



Land and Environment Court
New South Wales

Case Name: Gallon v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1002

Hearing Date(s): Conciliation conference on 7 November 2022; 5, 14 and 21 December 2022

Date of Orders: 05 January 2023

Decision Date: 5 January 2023

Jurisdiction: Class 1

Before: Dixon SC

Decision: The Court orders:
(1) The applicant is to pay the respondent's costs thrown away by the amendment of development application no. DA-237/2022 pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 in the agreed sum of \$5,000 within 21 days of these orders.
(2) The appeal is upheld.
(3) Development consent is granted to development application no. DA-237/2022 seeking the demolition of the existing dwelling, and the construction of a new residential flat building containing four units; associated swimming pool, landscaping, and site works at 144 Bellevue Road, Bellevue Hill, subject to conditions in Annexure A.

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.16, 4.17, 8.7; Sch 1 Div 2, 7(1)
Environmental Planning and Assessment Regulation 2021, ss 24, 27, 29, 37
Interpretation Act 1987, s 30A

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State Environmental Planning Policy No 55—Remediation of Land, cl 7 (repealed)
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, cl 28
Woollahra Local Environmental Plan 2014, cll 4.1A, 4.3, 4.4, 4.6, 6.1, 6.2

Texts Cited: Woollahra Community Participation Plan 2019

Category: Principal judgment

Parties: Nathan Gallon (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
V Conomos (Solicitor) (Applicant)
S Patterson (Solicitor) (Respondent)

Solicitors:
Conomos Legal (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2022/222648

Publication Restriction: Nil

JUDGMENT

- 1 This is an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of development application no. DA-237/2022 by Woollahra Municipal Council (Council). The development application, as amended, seeks consent for the demolition of the existing dwelling, and the construction of a new residential flat building containing four units; associated swimming pool, landscaping, and site works at 144 Bellevue Road, Bellevue Hill (site).
- 2 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

7 November, 5, 14 and 21 December 2022. I presided over the conciliation conference.

- 3 After 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.
- 4 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 4.16 of the EPA Act to grant consent to the development application.
- 5 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties have identified and explained how the jurisdictional prerequisites of relevance have been satisfied in a written submission accompanying the s34 agreement. In that regard, I note the parties' submissions as follows:

EPA Act

Owners' consent

- 6 The application was submitted with the consent, in writing, of the owners of the subject land.

Community Participation (Sch 1, Div 2, 7(1))

- 7 The application was notified and advertised from 6 July 2022 to 21 July 2022 in accordance with the Woollahra Community Participation Plan 2019. The Council is satisfied that the application as amended does not need to be re-notified as the amendments do not result in new or greater impacts.

Conditions

- 8 The agreement includes the imposition of conditions which are imposed under s 4.17(1) and (5).

Environmental Planning and Assessment Regulation 2021 (EPA Reg)

Documentation (s 24)

- 9 The application is accompanied by a BASIX Certificate (s 27), and a Design Statement by a qualified architect (s 29).

State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development

- 10 The Council does not have a design review panel (cl 28(1)) and has evaluated the design quality of the development in accordance with the design quality principles (cl 28(2)) and is satisfied about those matters.

State / Regional Environmental Planning Policies

- 11 State Environmental Planning Policy No 55—Remediation of Land (SEPP 55) was repealed on 1 March 2022. Its operative provisions were transferred to State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience & Hazards SEPP). Section 30A(2) of the *Interpretation Act 1987* provides: “The transfer does not affect the operation (if any) or meaning of the provision, and accordingly the provision is to be construed as if it had not been so transferred.”
- 12 Clause 7 of SEPP 55 has been transferred to s 4.6 of the Resilience & Hazards SEPP. Section 4.6 is expressed in identical terms to cl 7 of SEPP 55.
- 13 Section 4.6(1) precludes the granting of development consent unless the consent authority has considered relevantly whether the land is contaminated.
- 14 As outlined in the Statement of Environmental Effects, the historic use of the land the subject of the development application has been residential, and the Council has reviewed its historical files and confirms that the proposed use is acceptable in the context of the Resilience & Hazards SEPP.
- 15 Pursuant to State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the EPA Reg, the proposal is a BASIX affected development, containing a BASIX affected building. An updated BASIX has been prepared reflecting the updated Architectural Plans.

Woollahra Local Environmental Plan 2014 (LEP)

Permissibility

- 16 Development for the purposes of a residential flat building is permissible with consent in the R3 Medium Density Residential Zone.

Height

- 17 The application complies with the height development standard in cl 4.3 of the LEP.

Floor space ratio (FSR)

- 18 The application complies with the FSR development standard in cl 4.4 of the LEP, being a development standard of 0.65:1.

