



Land and Environment Court
New South Wales

Case Name: Taylor v Council of the Municipality of Woollahra

Medium Neutral Citation: [2022] NSWLEC 1658

Hearing Date(s): Conciliation conference on 9, 10 and 30 June 2022, 5, 14 and 22 July 2022, 9 August 2022, 24 October 2022 and 2, 8 and 15 November 2022

Date of Orders: 29 November 2022

Decision Date: 29 November 2022

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders:
(1) The Applicant's written request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP) seeking to justify contravention of the height of buildings standard under clause 4.3 of the WLEP has been considered and the necessary opinion of satisfaction has been formed under clause 4.6(4) of the WLEP.
(2) The appeal is upheld.
(3) Development consent is granted to Development Application Number DA 436/2020/1, as amended, for the demolition of an existing dwelling house and the construction of a new dwelling house, and swimming pool and associated works on 18 Olphert Avenue, Vaucluse, subject to the conditions of consent in Annexure A.

Catchwords: DEVELOPMENT APPEAL – residential - conciliation conference – agreement between the parties – jurisdictional prerequisite – contravention of height of building development standard – earthworks - orders

Legislation Cited:	Environmental Planning and Assessment Act 1979, Pt 4, ss 1.3, 4.16, 8.7 Environmental Planning and Assessment Regulation 2000, cl 55 Heritage Act 1977, s 139 Land and Environment Court Act 1979, ss 34, 34AA Local Land Services Act 2013, Pt 5B, s 60O State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chs 2, 10, Pt 10.3, Div 2, ss 2.7, 10.18 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6 Woollahra Local Environmental Plan 2014, cll 1.2, 2.1, 2.3, 2.7, 4.3, 4.6, 6.1, 6.2
Cases Cited:	Nicola v Waverley Council [2020] NSWLEC 1599 Wehbe v Pittwater Council [2007] NSWLEC 827; LGERA 446
Category:	Principal judgment
Parties:	Campbell Taylor (First Applicant) Sarah Curtis (Second Applicant) Council of the Municipality of Woollahra (Respondent)
Representation:	Counsel: R White (Applicant) S Patterson (Solicitor) (Respondent) Solicitors: Project Lawyers (Applicant) Wilshire Webb Staunton Beattie (Respondent)
File Number(s):	2022/44261
Publication Restriction:	Nil

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an appeal against the refusal of Development Application No. 436/2020/1 seeking development consent for the demolition of an existing single storey dwelling

house, the construction of a 2-3 storey dwelling house with flat roof form presenting 1 storey to the front and 3 storeys to the rear (the Proposed Development) at 18 Olphert Avenue Vacluse, legally described as Lot 66 DP 5139 (the Site).

- 2 The Court arranged a conciliation conference under s 34AA(2) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which has been held on 9, 10 and 30 June 2022, 5, 14 and 22 July 2022 and 9 August 2022 and 2, 8 and 15 November 2022. I have presided over the conciliation conference.
- 3 The proceedings commenced on site and the Court spent considerable time inspecting neighbouring properties and hearing from neighbour objectors, including by legal representatives and town planning experts as their representatives on site.
- 4 The neighbours made further written submissions including a legal submission on jurisdiction dated 9 June 2022 prepared by Peter Tomasetti, barrister (Legal Submission) and merits submissions prepared by Colin Biggers & Paisley Lawyers dated 9 August 2022, 14 September 2022 and 23 September 2022 which were provided to the Respondent and forwarded to the Court (Merits Submissions).
- 5 I have read and considered the written submissions and the oral submissions.
- 6 At the conciliation conference, the parties reached 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 subject to conditions.
- 7 Although a Heads of Agreement was settled between the parties on 10 June 2022, there were a number of circumstances leading to the delay in the resolution of the matter, including illness of certain expert consultants and difficulties uploading the amended Proposed Development onto the NSW Planning Portal. The parties filed an agreement pursuant to s 34 of the LEC Act (s34 Agreement) dated 16 November 2022 on 17 November 2022. I am

satisfied that the s34 Agreement is consistent with the Heads of Agreement of 10 June 2022.

