



Land and Environment Court
New South Wales

Case Name:	Abboud v City of Parramatta Council
Medium Neutral Citation:	[2022] NSWLEC 1540
Hearing Date(s):	Conciliation conference on 10, 23 and 31 May 2022
Date of Orders:	04 October 2022
Decision Date:	4 October 2022
Jurisdiction:	Class 1
Before:	Sheridan AC
Decision:	<p>The Court Orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development consent is granted to development application DA/250/2021, as amended, for the demolition of existing structures and construction of a boarding house comprising of 5 rooms for a maximum of 10 lodgers on the land at 7 Albion Street, Harris Park, subject to the conditions contained in Annexure A.</p>
Catchwords:	DEVELOPMENT APPEAL – boarding house — conciliation conference – agreement between the parties – orders
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979 ss 4.16, 8.7</p> <p>Environmental Planning and Assessment Regulation 2000 cl 55</p> <p>Land and Environment Court Act 1979 s 34</p> <p>Parramatta Local Environmental Plan 2011 cl 4.3, 4.4, 5.1, 5.1A, 5.10, 6.1, 6.2</p> <p>Standard Instrument (Local Environmental Plans) Amendment (Miscellaneous) Order 2021</p> <p>Standard Instrument (Local Environmental Plans) Order 2006 cl 8</p>

State Environmental Planning Policy (Affordable Rental Housing) 2009, cll 30, 30A, 30AA
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing) 2021
State Environmental Planning Policy (Resilience and Hazards) 2021 cl 4.6

Category: Principal judgment

Parties: Samira Abboud (Applicant)
Parramatta City Council (Respondent)

Representation: Counsel:
P Saab (Solicitor) (Applicant)
A Seton (Solicitor) (Respondent)

Solicitors:
Macquarie Lawyers (Applicant)
Marsdens Law Group (Respondent)

File Number(s): 2022/25553

Publication Restriction: Nil

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 refusal by Parramatta Council (the Respondent) of Development Application No. DA/250/2021 for the demolition of existing structures and construction of a single storey, with attic level, boarding house containing 6 double boarding rooms, 2 motorcycle parking spaces and 2 bicycle parking spaces and associated landscaping at 7 Albion Street, Harris Park (the Site).
- 2 The DA relates to a 284.8 m² parcel of land which is legally described as Lot 38 in DP 415 and known as 7 Albion Street Harris Park (the Site). The Site is a regular shaped allotment and has a frontage to Albion Street with rear access via Gordon Mckinnon Lane. The rear 1.3m of the site is marked for acquisition for the purposes of local road widening on the Land Acquisition Map under Parramatta Local Environmental Plan 2011 (PLEP). The Site is currently occupied by a single storey dwelling house and secondary dwelling.

- 3 The Development Application was notified by the Respondent from 9 April 2021 to 30 April 2021. A total of five (5) submissions (including a petition) were received by the Respondent. The Amended DA was not required to be renotified under the Parramatta Development Control Plan 2011 (DCP). All submissions have been considered by the Respondent and by the Court.
- 4 The Court arranged a conciliation conference under s 34(1) of the Land and Environment Court Act 1979 (LEC Act) between the parties, which commenced on site and then held at Parramatta Council offices on 10 May 2022, and at which I presided.
- 5 On 23 May 2022, the Applicant provided a further set of amended plans and reports on a without prejudice basis in response to the contentions raised by Council and in response to the discussions between the parties at the section 34 conference.
- 6 On 31 May 2022, the matter was listed for an adjourned conciliation conference. Following the adjourned conciliation conference, the Applicant provided further revised architectural plans. The amended architectural plans reduce the number of rooms to 5 rooms with a maximum of 10 lodgers, amend various elements of the built form, provide 1 on-site parking space and increase the communal open space and common room, as well as make minor resultant architectural amendments to resolve the contentions raised in the SOFAC (the Amended Proposal).
- 7 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 the Amended Proposal prepared by the Applicant, noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s 34 agreement.
- 8 The main changes between the plans as originally submitted to Council and the Amended Proposal, the subject of the s 34 agreement, are:

Ground Floor

- (1) A 1.3 metre (1300mm) setback from the western boundary (Laneway) is provided for the future council road widening plan.

- (2) A standard car space and standard motorcycle is provided to the rear of the site with access from the laneway.
- (3) The common outdoor space and associated common room is reconfigured toward the north-western corner of the site.
- (4) The configurations of Room 2, 3, 4 and 5 are not altered but are shifted in an easterly direction toward the front of the site to accommodate design changes made to the rear common room and outdoor space.
- (5) The adaptable room configuration of Room 1 is adjusted to accommodate the design changes whilst maintaining the average setback (denoted by red dotted line) between the adjoining properties No. 5 and No. 9 Albion Street.

