



Land and Environment Court New South Wales

Medium Neutral Citation:

**Reznikov Pty Ltd v Woollahra Municipal Council [2023]
NSWLEC 1140**

Hearing dates:

Conciliation conference held 10 and 17 March 2023, final agreement filed 17 March 2023

Date of orders:

29 March 2023

Decision date:

29 March 2023

Jurisdiction:

Class 1

Before:

Pullinger AC

Decision:

The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application DA373/2021 and rely upon the amended plans and documents referred to in condition A.4 at Annexure A.
- (2) Pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is to pay the Respondent's costs thrown away as a result of amending the Development Application as agreed or assessed.
- (3) The Applicant's written request, pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP), seeking to vary the development standard for minimum lot size as set out at clause 4.1A of the WLEP, is upheld.
- (4) The Applicant's written request, pursuant to clause 4.6 of the WLEP, seeking to vary the development standard for height of buildings as set out at clause 4.3 of the WLEP, is upheld.
- (5) The Applicant's written request, pursuant to clause 4.6 of the WLEP, seeking to vary the development standard for floor space ratio as set out at clause 4.4 of the WLEP, is upheld.
- (6) The appeal is upheld.
- (7) Consent is granted to Development Application DA373/2021 (as amended) for the substantial demolition of the existing commercial building and construction of a 5-storey residential apartment building comprising 8 units, with basement parking, and for strata subdivision at 491 New South Head Road, Double Bay, subject to the conditions of consent at Annexure A.

Catchwords:

DEVELOPMENT APPLICATION – residential apartment building – cl 4.6 written request – minimum lot size – height of buildings – floor space ratio – agreement between the

parties – orders

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.2, 8.7, 8.15
Environmental Planning and Assessment Regulation 2000, cl 55
Environmental Planning and Assessment Regulation 2021, s 29
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 10
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.119, 2.120
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development
Woollahra Local Environmental Plan 2014, cll 2.3, 4.1A, 4.3, 4.4, 4.6, 5.10, 5.21, 6.1, 6.2

Texts Cited:

NSW Department of Planning and Environment, Apartment Design Guide (July 2015)
NSW Department of Planning and Environment, Planning Circular PS 18-003, February 2018
NSW EPA, Managing Land Contamination, August 1998

Category:

Principal judgment

Parties:

Reznikov Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation:

Counsel:
A Boskovitz (Solicitor) (Applicant)
L Mulligan (Solicitor) (Respondent)

Solicitors:
Boskovitz Lawyers (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s):

2022/329091

Publication restriction:

Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application DA373/2021 (the DA) by the Woollahra Municipal Council (the Respondent). The DA sought consent for the substantial demolition of the existing commercial building and construction of a 5-storey residential apartment building comprising 8 units with basement parking, and for strata subdivision at 491 New South Head Road, Double Bay (the site).
- 2 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 10 and 17 March 2023. I presided over the conciliation conference.
- 3 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 development consent to an amended DA, subject to conditions.
- 4 Of particular note, the DA has been amended to address the reasons for refusal set out by the Respondent at the time of determination of the original DA.
- 5 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 amended DA.
- 6 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 7 In that regard, I am satisfied the DA was made with the consent of the owner of the land, evidenced within the Class 1 Application accompanying this matter.
- 8 The DA was publicly notified from 22 September to 22 October 2021. Seventeen submissions were received by the Respondent raising issues including non-compliance with minimum lot size, non-compliance with height of building control, non-compliance with floor space ratio (FSR) control, concerns for building setbacks, extent of excavation, stormwater and amenity issues more generally.
- 9 After its refusal, the Applicant amended the DA and, pursuant to s 8.2 of the EPA Act, sought a review of the determination by the Respondent. The amended DA was again publicly notified - from 3 August to 1 September 2022 - and a further five submissions