Minimum lot size

- 19 The proposed development has a lot size of 695m² which is 4.4m² short of the 700m² minimum lot size development standard in cl 4.1A of the LEP. The application was accompanied by a written request prepared by GSA Planning seeking a relaxation of this standard pursuant to cl 4.6 of the LEP.
- 20 Having read and considered the request, I am satisfied that it meets the requirements of cl 4.6(3) and (4). In that regard I accept that the shortfall in site area is negligible, and the sole objective of the standard is achieved notwithstanding the breach, and that the request identifies sufficient environmental planning grounds to justify the non-compliance.
- 21 As the proposed development is consistent with the sole objective for the standard and also with objectives of the zone in which the development is proposed to be carried out (again for the reasons articulated in the request), I find the proposal to be in the public interest. And, as there is no reason under cl 4.6(5) to preclude my approval I uphold the cl 4.6 request for variation of the standard in cl 4.1A of the LEP in this case.

Flooding

- 22 The development site is identified as being within a flood planning area, however, no objections to the approval of the development application have been raised by Council's drainage engineer subject to the recommended conditions (cl 5.21).

Acid Sulfate Soils

- 23 Clause 6.1 requires Council to consider any potential acid sulfate soil affectation. The Statement of Environmental Effects identifies that the proposal is unlikely to encounter Acid Sulfate Soils in this location and the Council does not raise any issue under cl 6.1 of the LEP.

Earthworks

- 24 The proposed development application involves excavation and a geotechnical report has been provided as part of that application and the Council is satisfied that cl 6.2 of the LEP is adequately addressed.

Conclusion

- 25 For the reasons stated I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions. Therefore, in accordance with s 34(3) of the LEC Act I now dispose of the proceedings in accordance with that decision.
- 26 The Court notes:
- (1) Woollahra Municipal Council, the respondent, as the relevant consent authority has agreed, under s 37(1) of the Environmental Planning and Assessment Regulation 2021, to the applicant amending development application no. DA-237/2022 in accordance with the following amended plans and documents:
- (a) Amended Architectural Plans (Rev K) prepared by EMK Architects dated 16 December 2022:

A0003 (Rev K)	Window Schedule and BASIX
A0008 (Rev K)	Demolition Plan
A0009 (Rev K)	Site Plan
A0101 (Rev K)	Ground Floor

A0102 (Rev K)	Level 01
A0103 (Rev K)	Level 02
A0104 (Rev K)	Level 03
A0105 (Rev K)	Roof Plan
A0201 (Rev K)	Elevations – Sheet 1
A0203 (Rev K)	Elevations – Sheet 2
A0204 (Rev K)	Elevations – Sheet 3
A0205 (Rev K)	Elevations – Sheet 4
A0301 (Rev K)	Sections Sheet 1
A0302 (Rev K)	Sections Sheet 2
A0303 (Rev K)	Sections Sheet 3
A0304 (Rev K)	Sightline Analysis

A0402 (Rev K)	Fence Elevations
A03010 (Rev K)	Pool Sections
A5001 (Rev K)	Colour Schedule

(b) Amended Stormwater Management Plans prepared by Henry & Hymas:

22B39_DA_C000-04	Stormwater Management Plans	
22B39_DA_C101-04		
22B39_DA_C102-02		21/11/2022
22B39_DA_C103-04		21/11/2022
22B39_DA_C200-03		21/11/2022
22B39_DA_C201-05		21/11/2022
22B39_DA_C250-04		21/11/2022
22B39_DA_C251-02		13/12/2022
22B39_DA_EX01-04		

(c) Amended Landscape Plans (LPS34 22 – 264 Rev.D Page Numbers 1 – 4) prepared by Conzept dated 16 December 2022.

- (d) Arboricultural Impact Assessment Report prepared by George Palmer dated 25 October 2022.
 - (e) Geotechnical Report (34836Lrpt-rev2) prepared by JK Geotechnics dated 25 October 2022.
 - (f) Queuing Analysis for Car Stackers prepared by Hemanote Traffic Consultants dated 26 October 2022.
 - (g) BASIX Certificate (No. 1292118M_02) issued by the NSW Department of Planning and Environment dated 19 December 2022.
 - (h) SEPP 65 Design Verification Statement prepared by EMK Architects dated 21 December 2022.
 - (i) SEPP 65 Principles & ADG Compliance Assessment prepared by EMK Architects dated 21 December 2022.
- (2) The applicant filed the updated architectural plans, landscape plans, stormwater plans and BASIX associated material with the Court on 21 December 2022.

27 The Court orders:

- (1) The applicant is to pay the respondent's costs thrown away by the amendment of development application no. DA-237/2022 pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* in the agreed sum of \$5,000 within 21 days of these orders.
- (2) The appeal is upheld.
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S Dixon

Senior Commissioner of the Court

Annexure A (839577,

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