



Land and Environment Court
New South Wales

Case Name: Crooked River Land Holdings Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1323

Hearing Date(s): Conciliation conference on 6 and 26 May 2022; 3 and 20 June 2022.

Date of Orders: 06 July 2022

Decision Date: 6 July 2022

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development application DA554/2021 to amend DA 274/2020 at 432-440 Oxford Street, Paddington is determined by the grant of consent subject to the conditions set out in annexure “A”.

Catchwords: DEVELOPMENT APPLICATION – alterations and additions to development consent – shop top housing development – conciliation conference – agreement between parties – orders

Legislation Cited: Architects Act 2003
Environmental Planning and Assessment Act 1979, ss 4.16, 8.7
Environmental Planning and Assessment Regulation 2000, cl 3, 50, 55
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development, cl 28, 30

State Environmental Planning Policy (Resilience and Hazards) 2021, cl 4.6
Woollahra Local Environmental Plan 2014, cll 4.4, 4.6, 5.10, 5.21, 6.2

Category: Principal judgment

Parties: Crooked River Land Holdings Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Knox (Solicitor) (Applicant)
K Mortimer (Solicitor) (Respondent)

Solicitors:
Pikes & Verekers Lawyers (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2022/44705

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This class 1 appeal is brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the deemed refusal by the Woollahra Municipal Council (the Respondent) of Development Application DA554/2021/1 (the DA) seeking consent for amendments to the consent granted to DA 274/2020 (original application) at Lots 1 and 2 in DP 535418 and Lot B in DP 365605, otherwise known as 432-440 Oxford Street, Paddington (the site).
- 2 Subsequent to the filing of the Class 1 application by the Applicant, the Woollahra Local Planning Panel determined the DA by the grant of consent, and the appeal was maintained in respect of conditions of consent.
- 3 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 6 May 2022, and at which I presided.
- 4 At the conciliation conference, the parties reached an in-principle agreement as to the scope of amendments required for the parties to reach terms of a decision in the proceedings that would be acceptable to the parties, subject to

time being granted for certain amendments to the subject of the development application.

- 5 I granted the parties an adjournment to permit the preparation of amended plans and other documents. I subsequently granted further adjournments so that additional amendments agreed between the parties could be made to the proposal.
- 6 This decision involved the Court upholding the appeal pursuant to s 4.16 of the EPA Act and granting development consent to the development application subject to conditions.
- 7 A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 30 June 2022.
- 8 The parties asked me to approve their decision as set out in the s 34 agreement before the Court. In general terms, the agreement approves the development subject to amended plans that were prepared by the Applicant, and notes that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s 34 agreement.
- 9 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 power under s 4.16 of the EPA Act. In this case, there are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 10 The parties explained to me during the conference as to how the jurisdictional prerequisites have been satisfied in order to allow the Court to make the agreed orders at [35], and I am satisfied for the reasons that follow.
- 11 The site is located predominantly within the B4 Mixed Use zone pursuant to the provisions of the Woollahra Local Environmental Plan 2014 (WLEP), and partly within the R2 Low Density Residential zone, at the rear of the Site which is burdened by a right of way.

- 12 The DA seeks development consent for development in the B4 Zone, in which shop top housing and commercial premises are permitted with consent where consistent with the following objectives for development in the zone:
- To provide a mixture of compatible land uses.
 - To integrate suitable business, office, residential, retail and other development in accessible locations so as to maximise public transport patronage and encourage walking and cycling.
 - 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.
- 13 For completeness, the objectives of the R2 zone are as follows:
- 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.
- 14 I also note that the portion of the site located within the R2 zone is to provide access to the shop top housing development by way of a “road”, which is nominated as a use permitted without consent in the R2 zone, and which is to provide road access to the subject development site, and to the properties benefited by the right of way, being 442-444 Oxford Street, 11 Elizabeth Place and 22 George Street. That right of way is to be expanded into the part of the Site zoned B4 by the function of agreed condition G2.
- 15 Clause 4.4 of WLEP provides a maximum permissible floor space ratio (FSR) on the site of 1:1. The proposed FSR is 1.2:1, which is the same as that for which consent was granted in the original application. Although there is no increase in FSR sought by the DA, there is a reallocation of gross floor area amounting to an exceedance of the FSR permitted by cl 4.4, and the Applicant relies upon a written request prepared by Mr Tom Moody in accordance with cl 4.6 of the WLEP, dated 14 April 2022.

- 16 I am satisfied that compliance with the development standard is unreasonable or unnecessary, pursuant to cl 4.6(3)(a) of the WLEP, in that the objectives of the standard are achieved, notwithstanding the non-compliance for the reasons set out in the written request.
- 17 The relevant objective of cl 4.4 of the WLEP, at subcl (1)(b) is:
- for buildings in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, and Zone B4 Mixed Use—to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.
- 18 I accept the assessment contained in the written request that the proposed new terrace-style development to the rear of the subject site will demonstrate the form, bulk, scale, proportionality and materials compatible with surrounding built form while being contemporary and therefore compatible with the desired future character. Furthermore, the proposed modifications to the Oxford Street frontages of the existing buildings enhance the significance of the existing buildings.
- 19 I also accept that there are sufficient environmental planning grounds to justify the contravention of the standard, within the terms of cl 4.6(3)(b) of the WLEP, and I am satisfied, on the basis that the arrangement of GFA on the site, that the proposal respects and enhances the heritage significance of a contributory site within the Paddington Heritage conservation area (Paddington HCA), retains and conserves the contributory buildings which form part of the larger ‘Cambrian’ group and the majority of the exterior and interior character-defining elements which contribute to the buildings’ significance, and provides for a publicly-accessible communal courtyard in the middle of the subject site.
- 20 I also accept and am satisfied that the objectives of development in the B4 zone are achieved by the proposed mix of uses, the active ground floor, of a height, scale and type of development that is compatible with the existing and desired future character of the zone. Furthermore, I do not consider there to be any grounds on which the concurrence of the Secretary should not be assumed, in accordance with cl 4.6(5) of the WLEP.
- 21 As the site is located within the Paddington HCA, the provisions at cl 5.10 of the WLEP apply. On the basis of the Statement of Heritage Impact, prepared by Urbis dated 10 November 2021, the revised Heritage Impact Statement of

the same author dated 11 February 2022, and the agreement of the experts, I have considered the effect of the proposed development on the Paddington HCA and I regard the proposal, that includes the removal of unsympathetic additions, to be compatible with the heritage values of the area.