- 8 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. 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.
- 9 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application.
- 10 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be the terms of cl 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP) to vary a development standard and the provisions of relevant applicable state environmental policies.
- 11 The parties explained how the jurisdictional prerequisites have been satisfied in an agreed Jurisdictional Statement which I will now address. I note that the Jurisdictional Statement prepared by the parties also addresses the objectors' legal submissions dated 9 June 2022 and I will include those where relevant in this judgment.
- 12 The Development Application was made with the consent in writing of the Applicants in these proceedings, being the registered proprietors of the site. The Applicants have standing to bring the proceedings under section 8.7(1) of the EPA Act. The development is confined to the Applicants' land, as demonstrated by the amended plans. No development is proposed on land owned by Frances and Jack Ezra and therefore their consent is not required for the making of the Development Application.
- 13 Amended plans were provided to the Court on 31 March 2022 and further amended plans were provided during the s 34AA conciliation conference. The parties agree that the Development Application, as amended, warrants development consent.

- 14 I am satisfied that the Proposed Development has been appropriately notified by the Respondent Council pursuant to the EPA Act for the following reasons:
- (1) The original development application was advertised and notified from 18 November to 2 December 2020 and was subsequently re-notified from 13 to 28 January 2021 due to the submission of a corrected site plan which documented the proposed works to the rear section of the site. The replacement application, the subject of these proceedings, was advertised and notified from 3 November to 18 November 2021. Collectively, twelve submissions were received in respect of the original, amended and replacement development application.
 - (2) The amended Revision F plans were provided to resident objectors for consideration in preparation for the s34AA conciliation and hearing listed 9 and 10 June 2022. Resident objectors made submissions on the Revision F amended plans. The Respondent was satisfied that amended Revision H plans did not need to be notified to residents. Following further conferencing between the respective experts for the parties, further amendments were made resulting in the production of Revision J plans. The Respondent is satisfied that the amended Revision J plans do not need to be notified to residents. The various amendments to the plans have been the subject of extensive conferencing between the respective experts, taking into account, amongst other considerations, the issues raised by the objectors at the s 34 conciliation conference together with the issues raised in the Merits Submissions. The Respondent has also provided the Court with a further submission letter dated 17 November 2022 and the Respondent advises the Court that the parties' experts do not consider that any amendments to the plans are required in response to the submission.
 - (3) All submissions made by, and on behalf of, resident objectors have been considered by the Respondent and by the Court, acting in its capacity as the consent authority.
 - (4) The Legal Submission and the Merit Submissions assert that the plans contain inconsistencies and inaccuracies. Any such inaccuracies have been addressed by the Revision J plans together with the conditions of consent. I am satisfied that it is clear from the amended plans what development is being applied for.
- 15 The site is zoned R2 Low Density Residential pursuant to WLEP and the Proposed Development is permissible with consent within the R2 zone. The Proposed Development is consistent with the zone objectives and land use table at cll 2.1 and 2.3 of WLEP.
- 16 Clause 2.7 of WLEP requires the demolition of a building or work may be carried out only with development consent. The demolition of structures on the Site is sought as part of the Proposed Development and will be carried out in

accordance with the relevant standards, conditions of consent and demolition plan.

The contravention of the Height of Buildings development standard is justified pursuant to cl 4.6 of the WLEP.

- 17 The height of building development standard maps contained in WLEP provide for a 9.5 m height limit applicable to the Site, pursuant to cl 4.3 of WLEP. The Proposed Development contravenes the development standard and the Applicant relies on a 34 page clause 4.6 written request prepared by Brett Daintry dated 2 November 2022 (Written Request).
- 18 The Written Request addresses two height of building scenarios. The first scenario is a contravention of maximum building height ranging from 119mm to 519mm above the 9.5 m development standard, or a contravention of 5.463%. This scenario is shown in Figure 1 and is based on the building height definition in the Dictionary to the WLEP.

