, meeting certain community needs, consistent with the first zone objective. The proposed development would naturally add to the variety of housing types in this environment consistent with the second objective. The third zone objective is not relevant. I am satisfied that the development is of a height which achieves the desired future character of the neighbourhood based on my analysis of the consistency of the proposal with objective (a) to cl 4.3(1) of WLEP. I am also satisfied that the development is of a scale which achieves the desired future character of the neighbourhood given that it meets the floor space ratio control.
- 33 Based on my conclusions above, the proposed development will be in the public interest because it is consistent with the objectives of the building height standard and the objectives for development within the R3 Medium Density Residential zone. On this

basis, I am satisfied that the requirements of cl 4.6(4)(a)(ii) of WLEP are met in regard to the height of buildings contravention.

Conclusion - height of buildings contravention

- 34 I do not need the concurrence of the Planning Secretary under cl 4.6(4)(b), but note that I have considered the matters in cl 4.6(5) of WLEP in coming to my conclusions in regard to the contravention and find nothing of significance arises in regard to these matters.
- 35 The states of satisfaction required by cl 4.6 of the 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 control.

Other considerations under s 4.15(1) of the EPA Act

- 36 Section 4.15(1) of the EPA Act requires a consent authority to take into consideration certain other matters as relevant:
- Mindful of subs 4.15(1)(a)(iii), I have given consideration to WDCP 2015, noting pertinent commentary in the Council assessment report.
 - I further note the advice of Council that the development application was notified in accordance with requirements. There was a single objecting submission which raised a concern in relation to the proposed driveway. The Council is satisfied that the proposal is satisfactory in relation to the proposed driveway (Council assessment report p 263). I have taken into consideration public submissions and the requirements of s 4.15(1)(d) of the EPA Act have been met.
 - 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

- 37 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.
- 38 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.
- 39 In regard to the amendments to the DA before me, the Court notes that:
- (1) Council as the relevant consent authority has agreed, under clause 55(1) of the Environmental Planning and Assessment Regulation 2000 (NSW), to the applicant amending Development Application No. DA-18/2022/1 in accordance

with the following amended plans and documents:

(a) Architectural Plans prepared by Bureau SRH:

Drawing No.	Drawing Name	Date
DA000, Rev C	Cover Page	7 June 2022
DA051, Rev C	Site Plan & Site Analysis Plan	7 June 2022
DA052, Rev B	Street Elevation	24 May 2022
DA102, Rev B	Ground Floor	24 May 2022
DA103, Rev C	First Floor	7 June 2022
DA104, Rev C	Second Floor	1 June 2022
DA105, Rev D	Roof	7 June 2022
DA200, Rev D	Elevation North - West	7 June 2022
DA201, Rev D	Elevation South - East	7 June 2022
DA300, Rev D	Sections	7 June 2022
DA400, Rev C	Shadow Diagrams – Plan June 21 st	7 June 2022
DA451, Rev C	Views From The Sun – Axo Proposed Envelope June 21 st	7 June 2022
DA500, Rev C	Area Diagrams – GFA & Landscaping	7 June 2022

DA501, Rev C	Privacy Diagrams	7 June 2022
DA502, Rev B	Envelope Diagrams Rev A Envelope	7 June 2022
DA503, Rev A	Envelope Diagrams Rev D Envelope	7 June 2022
DA550, Rev A	External Materials & Colours	7 June 2022

- (b) Schedule of amendments prepared by Bureau SRH dated 17 June 2022.
 - (c) Updated survey of 11 and 13 Buller Street, Bellevue Hill, prepared by Norton Survey Partners, Rev B dated 18 May 2022.
 - (d) Written request, pursuant to cl 4.6 of WLEP, seeking to vary the height of buildings development standard contained in cl 4.3 of WLEP, prepared by GSA Planning dated June 2022.
 - (e) BASIX Certificate No. 1269404S_02.
- (2) The amended development application has been uploaded onto the NSW planning portal.
 - (3) The Applicant has filed the amended development application with the Court.

Orders

40 The Court orders that:

- (1) The Applicant's written request pursuant to clause 4.6 of Woollahra Local Environmental Plan 2014 prepared by GSA Planning dated June 2022 is upheld.
- (2) The appeal is upheld.
- (3) Development Application No. DA18/2022/1, to amend Development Consent No. DA206/2019, involving a change of use from an approved 6 unit apartment building to a new single dwelling and associated works at 11 - 13 Buller Street, Bellevue Hill (Lots 10 and 11 in Deposited Plan 979515), is determined by the grant of consent, subject to the conditions of consent in **Annexure A**.

.....

P Walsh

Commissioner of the Court

(Annexure A) (275087, pdf)

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 23 June 2022