



Land and Environment Court
New South Wales

Case Name:	Gallon v Woollahra Municipal Council
Medium Neutral Citation:	[2023] NSWLEC 1115
Hearing Date(s):	Conciliation conference on 1 & 2 March 2023
Date of Orders:	15 March 2023
Decision Date:	15 March 2023
Jurisdiction:	Class 1
Before:	Washington AC
Decision:	<p>The Court orders:</p> <p>(1) The cl 4.6 written request prepared by Michael Neustein of City Planning Works dated 28 February 2023 for a variation to the height of building development standard under cl 4.3 of the Woollahra Local Environmental Plan 2014 is upheld.</p> <p>(2) The appeal is upheld.</p> <p>(3) Development Consent is granted to Amended Development Application DA338/2022/1 seeking the demolition of the existing dwelling, and the construction of a multi-storey dwelling house, car lift, associated swimming pool, landscaping, and site works at 12 Tivoli Avenue, Rose Bay, subject to conditions in Annexure A.</p>
Catchwords:	DEVELOPMENT APPLICATION – conciliation conference – Clause 4.6 request – height of buildings development standard – 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 2021, s 37</p> <p>Land and Environment Court Act 1979, s 34AA</p>

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
Woollahra Local Environmental Plan 2014, cl 4.3, 4.4, 4.6, 5.10, 5.21, 6.1, 6.2, 6.4

Texts Cited: Woollahra community Participation Plan 2019

Category: Principal judgment

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

Representation: Counsel:
A Pickles SC (Applicant)
J Ede (Solicitor) (Respondent)

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

File Number(s): 2022/290273

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These Class 1 proceedings arise from the Respondent, Woollahra Municipal Council's refusal of DA 338/2022/1, which seeks consent for the demolition of an existing 2-3 storey dwelling and construction of a multi-storey dwelling house and car lift, and associated swimming pool, landscaping and site works at 12 Tivoli Avenue, Rose Bay. The applicant, Nathan Gallon, has brought these proceedings to the Court pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 2 The Court arranged a conciliation conference under s 34AA of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 1 & 2 March 2023. I presided over the conciliation conference.
- 3 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.

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 one 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. 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 and explained how the jurisdictional prerequisites have been satisfied. From this I note the following points.

- (1) The application was submitted with the written consent of the owners of the subject land, and was duly notified in accordance with the Woollahra community Participation Plan 2019.
- (2) The amended application is accompanied by a BASIX Certificate that applies to the development.
- (3) Section 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 requires the consent authority to consider whether the land is contaminated. The parties submit, and based on the information in the Statement of Environmental Effects and the Heritage Impact Statement, I accept that the historic use of the subject site has been residential with no change of use, and that the land is not likely to be contaminated.
- (4) Pursuant to the Woollahra Local Environmental Plan 2014 (WLEP), the proposed application is permissible with consent in the R2 Low Density Residential Zone.
- (5) The proposed development exceeds the development standard set for height under WLEP cl 4.3. The non-compliances are confined to the leading edges of two elements: an awning that exceeds the height standard by 2.11m, and a portion of a green roof planter which exceeds the height standard by 590mm. Both non-compliances are the result of the sloping topography of the site as well as some localised sub-floor excavation to the existing dwelling. WLEP cl 4.6(3) requires a written request which demonstrates 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 contravening the development standard. To that end, the applicant has submitted a written request prepared by City Planning Works dated 28 February 2023. Pursuant to cl 4.6 I am satisfied that:
 - (a) The written request demonstrates that compliance with the development standard is unreasonable and unnecessary because the proposal complies with the relevant objectives of both the R2 Low Density Residential Zone and the Height of Buildings development standard, notwithstanding the non-

compliance with the standard. Further, the non-compliance does not create any adverse impacts.

- (b) The written request establishes sufficient environmental planning grounds to justify contravening the development standard by demonstrating that the breach of the height control is the result of design responses to specific environmental concerns, the sloping topography of the site, and localised excavation on site. The specific environmental concerns include a reduction of heat island effects through the provision of a green roof, and minimising heat load and therefore energy use by using an awning to shade the harbour-facing glazed wall. There is no material or discernible impact from the provision of either the green roof or awning, whereas the benefits are apparent. The contravention is therefore justified by the beneficial environmental impacts on the proposed dwelling and its energy use, and the lack of resulting adverse impacts.
 - (c) The written request demonstrates that the proposal is in the public interest as it is consistent with the objectives of both the zone and the development standard.
- (6) The proposed development complies with the floor space ratio (FSR) development standard of WLEP (cl 4.4). Additionally, the development site does not contain a heritage item nor is it located within a heritage conservation area (cl 5.10), and the site is not flood prone (cl 5.21).
- (7) The site is located within 500m of class 3 and 4 land that is below 5m Australian Height Datum. Subsequently, an Acid Sulfate Soils Assessment has been provided satisfying the requirements of WLEP cl 6.1.
- (8) The proposed development application involves some excavation, triggering a requirement to consider the matters listed under WLEP cl 6.2(3). Based on the parties' submission and the geotechnical report accompanying the Class 1 application, I am satisfied that the relevant matters listed in this clause have been taken into consideration. In particular, I am satisfied that the development is not likely to disrupt, or have any detrimental effect on, drainage patterns or soil stability in the locality, nor on the structural stability of adjoining properties. Furthermore, there are no known relics on site that are likely to be disturbed, and the development is not likely to have any adverse impact on the drinking water catchment or environmental sensitive areas, including nearby Sydney Harbour.
- (9) Pursuant to WLEP cl 6.4, the land is affected by a 12m foreshore area control. The proposed rebuilding of waterway access stairs and an existing deck is permitted under cl 6.4(2)(a) and (b), and as the works constitute rebuilding of existing works, I am satisfied that the alteration or rebuilding will not have an adverse impact on the amenity or aesthetic appearance of the foreshore as required under 6.4(4).

5 For these reasons, 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.

6 As the parties' decision is one 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.

7 The Court notes:

(1) Woollahra Municipal Council, the respondent, as the relevant consent authority has agreed, under s 37 of the Environmental Planning and Assessment Regulation 2021, to the applicant amending Development Application No. DA338/2022/1 in accordance with the following amended plans and documents:

(a) Amended Architectural Plans (Rev DA01B) prepared by Collins and Turner dated 3 February 2023.

(b) Amended Landscape Plans (Rev D) prepared by TWLA dated February 2023.

(c) NatHERS and BASIX Assessment prepared by Efficient Living dated 16 February 2023.

(d) Clause 4.6 Variation Request prepared by Michael Neustein of City Planning Works dated 28 February 2023.

(2) The applicant filed the amended material with the court on 2 March 2023.

8 The Court orders:

(1) The cl 4.6 written request prepared by Michael Neustein of City Planning Works dated 28 February 2023 for a variation to the height of building development standard under cl 4.3 of the Woollahra Local Environmental Plan 2014 is upheld.

(2) The appeal is upheld.

(3) Development Consent is granted to Amended Development Application DA338/2022/1 seeking the demolition of the existing dwelling, and the construction of a multi-storey dwelling house, car lift, associated swimming pool, landscaping, and site works at 12 Tivoli Avenue, Rose Bay, subject to conditions in Annexure A.

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E Washington

Acting Commissioner of the Court

Annexure A (660261, pdf)

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