The second scenario is based on the assumption that the height of building contravention is as measured by the representatives of the neighbours, namely a maximum building height of 10.54 m, or a contravention of 1.04 m above the 9.5 m development standard (page 16, Written Request). Mr Daintry does not agree with the neighbour's interpretation of Ground Level (Existing) and does not agree that the height of the building contravenes the development standard by a height of 1.04 m being at a location above the eastern planter box. Mr Daintry explains that the neighbours rely upon interpolation between Reduced Levels (RLs) outside the building footprint whereas Mr Daintry relies on a surveyed spot RL beneath the existing house (page 19, Written Request). I note that the Revision J plans contain no change in RL or height of building proposed. I reproduce an extract of Plan_DA1.5 Rev J which appears at page 4 of the Written Request.

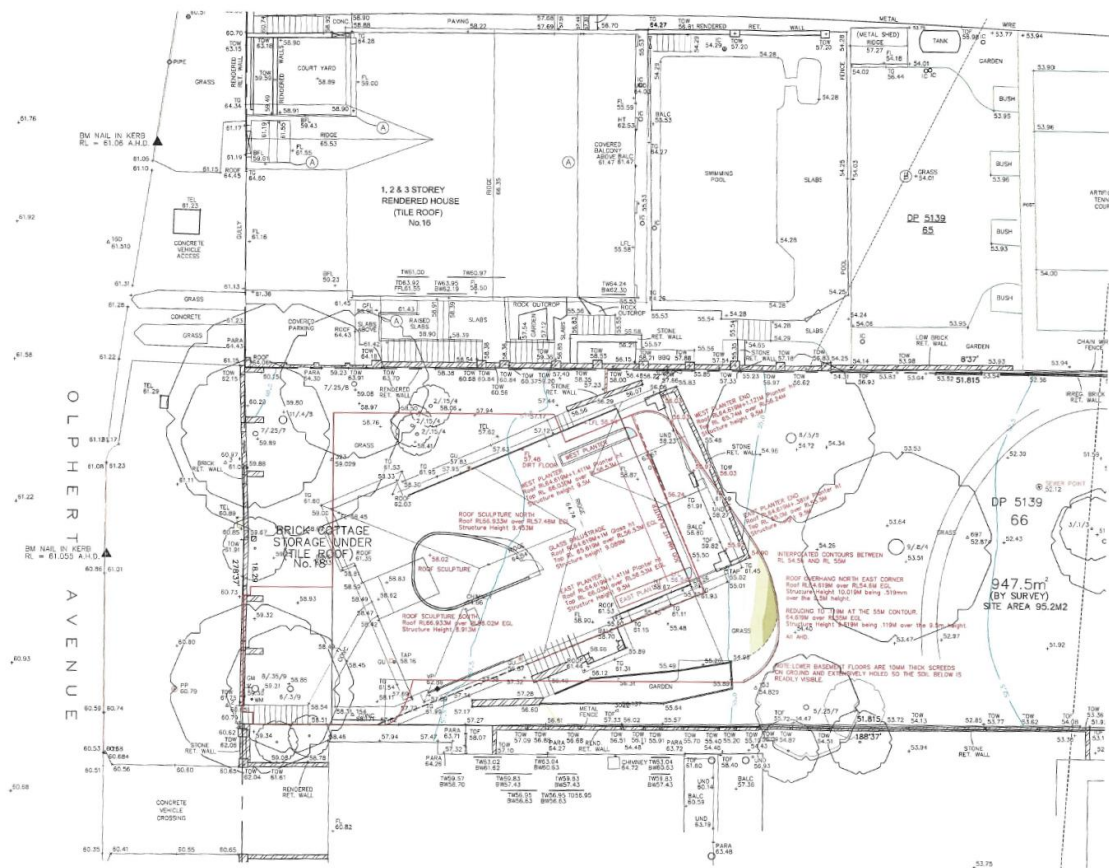


Fig 1: Plan_DA1.5 Rev J which appears at page 4 of the Written Request

- 19 Mr Daintry's opinion is that the correct maximum height of building is as shown in Figure 1 based on the definition in the Dictionary to the WELP as follows:

building height (or height of building) means—

- (a) in relation to the height of a building in metres—the vertical distance from ground level (existing) to the highest point of the building, or
- (b) in relation to the RL of a building—the vertical distance from the Australian Height Datum to the highest point of the building,

including plant and lift overruns, but excluding communication devices, antennae, satellite dishes, masts, flagpoles, chimneys, flues and the like.