First Floor Plan

- (1) Roof falls and levels are adjusted to match the revised plan layout on the ground floor. Revised ridge and gutter levels are marked in blue and are confined to the front and rear (east / west) components of the proposal.
- (2) The upper floor bedrooms are not amended but are shifted to the east to accommodate changes made on the ground floor.

Roof Plan

- (1) Updated ridge and gutter levels as identified on the first floor plan.

Elevations

Southern

- (1) Adjustment to the rear portion toward the lane, with new window opening for the common room, new timber fencing for the common outdoor area and new doorway entry for the shared bathroom and common room.
- (2) Adjustment to the gutter and ridge levels as consistent with the floor plans shown in blue.

Northern

- (1) Adjustment to the rear portion of the site, with new glazing to the common room and revised roof ridge level shown.
- (2) Minor adjustment to the front portion of the dwelling to adjust gutter levels in line with the revised design.

Eastern (Street)

- (1) Adjustment to the gutter and verandah roof levels. No change to the principal roof ridge level is made.

Western (Lane)

- (1) Adjustment to the gutter and ridge levels to the rear of the site.

- (2) Adjusted window opening to the rear common outdoor space comprising sliding doors and glass panels.
- (3) New 1500mm tall timber palisade fence around common outdoor space.

Sections

- (1) Changes to the lower ridge and gutter levels to match revised design.
 - (2) No design change is made to the primary roof ridge of the proposed development.
 - (3) Introduction of rear car space to the Lane.
 - (4) Introduction of 1300mm setback for future road widening.
- 9 A signed agreement and conditions of consent prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 21 June 2022.
- 10 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.

Satisfaction of Jurisdiction

- 11 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 12 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I have formed this state of satisfaction for the following reasons:
- (1) Landowners' consent was provided by the owner of the land at the time of the lodgement of the Development Application.
 - (2) The original application was notified in accordance with the Respondent Council's DCP and the submissions have been considered by the Council and the Court.

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

- (1) Under State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the Environmental Planning and Assessment Regulation 2000 (Regulation), the Amended Proposal is BASIX affected development, containing a BASIX affected building. An amended BASIX certificate has been provided to accompany the Amended Proposal which satisfies the requirement of the BASIX SEPP.

State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) and State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH)

(1) The DA was made, but not yet determined by the Court, before 26 November 2021 and due to the general savings provisions, does not apply to the DA and the provisions of State Environmental Planning Policy (Affordable Rental Housing) 2009 (SEPP ARH) apply to the proposed development. The jurisdictional requirements of SEPP ARH are satisfied as follows:

- The boarding house has 5 boarding rooms and there is at least one communal living room as required by cl 30(1)(a);
- No boarding room has a gross floor area (excluding any area used for the purposes of private kitchen or bathroom facilities) of more than 25 square metres as required by cl 30(1)(b);
- No boarding room will be occupied by more than 2 adult lodgers as required by cl 30(1)(c);
- Adequate bathroom and kitchen facilities will be available within the boarding house for the use of each lodger as required by cl 30(1)(d);
- The boarding house does not have capacity to accommodate 20 or more lodgers, meaning a boarding room for a manager is not required by cl 30(1)(e);
- The boarding house is not on land zoned primarily for commercial purposes, so cl 30(1)(g) is not applicable;
- Two bicycle spaces are provided and one motorcycle space is provided as required by cl 30(1)(h) (in addition to one car parking space);
- The boarding house has less than 12 boarding rooms and cl 30AA is therefore satisfied; and
- The parties have taken into consideration whether the design of the proposed development is compatible with the character of the local area as required by cl 30A.

State Environmental Planning Policy (Resilience and Hazards) 2021.

(1) Consideration has been given to whether the Site is contaminated as required by s 4.6(1) of State Environmental Planning Policy (Resilience and Hazards) 2021. Given the historical use of the site for residential purposes, I am satisfied from the evidence that the land is not contaminated.

Parramatta Local Environmental Plan 2011 (PLEP)

(1) The Standard Instrument (Local Environmental Plans) Amendment (Miscellaneous) Order 2021 (**Amending Order**) commenced on 26 November 2021 and relevantly omitted development for the purpose of “boarding houses” from Item 3 of the Land Use Table for Zone R2 Low Density Residential in the Standard Instrument, as well as inserted new definitions of “boarding house” and “co-living housing”.

- (2) Clause 8 of the Standard Instrument (Local Environmental Plans) Order 2006 (**Standard Instrument Order**) provides as follows:

“8 Application of amending orders

- (1) The amendments made by an amending order do not apply to or in respect of any development application that was made, but not determined, before the commencement of the amending order.”
- (3) The DA was made, but not determined by the Court, before 26 November 2021 and is saved from the Amending Order by dint of cl 8 of the Standard Instrument Order. The Amended Proposal is therefore permissible with development consent in the Zone R2 Low Density Residential under PLEP (as in force to 26 November 2021).
- (4) The parties agree and I am satisfied that the Amended Proposal is consistent with the objectives of Zone R2 Low Density Residential under PLEP.