- 22 While the site is identified by the relevant map at cl 6.1(2) of the WLEP to contain Class 5 acid sulfate soils, the site is not located within 500m of a Class 1, 2, 3 or 4 land classifications.
- 23 The proposed development includes excavation that is additional to that depicted in the DA for which consent, at [2], has been granted. On the basis of the Preliminary Geotechnical Assessment prepared by EI Australia, dated 12 November 2021, and the Groundwater Take Assessment of the same author, dated 13 May 2022, the Civil Engineering Report prepared by TTW dated 11 May 2022, Bulk Earthworks Plan prepared by TTW Dwg C104 Rev P2, and agreed conditions of consent, I consider the matters at cl 6.2(3) of the WLEP to be adequately addressed.
- 24 Relatedly, as the site is identified within the flood planning area, I have considered those matters at cl 5.21(3) of the WLEP, and I am satisfied as to the matters at cl 5.21(2) on the basis of the Flood Assessment report prepared by Catchment Simulation, dated March 2020 and the On Site Rainwater Retention Volumes assessment prepared by TTW, dated 11 May 2022, that are consistent with the agreed conditions of consent.

State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65)

- 25 As the proposal is for shop top housing development, the provisions of SEPP 65 apply.
- 26 Clause 28(2) of SEPP 65 requires a consent authority to take into consideration, in addition to any other matters that are required to be, or may be, taken into consideration, the following:
 - (a) the advice (if any) obtained from the design review panel, and
 - (b) the design quality of the development when evaluated in accordance with the design quality principles, and
 - (c) the Apartment Design Guide.

- 27 Relatedly, where an application relates to residential apartment development, cl 50(1A) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation) requires a development application to be accompanied by a statement by a qualified designer, defined at cl 3 of the EPA Regulation as a person registered as an architect in accordance with the *Architects Act 2003*.
- 28 The statement must conform to the provisions of cl 50(1AB) of the EPA Regulation, which include attestations in relation to those matters for consideration at cl 28(2)(b) and (c) of SEPP 65. I am satisfied that the statement signed by Mr Brian Meyerson, dated 18 October 2021, when read in conjunction with drawings DA 70-72, is in a complying form and adequately demonstrates that the development is consistent with the design quality principles, objectives and design criteria of the Apartment Design Guide.
- 29 On the basis of the design statement prepared by Mr Meyerson, I am also of the opinion that the proposal is consistent with those standards at cl 30 that cannot be used as grounds to refuse development consent, and I consider that adequate regard has been had to the design quality principles and to the objectives specified in the Apartment Design Guide, in accordance with cl 30(2) of SEPP 65.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX)

- 30 I am satisfied that the application is accompanied by a BASIX certificate (Cert No. 1234333M), prepared by ADP Consulting dated 5 November 2021 in accordance with SEPP BASIX and the EPA Regulation.

State Environmental Planning Policy (Resilience and Hazards) 2021 (Hazards SEPP)

- 31 I accept the agreed position of the parties that as the DA seeks consent for certain amendments to the original application, the matter of remediation of land has been addressed, pursuant to cl 4.6 of the Hazards SEPP.

Conclusion

- 32 As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.

33 In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.

34 In making the orders, the Court also notes that:

- (1) Woollahra Municipal 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 274/2020, in accordance with the below documentation:

Document:	Prepared by:	Dated:
Survey Sketch	True North Survey Group	17/5/22
DA21 - Ground Floor Plan	MHNDUNION	16/5/22
DA22 – Level 1 Floor Plan	MHNDUNION	16/5/22
DA30 – Elevation North & South	MHNDUNION	31/5/22
DA31 – Elevation East & West	MHNDUNION	31/5/22
DA32 – Elevation North & South Courtyard	MHNDUNION	31/5/22
DA32 – Detailed Elevation Oxford Street	MHNDUNION	31/5/22
S34 103 – Section C	MHNDUNION	16/5/22
Acoustic Statement	E-LAB Consulting	13/5/22
Groundwater Take Assessment	EI Australia	13/5/22
Subsoil Drainage Capacity	TTW NSW PTY LTD	12/5/22

Civil Engineering Report	TTW NSW PTY LTD	11/5/22
Stormwater Letter	TTW NSW PTY LTD	11/5/22
L-01 Legend and Schedules	Jane Irwin Landscape Architecture	11/5/22
L-301 Planting Plan Ground Floor	Jane Irwin Landscape Architecture	11/5/22
Clause 4.6 Request for FSR	Tony Moody	14/4/22

- (2) The Applicant lodged the amended application on the NSW Planning Portal on 16 June 2022.
- (3) The Applicant filed the amended application with the Court on 20 June 2022.

Orders

35 The Court orders that:

- (1) The appeal is upheld.
- (2) Development application DA554/2021/1 to amend DA 274/2020 at 432-440 Oxford Street, Paddington is determined by the grant of consent subject to the conditions set out in annexure "A".

.....

T Horton

Commissioner of the Court

[Annexure A.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.