- were received by the Respondent. These submissions raised issues including amenity impacts, extent of excavation, concern for likely impacts upon existing trees, stormwater and inconsistencies with the Apartment Design Guide (ADG).
- 10 The parties agree that the final amended DA now satisfactorily resolves the matters raised in public submissions. Accordingly, I am satisfied that s 4.15(1)(d) of the EPA Act has been appropriately addressed.
- 11 The parties agree, and I am satisfied, that the Woollahra Local Environmental Plan 2014 (WLEP) is the relevant local environmental planning instrument. The site is zoned R3 Medium Density Residential, and the proposed development - characterised as a residential apartment building - is permissible with consent.
- 12 The parties agree, and I am satisfied, that pursuant to cl 2.3 of the WLEP, the proposed development is consistent with the R3 Medium Density Residential zone objectives, which include providing for the housing needs of the community within a medium density residential environment, providing a variety of housing types within a medium density residential environment, and ensuring that development is of a height and scale that achieves the desired future character of the neighbourhood.
- 13 The parties agree, and I am satisfied, that all principal development standards of the WLEP have been met by the DA, with the exception of:
- (1) Clause 4.1A, Minimum lot sizes for dual occupancies, manor houses, multi dwelling housing and residential flat buildings, which establishes a minimum lot size of 700sqm.
 - (2) Clause 4.3, Height of buildings, which establishes a maximum height of building development standard of 15m for the site.
 - (3) Clause 4.4, Floor space ratio, which establishes a maximum FSR development standard of 1.3:1.
- 14 In such an instance, cl 4.6(3) of the WLEP requires consideration of a written request from the Applicant demonstrating that compliance with each of these development standards is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.
- 15 Clause 4.6(4) of the WLEP requires the consent authority to be satisfied the Applicant's written requests have adequately addressed the matters required by cl 4.6(3), and that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 16 Additionally, cl 4.6(4)(b) of the WLEP requires the concurrence of the Planning Secretary be obtained, while cl 4.6(5) requires the Planning Secretary to consider whether, in granting this concurrence, the proposed contravention of the development standard raises any matters of significance for State environmental planning, the public benefits of maintaining the standard, and any other matters required to be considered

by the Planning Secretary. Given the earlier written advice of the Planning Secretary (in the form of Planning Circular PS 18-003 issued on 21 February 2018), the Court may assume the concurrence of the Planning Secretary in this matter.

17 As required by cl 4.6 of the WLEP, the Applicant has provided a written request (prepared by aSquare Planning and dated 20 September 2021) seeking to vary the minimum lot size development standard set out at cl 4.1A.

18 The parties agree, and I am satisfied, that this written request adequately justifies the variance to the minimum lot size development standard of 700sqm for the following reasons:

- (1) The subject site has an area of 657.2sqm, falling short of the development standard by 42.8m, representing a variation of approximately 6.1%, which will largely be imperceptible from the public domain.
- (2) The Respondent has in recent years acknowledged that the site is suitable for residential apartment development by approving a new five-storey residential apartment building (DA246/2016).
- (3) The locality comprises a number of similarly-scaled residential apartment buildings conforming with a reasonably consistent pattern of form, massing and set backs evident in the vicinity of the site.
- (4) The objectives of the WLEP Zone R3 Medium Density Residential land use zone include providing for the housing needs of the community within a medium density residential environment, providing a variety of housing types within a medium density residential environment, and ensuring that development is of a height and scale that achieves the desired future character of the neighbourhood. I am satisfied the amended DA meets these objectives.
- (5) The objectives of cl 4.1A of the WLEP include to achieve planned residential density in certain zones consistent with the desired future character of the neighbourhood. I am satisfied the amended DA meets these objectives.

19 As required by cl 4.6 of the WLEP, the Applicant has provided a written request (prepared by aSquare Planning and dated 26 August 2021) seeking to vary the height of building development standard set out at cl 4.3.

20 The parties agree, and I am satisfied, that this written request adequately justifies the variance to the height of building development standard for the following reasons:

- (1) The amended DA exceeds the height of building development standard of 15m. The development proposes a maximum height of 15.558m above existing ground level, which is 0.558m greater than the standard, or a variation of approximately 3.7%.
- (2) Of note, the extent of the building height exceedance is limited to a lift over-run situated in the north west portion of the building. This portion of the building tends to recede from view when observed from vantage points in the immediate

vicinity, and brings with it no material additional impacts of overshadowing, view loss or loss of privacy.

- (3) The proposed building form relates to the existing pattern of residential apartment buildings evident along New South Head Road.
- (4) The lowest habitable floor proposed in the final amended DA has been raised by approximately 450mm to conform with a minimum flood planning design level.
- (5) The objectives of the WLEP Zone R3 Medium Density Residential land use zone include providing for the housing needs of the community within a medium density residential environment, providing a variety of housing types within a medium density residential environment, and ensuring that development is of a height and scale that achieves the desired future character of the neighbourhood. I am satisfied the amended DA meets these objectives.
- (6) The objectives of cl 4.3 of the WLEP include to establish building heights that are consistent with the desired future character of the neighbourhood, to minimise the loss of solar access to existing buildings and open space, and to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion. I am satisfied the amended DA meets these objectives.