- 20 Mr Daintry relies on the decision of *Nicola v Waverley Council* [2020] NSWLEC 1599 when he concludes that “[a]s ground level (existing) vertically below the eastern planter box is a known level within the subfloor (RL56.53), as measured from the survey, that level is an accurate measurement of ground level existing.” (page 5 Written Request)
- 21 I am satisfied that the first scenario is the correct height of building of the Proposed Development and agree that where the Ground Level (Existing) is

known, directly below (vertically below) a proposed building element, that level should be adopted in preference to interpolation. However, in the event that I am incorrect, and the second scenario depicts the maximum height of building of the Proposed Development, I have read and considered the detailed submission in the Written Request addressing the second scenario and I reach the same conclusion regarding the cl 4.6 jurisdictional prerequisite as with the first scenario.

- 22 The Respondent and the Court acting as consent authority has considered the cl 4.6 written request which seeks to justify the contravention of the development standard by demonstrating firstly that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and, secondly, that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3) WLEP).
- 23 I am satisfied that the Written Request has adequately addressed the matters required to be demonstrated by cl 4.6(3), namely that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the contravention of the development standard.
- 24 In relation to whether compliance with the development standard is unreasonable or unnecessary, (cl 4.6(3)(a) WLEP), the Written Request relies on the first test in the decision of *Wehbe v Pittwater Council* [2007] NSWLEC 827; LGERA 446 at [42]-[51], being that the objectives of development standard are achieved (page 10 Written Request). The objectives of the height of building development standard are set out in cl 4.3(1) WLEP as follows:
 - (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.

- 25 These objectives of the cl 4.3 development standard and how they are achieved are adequately addressed at pages 10 to 13 of the Written Request. Most relevantly is the submission in the Written Request in response to objective (d) at page 12 and I reproduce this below as follows:

“Views

The design of the dwelling enables the retention of panoramic harbour views from the neighbouring properties. Any impacts on views are considered [negligible] and relate to views across a side boundary. The element exceeding the HOB does not contribute to any loss of views.

Loss of Privacy

The design incorporates features to address acoustic and visual privacy. These include the provision of a full height wall to the eastern elevation of the POS at the living room level which terminates in alignment with the northwest corner of the existing dwelling on No. 20 Olphert Avenue, the installation of a privacy screen in the first quadrant of the POS, an additional 1m setback for the roof terrace balustrade to address lines of [sight] and addition of structure planting depth to maintain non-0trafficale balcony areas to [address] line of sight. The [element] exceeding the HOB does not contribute to any loss of privacy.

Overshadowing

The development as a whole [does] not lead to any contravention of the overshadowing controls. The element exceeding the HOB does not contribute to any overshadowing.

Visual intrusion

The design contains a curved architectural roof feature and critical ESD element of the design of the building as a whole, ensuring shade in summer and solar access in winter to the proposed house.

It is a roof overhand (eave), and does not add to the perceived visual bulk.

It is a recessive element, that adds to the articulation of the building, it is set well back from the side boundary with No.20 Olphert Avenue. It will be barely visible from the streetscape and has no impact upon the amenity of No. 16. The [element] exceeding the HOB does not contribute to any visual intrusion.”

- 26 The Written Request also adequately demonstrates that there are sufficient environmental planning grounds to justify the contravention of the development standard (Page 9 Written Request) (cl 4.6(3)(b) WLEP) including the site topography, accessibility, overland flows, context, amenity, better outcomes for neighbours and consistency with the objects of the EPA Act. Mr Daintry explains that “[r]emoving the roof element to ensure compliance with the height of building development standard would have a severe deleterious effect on

the design, the shading and solar access and be antipathetic to sections 1.3(b) & (g) of the EPA Act.” (page 7, Written Request)

27 The objects of the EPA Act relied on are as follows:

1.3 Objects of Act

The objects of this Act are as follows—

(b) to facilitate ecologically sustainable development by integrating relevant economic, environmental and social considerations in decision-making about environmental planning and assessment,

...