Principal Development Standards - PLEP

- (1) The Amended Proposal does not exceed the maximum height of 6 metres shown for the Site on the Height of Buildings Map referred to in cl 4.3(2) of PLEP.
- (2) There is no maximum FSR prescribed for the Site under cl 4.4 of PLEP.

Clause 5.1A of PLEP

- (1) Part of the site is shown on the Land Reservation Acquisition Map as “Local Road Widening (R2)” in respect of the future widening of Gorgon McKinnon Lane at the rear. That land is situated in Zone R2 Low Density Residential and has not yet been acquired by the Respondent as the relevant acquisition authority specified for the land in cl 5.1 of PLEP. It follows that cl 5.1A of PLEP applies to that part of the Site.
- (2) The DA originally proposed development on the land marked on the Land Reservation Acquisition Map; however, this no longer forms part of the Amended Proposal.

Heritage - PLEP

- (1) The Site is within the Harris Park West Heritage Conservation Area (HCA) listed in Pt 2 of Sch 5 of PLEP and is located in close proximity to a number of heritage items including Item I249 to its immediate northern and southern boundaries. I am satisfied from the evidence, including the Statement of Heritage Impact prepared by Cracknell and Lonergan Architects, dated 10 February 2021 and revised on 19 October 2021, that the Amended Proposal will not have an adverse effect on the heritage significance of the HCA or adjoining item, which is a mandatory consideration under cl 5.10(4) of PLEP.

Additional Local Provisions - PLEP

- (1) The subject site is identified as being affected by Class 5 Acid Sulfate soils on the Acid Sulfate Soils Map referred to in cl 6.1 of PLEP. I am satisfied from the evidence that as only minor excavation is proposed

the Amended Proposal is not likely to lower the water table, meaning it does not require specific consent under this clause nor the submission of an acid sulfate soils management plan.

- (2) The Amended Proposal involves minor excavation requiring consent in accordance with cl 6.2(2) of PLEP. The parties agree that the Amended Proposal is acceptable having regard to the matters for consideration in cl 6.2(3) and I am satisfied that the requirement's of this clause have been met.

Disposal of proceedings

- 13 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.
- 14 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.

Notes

- 15 The Court notes

- (1) That City of Parramatta Council as the relevant consent authority, pursuant to cl 55(1) of the Environmental Planning and Assessment Regulation 2000, has consented to the Applicant amending the development application DA/250/2021 made on 31 March 2021 to rely on the documents and plans specified below:

Drawing No.	Drawing Name	Prepared by	Revision	Date
101	Ground Floor Plan	Cracknell & Lonergan	E	2 June 2022
102	First Floor Plan	Cracknell & Lonergan	E	2 June 2022

				2
103	Roof Plan	Cracknell & Lonergan	E	2 June 2022
201	Long Elevations- North & South	Cracknell & Lonergan	E	2 June 2022
202	Short Elevations (Street & Lane)	Cracknell & Lonergan	E	2 June 2022
301	Section A & Section B	Cracknell & Lonergan	E	2 June 2022
401	Areas Schedule	Cracknell & Lonergan	E	2 June 2022
501	Materials & Finishes	Cracknell &	E	2 June

	Schedule	Lonergan		2022
LPS34 21-222/1	Hardscape Plan	Conzept Landscape	E	18 May 2022
LPS34 21-222/2	Landscape Plan	Conzept Landscape	E	18 May 2022
LPS34 21-222/3	Details	Conzept Landscape	E	18 May 2022
LPS34 21-222/4	Details	Conzept Landscape	E	18 May 2022
LPS34 21-222/5	Specifications	Conzept Landscape	E	18 May 2022
SW01	Cover Sheet &	Geba Consultin	D	16 Ma

	Specifications	G		Y 2022
SW02	Erosion & Sediment Control Plan	Geba Consulting	D	16 May 2022
SW03	Site Stormwater Plan	Geba Consulting	D	16 May 2022
SW04	Detail Sheet	Geba Consulting	D	16 May 2022
1158289M_05	BASIX Certificate	Noura Al Hazzouri	-	8 June 2022

- (2) That City of Parramatta Council has uploaded the amended application on the NSW Planning Portal on 20 June 2022.
- (3) That the Applicant has subsequently filed the amended application with the Court on 21 June 2022.

Orders

16 The Court Orders that:

(1) The appeal is upheld.

(2) Development consent is granted to development application DA/250/2021, as amended, for the demolition of existing structures and construction of a boarding house comprising of 5 rooms for a maximum of 10 lodgers on the land at 7 Albion Street, Harris Park, subject to the conditions contained in Annexure A.

.....

L Sheridan

Acting Commissioner of the Court

[Annexure A \(299129, pdf\)](#)

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