



Land and Environment Court  
New South Wales

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Case Name: Keenan v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1451

Hearing Date(s): Conciliation conference on 18 August 2022

Date of Orders: 26 August 2022

Decision Date: 26 August 2022

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders that:

(1) The clause 4.6 written request prepared by GSA Planning dated August 2022 to vary the maximum height of buildings development standard in clause 4.3 of Woollahra Local Environmental Plan 2014 is upheld.

(2) The appeal is upheld.

(3) Development Application No. DA438/2021/1 for alterations and additions to the existing building, change of use from a dual occupancy to a single dwelling, new pool and associated landscaping at 5 Linden Avenue, Woollahra, being Lots 1, 2 and Common Property in Strata Plan 16091 is approved 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 2021, s 113  
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, 5.21, 6.1, 6.2

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118; (2018) 236 LGERA 256  
Wehbe v Pittwater Council [2007] 156 LGERA 446; (2007) NSWLEC 827

Texts Cited: Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Catherine Keenan (Applicant)  
Woollahra Municipal Council (Respondent)

Representation: Solicitors:  
A Boskovitz, Boskovitz Lawyers (Applicant)  
A Kleiss, Lindsay Taylor Lawyers (Respondent)

File Number(s): 2022/211099

Publication Restriction: Nil

## 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. DA438/2021/1 (DA).
- 2 The DA seeks consent for alterations and additions to the existing building, change of use from a dual occupancy to a single dwelling, new pool and associated landscaping at 5 Linden Avenue, Woollahra, being Lots 1, 2 and Common Property in Strata Plan 16091 (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 19 August 2022, at which I presided. Prior to the conciliation, the parties had filed an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. This decision involved the Court upholding the appeal and granting development consent to the development application, as amended, subject to conditions.

- 4 With respect to amendments to the DA, the Court notes that the respondent has agreed, pursuant to s113 of the Environmental Planning and Assessment Regulation 2021, to the applicant's amendment of the DA to rely on the amended plans and documents filed with the Court and uploaded on the NSW Planning Portal on 17 August 2022, and now referenced, relevantly, at Condition A3 of Annexure A to this judgment. In turn, it is now the DA, as amended, which is before the Court.
- 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 There are certain jurisdictional pre-requisites which require attention before the function of upholding the appeal can be exercised. The parties outlined jurisdictional matters of relevance in these proceedings in an agreed statement of jurisdictional prerequisites filed on 17 August 2022.
- 7 Regarding jurisdiction, and noting this advice, I am satisfied in regard to the matters listed below.

#### **State Environmental Planning Policy (Resilience and Hazards) 2021**

- 8 I accept the advice of the parties that the site has previously been used for residential purposes and that there is no likelihood of contamination. The requirements of cl 4.6(1) are satisfied.

#### **Woollahra Local Environmental Plan 2014 (WLEP)**

- 9 The site is zoned R2 Low Density Residential under WLEP and development for the purposes of single dwelling house is permissible in the zone. I have considered the zone objectives.
- 10 The proposed development would contravene the height of buildings development standard at cl 4.3 of WLEP. The contravention is considered below.
- 11 The site is within a flood planning area within the meaning of cl 5.21 of WLEP. A Flood Review Statement dated 21 December 2020 was submitted with the DA. The parties advise me that they are satisfied that the requirements of cl 5.21 are met having regard to the Flood Review Statement, the amended plans

and the agreed conditions of consent (in particular Condition C.9 of Annexure A). I have considered the matters at cl 5.21(3) and reviewed the Flood Review Statement and factored in the provisions at proposed condition C.9. Having regard to each of these matters and the advice of the parties and noting the technical capacities of Council here, I agree with the parties that the matters at cl 5.21(2) are satisfied.

- 12 In regard to cl 6.1, the site is located in a Class 5 Acid Sulfate Soils area. While the site is within 500m of Class 3 land, I accept the advice of the parties that the proposal does not provide for earthworks which would be likely to lower the water table below 1m for the relevant adjacent land. I accept the agreement of the parties that an Acid Sulfate Soils Management Plan is not required.
- 13 I have also given consideration to the required matters at cl 6.2(3) of the WLEP in regard to earthworks. I note the advice of the parties that the Court may be satisfied that the plans do not give rise to concerns in regard cl 6.2. Jurisdictional requirements have been met.

### **Contravention of development standard**

- 14 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:

#### **4.6 Exceptions to development standards**

(1) The objectives of this clause are 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...