(g) to promote good design and amenity of the built environment

28 For the reasons set out in the Written Request, I am satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the cl 4.3 development standard and the objectives for development in the R2 zone.

29 Objectives of the R2 Low Density Residential zone are set out in the Land Use Table of the WLEP as follows:

“1 Objectives of zone

- 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.”

30 The Written Request at page 13 addresses the zone objects.

31 Lastly, in considering the factors set out in cl 4.6(5) of the WLEP, I have referred to page 15 of the Written Request. I am satisfied that the contravention of the development standard does not raise any matter of significance for State or regional environmental planning, and that there is public benefit in ensuring the proposal is consistent with the aims and objects of the Act and the LEP as detailed by the detailed Written Request providing sufficient environmental planning justification and that this outweighs the benefit of maintaining the development standard in the circumstances of this case.

- 32 The Court is satisfied that the applicant's Written Request seeking to justify the contravention of the development standard in cl 4.3 of the WLEP has adequately addressed the matters required to be demonstrated by cl 4.6(3) of the WLEP and that the proposed development would 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.
- 33 I now move on to consider the other jurisdictional prerequisites to the granting of development consent in accordance with the s34 Agreement.
- 34 Clause 6.1 of WLEP– *Acid Sulphate Soils*, does not apply to the Proposed Development, as the Site has not been identified as containing Class 5 acid sulphate soil. The proposal does not include any works below 5m Australian Height Datum and is not likely to lower the water table below 1m Australian Height Datum on any adjacent Class 1, 2, 3 or 4 land as the Geotechnical Investigations found no ground water present and further the site is not in the vicinity of any Class 1, 2, 3 or 4 land.

Earthworks, cl 6.2 of the WLEP

- 35 Earthworks are proposed and the provisions of cl 6.2 of WLEP applies to the Proposed Development. The following documents exist in connection with the Development Application which specifically consider and address how the earthworks proposed on the site can be appropriately managed:
- (1) Revision J plans, which reduce the extent of fill and excavation;
 - (2) Revised Stormwater Management Plan prepared by NB Consulting Engineers, dated 29 June 2022;
 - (3) Geotechnical Investigation Report reference 32829SCrptRev2, prepared by JK Geotechnics, dated 7 February 2020;
 - (4) Woollahra Municipal Council Referral Response by Development Engineering, dated 18 March 2021 (annexed to WLPP agenda, dated 3 March 2022);
 - (5) Woollahra Municipal Council Local Planning Panel Development Application Assessment Report, dated 3 March 2022;
 - (6) Joint Planning Expert Witness Report, filed 8 June 2022, at [2.4] *Swimming pool elevation* and [2.5] *Excessive cut and fill*;

- (7) Statement of Environmental Effects (Addendum) prepared by Daintry Associates, dated 22 June 2022; and
 - (8) Agreed conditions of consent.
- 36 In particular, cl 6.2 of WLEP was considered by Council at the WLPP Meeting on 3 March 2022, when it considered the Assessment Report. That Assessment Report addressed cl 6.2 and identified that Council's Engineer had assessed the Geotechnical Report, that the Engineer had raised no objection to the extent of excavation in terms of geotechnical and hydrogeological issues, subject to recommended conditions of consent.
- 37 The Assessment Report advised that the development proposal was considered to be acceptable with regard to cl 6.2 of WLEP, subject to the imposition of recommended conditions of consent.
- 38 Since the publication of the Assessment Report, amended plans Revision J demonstrate that less fill/excavation is proposed on the site.
- 39 Clause 6.2 of WLEP requires the consent authority to have regard to specific matters in deciding whether to grant consent for earthworks.
- 40 The Legal Submissions particularly focus on matters (a), (d) and (h) of cl 6.2 and I am satisfied that these matters are addressed below at pars [41(1)], [41(4)] and [41(8)]. In addition, the Legal Submission states, at [43], that the maximum depth of fill on the site is 2.93 m. I am satisfied that this is incorrect and note that the parties' experts in the Joint Expert Report adopted a lower figure based upon an agreed spot level provided on the survey ([2.4.1] Joint Expert Report).
- 41 I now list the cl 6.2 matters and address each of these in turn as follows:
- (1) the likely disruption of, or any detrimental effect on, drainage patterns and soil stability in the locality of the development.
 - (a) The Geotechnical Report prepared on behalf of the Applicants provides comments and recommendations on excavation, earthworks, retention, footings and hydrogeological issues on site, arising from a geotechnical investigation. Those comments and recommendations have been accepted by the Applicants. No concerns were raised by Council in connection with the drainage patterns and soil stability arising from the development. Further, an amended stormwater management plan has been prepared to reflect the Revision J plans. Both the Geotechnical

