



Land and Environment Court
New South Wales

Case Name: 513 Spencer Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1681

Hearing Date(s): Conciliation conference on 19 September, and 6 and 28 October 2022, final agreement filed 31 October 2022

Date of Orders: 07 December 2022

Decision Date: 7 December 2022

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:
(1) Leave is granted to the Applicant to amend DA300/2021 and rely on the amended plans and documents listed at condition A.7 of Annexure B.
(2) The appeal is upheld.
(3) Development Consent DA300/2021 is modified in the terms set out at Annexure A.
(4) Development Consent DA300/2021 as modified by the Court is set out at Annexure B.

Catchwords: MODIFICATION APPLICATION – dwelling house development – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.55, 8.9
Environmental Planning and Assessment Regulation 2021, ss 102, 113
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development

Woollahra Local Environmental Plan 2014, cll 4.3, 4.4, 5.10, 5.21, 6.1, 6.2

Texts Cited: Land and Environment Court of New South Wales, COVID-19 Pandemic Arrangements Policy (February 2022)
NSW Department of Planning, Apartment Design Guide (2015)

Category: Principal judgment

Parties: 513 Spencer Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Boskovitz (Solicitor) (Applicant)
J Ede (Solicitor) (Respondent)

Solicitors:
Boskovitz Lawyers (Applicant)
Wilshire Webb Staunton Beattie Lawyers (Respondent)

File Number(s): 2022/171982

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.9 of the *Environmental Planning and Assessment Act 1979* (EPA Act). The appeal concerns a Modification Application (the MA) seeking to modify the parent Development Consent DA300/2021 (the DA), which granted consent for the demolition of existing buildings, lot amalgamation and construction of a new residential flat building containing twelve units at 5-13 Spencer Street, Rose Bay (the site).
- 2 Consent for this parent DA was granted by Woollahra Municipal Council (the Respondent) on 24 March 2022. The MA was lodged with the Respondent on 29 April 2022. The appeal against the Respondent's deemed refusal of the MA was filed by the Applicant on 14 June 2022. On 4 August 2022, the MA was refused by the Respondent.

- 3 The MA seeks approval for alterations and additions to the residential flat building, and to modify conditions A.3, C.3, H.1 and I.3, which relate to the architectural plans and BASIX certificate, and the deletion of condition C.1 (a) and (e)
- 4 In summary, the combined effect of these modifications will result in the following changes:
 - (1) Basement level reconfiguration.
 - (2) Removal of a proposed communal open space at ground level.
 - (3) Reconfiguration of the common circulation areas generally.
 - (4) Modifications to the internal configuration of most apartments.
 - (5) Modifications to the fenestration and detailed architectural composition of the building, particularly as it addresses Spencer Street.
- 5 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 19 September, and 6 and 28 October 2022. I presided over the conciliation conference.
- 6 Consistent with the Court's COVID-19 Pandemic Arrangements Policy, published in February 2022, and at the request of the parties, the matter commenced with a site view in person and was thereafter conducted by Microsoft Teams.
- 7 During the conciliation conference, the parties reached agreement as to the terms of a decision in these proceedings that would be acceptable to the parties. The agreement involves the Court upholding the appeal and granting approval to an amended MA, subject to conditions.
- 8 Of particular note, the MA has been amended during the conciliation conference so as to resolve the contentions initially raised by the Respondent, which relate to issues of building height, bulk and scale, as well as for poor internal and external amenity.
- 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 the function under s 4.55(8) of the EPA Act to modify the existing DA.

- 10 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 11 In that regard, I am satisfied the MA has been made with the consent of the owners of the land, evidenced within the Class 1 Application accompanying this matter.
- 12 The parties agree, and I am satisfied, that pursuant to s 4.55(2)(a) of the EPA Act, the MA remains substantially the same as the parent DA. The amendments are relatively minor, there is no change to the proposed use, the external appearance of the building continues to read as two forms flanking a central recessed entry. Other than a relatively minor increase to the resultant floor space ratio (FSR) and building height, the proposal comprises the same number of units and maintains an equivalent bulk and scale when perceived from the street and from adjoining properties.
- 13 The parties agree, and I am satisfied, that the MA was notified in accordance with the Respondent's Community Participation Plan. The MA was initially notified between 18 May and 2 June 2022 and again between 22 June and 7 July 2022.
- 14 The Respondent received nine submissions in response to these two notification periods, with concerns raised including adverse impacts arising from building height, bulk and scale, unreasonable overshadowing, reduced visual and acoustic privacy, increased traffic and parking congestion, and inadequate provision of communal open space amongst other issues.
- 15 At the commencement of the conciliation conference, four resident objectors addressed the Court, each raising similar concerns for the impacts arising from the proposal and associated reduction to local amenity.
- 16 The final amended MA was notified between 6 October and 21 October 2022 and one submission received in response, maintaining concerns for the final amended proposal and raising no new concerns.