- 15 The permissive power in cl 4.6(2) is subject to the restrictions in subcl 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.

16 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]).

17 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.

- 18 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 August 2022.
- 19 The height of buildings standard applying to the site is 9.5m. The DA would have a building height up to 10.04m, as defined under WLEP.
- 20 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.
- 21 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.
- 22 In regard to building height objective (a), the written request refers to what it terms the "technical" nature of the non-compliance. That is to say that the dwelling predominantly complies with the standard and, when viewed from Linden Avenue, the dwelling would have a compliant building height. The contravening height is located above a lower ground floor garage and would not be readily discernible when viewed in the streetscape. The architectural form of the proposal, including the hipped roof, suggests compatibility with the desired character of the area. The arguments in the written request demonstrate that objective (a) is achieved with the proposal.

- 23 The written request argues that building height objective (b) is not applicable because the site is not near a zone boundary. I accept this argument and generally find that objective (b) is explanatory of the function of the applicable development standards in providing for the achievement of the underlying objectives relating to building height. Objective (b) is essentially achieved with the changes to the building height standards relating to zone interfaces under WLEP (see *Baron Corporation Pty Limited v Council of the City of Sydney* [2019] NSWLEC 61 at par 49).
- 24 In regard to building height objective (c), the written request refers to shadow diagrams which indicate there are no unreasonable reductions in solar access to existing buildings and open space as a result of the height contravention, and that, therefore, solar access loss is minimised to the relevant areas.
- 25 In regard to building height objective (d), it is demonstrated in the written request that because the building height generally complies with height standard and the additional height is at the downhill side of the property, view effects are very unlikely. The written request also demonstrates that there would be no effect on privacy as a consequence of the additional height. It has already been demonstrated that there would be no unreasonable consequences in terms of overshadowing. The contravention is argued to be not readily perceivable and therefore not visually intrusive. These points satisfy me that impacts relating to the matters raised in building height objective (d) have been minimised.
- 26 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 iconic views available across the site and that, given the proposal predominantly complies with the building height standard, there are not likely to be any unreasonable effects on views.
- 27 I find these arguments convincing. WLEP's building height objectives have been achieved notwithstanding the contravention. 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**

- 28 The written request suggests that the contravention of the building height control is “technical” (as discussed above), would not be visible from the streetscape and would not unreasonably affect the amenity of neighbouring properties or public domain. The written request, with these arguments, establishes that there are sufficient environmental planning grounds to justify the contravention of the development standard.
- 29 Together, the above findings mean that 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**

- 30 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 R2 zone.
- 31 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.
- 32 The zone objectives 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.
- 33 The proposed development provides residential accommodation within the existing low density residential environment, meeting certain community needs consistent with the first zone objective. The second zone objective is not relevant. In regard to the third zone objective, I am satisfied that the proposed development including the new roof form will be compatible with the character



of the area. This is because of its architectural form and consistency or near consistency with relevant building envelope standards, as apparent from the street and other areas generally. I am also satisfied that the development is compatible with the amenity of the surrounding neighbourhood given the minimal environmental effects of the proposal on neighbouring amenity. I do see the height contravention as technical in nature and that the development would be perceived as of the height and scale that achieves the desired future character of the neighbourhood.

- 34 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 R2 Low 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**

- 35 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.
- 36 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 control.

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

- 37 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 the commentary in regard to it in the statement of environmental effects accompanying the Class 1 Application to the Court, filed on 19 July 2022.
  - I note the advice of Council that the DA was notified in accordance with its requirements. There were objecting submissions. These have been drawn to my attention and I have considered the submissions made. 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**

- 38 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.
- 39 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.

## **Orders**

- 40 The Court orders that:
- (1) The clause 4.6 written request prepared by GSA Planning dated August 2022 to vary the maximum height of buildings development standard in clause 4.3 of Woollahra Local Environmental Plan 2014 is upheld.
  - (2) The appeal is upheld.
  - (3) Development Application No. DA438/2021/1 for alterations and additions to the existing building, change of use from a dual occupancy to a single dwelling, new pool and associated landscaping at 5 Linden Avenue, Woollahra, being Lots 1, 2 and Common Property in Strata Plan 16091 is approved subject to the conditions of consent in Annexure A.

.....

**P Walsh**

**Commissioner of the Court**

[Annexure A \(599913, pdf\)](#)

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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.