Report and the stormwater management plan are expressly identified in Condition A.3 "*Approved Plans and Supporting Documents*". The development is required to be carried out in accordance with these documents.

- (b) The conditions of consent impose ongoing obligations on the Applicants in connection with the preparation and implementation of erosion and sediment controls. These include the following conditions:
 - (i) C.6 "Soil and Water Management Plan – Submission & Approval",
 - (ii) D.11 "Erosion and Sediment Controls – Installation",
 - (iii) E.3 "Maintenance of Environmental Controls", and
 - (iv) E.7 "Erosion and Sediment Controls – Maintenance".
- (2) the effect of the development on the likely future use or redevelopment of the land.
 - (a) The Site has been historically used for residential development and will continue to be so used.
- (3) the quality of the fill or the soil to be excavated, or both.
 - (a) There is no imported fill proposed as part of the Proposed Development. The Geotechnical Report identifies the qualities of the fill/soil on the site which will be excavated. Contaminated soils are not present on the Site.
- (4) the effect of the development on the existing and likely amenity of adjoining properties.
 - (a) By reason of the amended plans Revision H and the Joint Expert Report, the parties have agreed that the development will not have an adverse impact on the existing and likely future amenity of neighbouring properties.
- (5) the source of any fill material and the destination of any excavated material.
 - (a) All fill will be VENM sourced from excavation of VENM on the same site. No imported fill will be brought onto the site. This criterion is also addressed through the imposition of Condition E.24 "*Disposal of soils and waste materials*".
- (6) the likelihood of disturbing relics.
 - (a) There is no known or reasonable cause to suspect that excavation will or is likely to result in a relic being discovered, exposed, moved, damaged, or destroyed. It is not considered reasonably necessary for the Applicants to seek or obtain an excavation permit under the s 139 of the *Heritage Act 1977* in the circumstance of this proposal. This is addressed in the Statement of Environmental Effects (Addendum) at [3.3.4]. In the

unlikely event that unexpected archaeological features are discovered, this has been addressed through the imposition of Condition E.29 “*Archaeological Features – Unexpected Findings*”.

- (7) the proximity to, and potential for adverse impacts on, any waterway, drinking water catchment or environmentally sensitive area.
 - (a) The site is not proximate to a drinking water catchment or an environmentally sensitive area, nevertheless it is proximate to Sydney Harbour. The Development Application, as amended, includes a stormwater management plan. Condition C.6 requires the submission of a soil and water management plan to the Principal Certifying Authority (PCA). Condition D.11 requires the installation of the controls identified in the plan. Condition E.7 “*Erosion and Sedimentation Controls – Maintenance*” also addresses this matter.
- (8) any appropriate measures proposed to avoid, minimise or mitigate the impacts of the development.
 - (a) In particular, the Joint Expert Report and conditions of consent address this matter. The parties’ experts have agreed that there is no issue with the extent of excavation, or the volume of excavation proposed which is generally consistent with No.16 and No.20’s basement levels (Joint Planning Expert Witness Report, filed 8 June 2022, at [2.5] *Excessive cut and fill*). The conditions of consent also impose requirements that address the impact of the development, in particular the following conditions;
 - (i) A.3 “Approved Plans and supporting documents” (adopting Geotechnical Report),
 - (ii) B.3 Establishment of Tree Protection Zone Fence,
 - (iii) C.1(b) “Modification of Details of the Development” (fill limit),
 - (iv) C.6 “Soil and water management plan”,
 - (v) C.7 “Professional engineering details”,
 - (vi) C.8 “Geotechnical and Hydrogeological Design, Certification and Monitoring”,
 - (vii) C.9 “Ground anchors”,
 - (viii) C.10 “Stormwater Management Plan”,
 - (ix) D.1 “Compliance with BCA and insurance requirements”,
 - (x) D.2 “Security Fencing, Hoarding and Overhead Protection”,
 - (xi) D.8 “Adjoining Buildings Founded on Loose Foundation Materials”,