- 17 The parties agree, and I am satisfied, that the issues raised in written and oral submissions have been appropriately considered in the preparation of the final amended MA.
- 18 The parties agree, and I am satisfied, that the Woollahra Local Environmental Plan 2014 (WLEP) is a relevant environmental planning instrument. The site is zoned R3 Medium Density Residential and the proposed development - characterised as residential apartment development - is permissible with consent, and that the MA (as amended) maintains the objectives of the R3 zone.
- 19 The parties agree, and I am satisfied, that all principal development standards of the WLEP are maintained by the MA (as amended) with the exception of the following:
- (1) Clause 4.3, Height of buildings.
 - (2) Clause 4.4, Floor space ratio.
- 20 In the instance of cl 4.3, the relevant maximum height of building development standard for the site is 9.5m. The height of the final amended MA increases as a result of amendments to the structural depth of the roof slab and the addition of balustrading to facilitate access to private open space on the roof. The resultant maximum building height is 12.5m. The parties agree, and I am satisfied, that the exceedance of the maximum height of building reflected in the MA is acceptable.
- 21 Similarly, in the instance of cl 4.4, the relevant FSR development standard for the site is 1:1. The final amended MA results in a total FSR of 1.14:1 attributable to the extension of the ground level towards the rear of the site and from minor amendments to the building envelope changes, and largely arises from internal reconfiguration of the building form. The parties agree, and I am satisfied, that the exceedance of the FSR reflected in the MA is acceptable.
- 22 The parties agree, and I am satisfied, that pursuant to cl 5.10, Heritage conservation, of the WLEP, the final amended MA maintains the parent DA's consistency with the terms of cl 5.10.

- 23 The parties agree, and I am satisfied, that pursuant to cl 5.21, Flood Planning, of the WLEP, the site is not identified in the flood map. Conditions of consent have been imposed in relation to flooding in the parent DA.
- 24 The parties agree, and I am satisfied, that pursuant to cl 6.1, Acid sulfate soils, of the WLEP, the MA remains consistent with the parent DA and raises no further considerations under the terms of cl 6.1.
- 25 The parties agree, and I am satisfied, that pursuant to cl 6.2, Earthworks, of the WLEP, the final amended MA, now proposing some minor additional excavation, is consistent with the objectives of cl 6.2.
- 26 The parties agree, and I am satisfied, that State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) is an additional relevant environmental planning instrument. The parties agree the site has historically been used for residential purposes not associated with contamination and that no change of use is proposed. Consequently, I am satisfied the site is unlikely to be contaminated and further investigation is not required. Accordingly, I am satisfied the amended MA addresses the matters outlined in s 4.6 of SEPP Resilience and Hazards.
- 27 The parties agree, and I am satisfied, that the MA is subject to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. A revised BASIX certificate, dated 28 October 2022, have been submitted with the amended MA. Conditions of consent are imposed to ensure compliance with the BASIX certificate.
- 28 The parties agree, and I am satisfied, that the MA is subject to the provisions of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65). Pursuant to the provisions of the Environmental Planning and Assessment Regulation 2021 (EPA Reg), the Applicant's architect, MHNDU Architects and its nominated architect Mr Brian Meyerson (NSW registered architect 4907), has prepared a Design Verification Statement, dated 24 October 2022, fulfilling the requirements of s 102 of the EPA Reg, and confirming that the amended MA maintains the Design Quality Principles set out in SEPP 65, and stating how the objectives of Parts 3 and 4 of the Apartment Design Guide have been maintained.

29 Having considered each of the preceding jurisdictional requirements, and having formed the necessary view required by s 34(3) of the LEC Act, I find it is appropriate to make the orders agreed to by the parties and now dispose of the matter.

30 The Court notes that:

- (1) Pursuant to s 113 of the Environmental Planning and Assessment Regulation 2021, the Applicant has amended the MA with the agreement of the Respondent.
- (2) The Applicant has uploaded the amended MA to the NSW Planning Portal 27 and 28 October 2022.
- (3) The Applicant has filed the amended MA with the Court on 28 and 31 October 2022.

Orders

31 The Court orders that:

- (1) Leave is granted to the Applicant to amend DA300/2021 and rely on the amended plans and documents listed at condition A.7 of Annexure B.
- (2) The appeal is upheld.
- (3) Development Consent DA300/2021 is modified in the terms set out at Annexure A.
- (4) Development Consent DA300/2021 as modified by the Court is set out at Annexure B.

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M Pullinger

Acting Commissioner of the Court

[Annexure A \(137888, pdf\)](#)

[Annexure B \(717497, pdf\)](#)

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