- (xii) D.9 “Piezometers for the Monitoring of Ground Water Levels”,
- (xiii) D.11 “Erosion and Sedimentation Controls – Installation”,
- (xiv) E.1 “Compliance with BCA and Insurance Requirements”,
- (xv) E.3 “Maintenance of Environmental Controls”,
- (xvi) E.4 “Compliance with Geotechnical/Hydrogeological Monitoring Program”,
- (xvii) E.5 “Support of adjoining land and buildings”,
- (xviii) E.6 “Vibration Monitoring”,
- (xix) E.7 “Erosion and Sedimentation Controls – Maintenance”,
- (xx) E.8 “Disposal of Site Water During Construction”,
- (xxi) E.11 “Hours of Work”,
- (xxii) E.12 “Dust Mitigation”,
- (xxiii) E.24 “Disposal of Soils and Waste Materials”,
- (xxiv) E.26 “Tree Preservation”,
- (xxv) E.28 “Aboriginal Objects”, and
- (xxvi) E.29 “Archaeological Features”.

- 42 It is considered that the proposed excavations will have minimal adverse environmental or amenity impacts. It is also considered that the Proposed Development will result in an appropriate outcome given the unique nature of the characteristics of the Site and the demonstrated compliance with the relevant planning controls that apply to the Site.
- 43 These earthworks will be undertaken in accordance with the Geotechnical Investigation Report and Council’s standard conditions of consent relating to excavation and earthworks.
- 44 The extent and volume of the excavation is considered to be minor and not within the zone of influence of any adjoining buildings.
- 45 The accompanying Geotechnical Report provides a number of recommendations specific to the ground conditions. Agreed conditions of consent are included in this regard. Excavation techniques which focus on minimising disturbance resulting from noise and vibration transmission will be implemented.

- 46 I am satisfied that the Proposed Development will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.
- 47 The Revision J plans and the associated cut and fill calculations provided to Council and filed with the Court, demonstrate a further reduction in the volume of fill on the Site. The depth of fill is now in the order of 1.2 m. The volume of fill is also expressly addressed in Condition C.1 “*Modification of Details of the Development*”.
- 48 Accordingly, I am satisfied that the matters of cl 6.2 of WLEP have been adequately addressed and considered.

Other Environmental Planning Instruments

- 49 Section 2.7(1) of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP Biodiversity) provides that a permit or approval is not required under Ch 2 if tree or vegetation clearing is of a kind that is authorised under the *Local Land Services Act 2013*, section 60O or Part 5B. Section 60O of the *Local Land Services Act 2013* authorises clearing of vegetation by a development consent under Part 4 of the EPA Act. On that basis, in the present case s 2.7(1) of the SEPP Biodiversity is satisfied due to the need for development consent under Part 4 of the EPA Act.
- 50 The Site is identified as within the Sydney Harbour Catchment and the Foreshores and Waterways Boundary pursuant to Ch 10 Sydney Harbour Catchment of the SEPP Biodiversity. Section 10.18 of SEPP Biodiversity requires the consent authority to consider the matters identified in Pt 10.3, Div 2 prior to granting consent to development under Part 4 of the EPA Act. These matters include, relevantly, the foreshore and waterways scenic quality and the maintenance, protection and enhancement of views. These matters have been considered by the Respondent and by the Court, acting in its capacity as the consent authority. The Proposed Development, as amended, is responsive to these matters, particularly in the context of impacts on the existing surrounding development.
- 51 Section 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience) requires the consent authority to consider whether

land is contaminated, and if contaminated, it needs to be satisfied that the land is suitable for the purpose proposed. As outlined in the Addendum SEE prepared in support of the Proposed Development, given the development site has been historically used as residential accommodation and there is no evidence of potentially contaminating activities having occurred on site, in this case, there is no need to carry out a preliminary site investigation. I am satisfied that the land is not contaminated and the matters in s 4.6 of SEPP Resilience have been considered and addressed.

- 52 Pursuant to State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, a BASIX certificate has been submitted by the Applicants. In combination with the conditions of consent this satisfies the requirements of the instrument.

Draft Woollahra Local Environmental Local Environmental Plan 2014

- 53 A planning proposal seeking to amend cl 1.2 - *Aims of Plan* and 6.2 - *Earthworks* of WLEP was on public exhibition until 11 March 2022. The amendments are proposed to emphasise the consideration of groundwater dewatering as part of the development assessment process. Set out above in this judgment are the relevant matters relating to cl 6.2 of WLEP and I note that the Geotechnical Report confirms there was no indication of groundwater in the investigation undertaken. As such, no ground water dewatering is proposed.
- 54 I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act for the reasons given in this judgment.
- 55 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.

Notations:

- 56 The Court notes:
- (1) The applicants have amended the development application with the consent of Woollahra Municipal Council pursuant to cl 55(1) of the *Environmental Planning and Assessment Regulation 2000*. The amended application was filed with the Court.

- (2) The parties have reached an agreement under s 34(3) of the *Land and Environment Court Act 1979* as to the terms of a decision in the proceedings that would be acceptable to the parties, being a decision that the Court could have made in the proper exercise of its functions.
- (3) The amended application was uploaded to the NSW Planning Portal on 14 July 2022, 20 July 2022, 7 September 2022 and 15 November 2022, comprising the following documents which are, in the main, referred to in Condition A.3 in Annexure A (Conditions of Consent):

No.	Document	Revision/Issue	Date
1.	Plans prepared by Louise St John Kennedy:		
	i. Cover Sheet, Drawing No. DA0	J	3 November 2022
	ii. Site Boundary Fences No. DA1.2	J	3 November 2022
	iii. Plan Living + Bedroom, Drawing No. DA2	J	3 November 2022
	iv. Plan Garden + Roof, Drawing No. DA2.1	J	3 November 2022
	v. Elevations North South, Drawing No. DA3	J	3 November 2022
	vi. Elevations East West, Drawing No.	J	3 November

	DA3.1		2022
	vii. Cross Sections, Drawing No. DA4	J	3 November 2022
	viii. Longitudinal Sections, Drawing No. DA4.1	J	3 November 2022
	ix. Landscape Plan, Drawing No. DA6	J	3 November 2022
2.	Clause 4.6 Variation, prepared by Daintry Associates		2 November 2022
3.	Stormwater Management Plan, prepared by NB Consulting Engineers:		29 June 2022
	i. Stormwater general notes, Drawing No. D01	C	29 June 2022
	ii. Site/Roof drainage (concept) plan, Drawing No. D02	E	29 June 2022
	iii. Drainage details, Drawing No. D03	C	29 June 2022
4.	Arboricultural Impact	V2	5 May

	Assessment, prepared by David Shrimpton		2020
5.	Geotechnical Assessment, prepared by JK Geotechnics	32829SCrptRev2	7 February 2020
6.	NatHERS materials, prepared by Gradwell Consulting:		
	i. NatHERS Certificate		23 August 2022
	ii. BASIX Certificate		23 August 2022
	iii. NatHERS Assessor Construction Summary		23 August 2022
7.	Cut and Fill calculations, prepared by Boxall Surveyors		10 November 2022

Orders:

57 The Court orders:

- (1) The Applicant's written request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 (**WLEP**) seeking to justify contravention of the height of buildings standard under clause 4.3 of the WLEP has been considered and the necessary opinion of satisfaction has been formed under clause 4.6(4) of the WLEP.
- (2) The appeal is upheld.
- (3) Development consent is granted to Development Application Number DA 436/2020/1, as amended, for the demolition of an existing dwelling house and the construction of a new dwelling house, swimming pool and associated works on 18 Olphert Avenue, Vacluse, subject to the conditions of consent in Annexure A.

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E Espinosa

Commissioner of the Court

44261.22 Annexure A (499895, pdf)

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