21 As required by cl 4.6 of the WLEP, the Applicant has provided a written request (prepared by aSquare Planning and dated 26 August 2021) seeking to vary the FSR development standard set out at cl 4.4.

22 The parties agree, and I am satisfied, that this written request adequately justifies the variance to the FSR development standard for the following reasons:

- (1) The amended DA exceeds the maximum FSR development standard of 1.3:1. The development proposes a maximum FSR of 1.35:1, which is 35.64sqm greater than the standard, or a variation of approximately 4.2%.
- (2) The proposed building form is contextually appropriate, articulated and compatible with surrounding development and the desired future character of the locality.
- (3) The extent of FSR exceedance is relatively minor and will not be discernible from the streetscape or surrounding properties.
- (4) The amended DA is generally sited within the envelope described by an earlier approved building. The amended DA will not alter the side setbacks of the approved development.
- (5) Exceedance of the FSR control does not bring with it unreasonable environmental impacts of overshadowing, loss of views, loss of privacy or loss of visual amenity and a reduction in this FSR would not create any specific benefit for adjoining properties.
- (6) The exceedance of FSR does not compromise the ability of the DA to provide an

acceptable level of residential amenity within the subject site.

(7) The objectives of the WLEP Zone R3 Medium Density Residential land use zone include providing for the housing needs of the community within a medium density residential environment, providing a variety of housing types within a medium density residential environment, and ensuring that development is of a height and scale that achieves the desired future character of the neighbourhood. I am satisfied the amended DA meets these objectives.

(8) The objectives of cl 4.4 of the WLEP include to ensure the bulk and scale of new development is compatible with the desired future character of the area, to minimise adverse environmental effects on the use or enjoyment of adjoining properties and the public domain, and to ensure that development allows adequate provision on the land for deep soil planting and areas of private open space. I am satisfied the amended DA meets these objectives.

23 Consequently, I am satisfied the Applicant's three cl 4.6 written requests adequately justify the proposed variation to minimum lot size, height of building and FSR, and I find to uphold these written requests.

24 The parties agree, and I am satisfied, that pursuant to cl 5.10 of the WLEP, Heritage conservation, the site is not identified as a heritage item, nor is it situated within a heritage conservation area. The subject site is within close proximity of identified heritage items - to the south and west - and I am satisfied the final amended DA does not have a detrimental impact upon their heritage significance.

25 The parties agree, and I am satisfied, that pursuant to cl 5.21 of the WLEP, Flood planning, the site is located within an area identified in the Flood Planning Area on the Flood Planning Map. The Applicant has provided a Flood Review Report, prepared by TDL Engineering Consulting Pty Ltd, and the Respondent has assessed this report as being satisfactory. Agreed conditions of consent reflecting the report's recommendations are imposed.

26 The parties agree, and I am satisfied, that pursuant to cl 6.1 of the WLEP, Acid sulfate soils, the site is mapped within a Class 5 Acid Sulfate Soils area. The Applicant has provided a Preliminary Acid Sulfate Soils Assessment Report prepared by Environmental Investigations Services. The report concludes that an Acid Sulfate Soil Management Plan is not required.

27 The parties agree, and I am satisfied, that pursuant to cl 6.2 of the WLEP, Earthworks, the Applicant has provided a Construction Methodology Report dated 27 November 2022, a Structural Report dated 10 November 2022, Shoring and Foundation Plans dated 25 November 2022 and a Geotechnical Investigation Report dated 4 July 2022.

These reports have been assessed by the Respondent and I am satisfied they address those matters set out at cl 6.2(3). Agreed conditions of consent reflecting the reports' recommendations are imposed.

- 28 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, and I am satisfied, that the subject site is not within any contamination investigation area and is currently used as commercial premises and not for any use listed in Table 1 of the contaminated land planning guidelines. In the context of past uses of the site, a Preliminary Site Investigation (PSI) was provided to the Respondent for the earlier approval (DA2016/246). This PSI contain a detailed summary of the past land uses of the site dating to the 1930s. On the basis of that document, the Respondent is satisfied it has sufficient knowledge that no Table 1 use has been carried out on the site. Accordingly, I am satisfied the amended DA addresses the matters outlined in s 4.6 of SEPP Resilience and Hazards.
- 29 The parties agree, and I am satisfied, that the DA 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, Ink Architects and its nominated architect Mr Pierre Della Putta (NSW registered architect 5492), has prepared a Design Verification Statement, dated 29 November 2022, fulfilling the requirements of s 29 of the EPA Reg, and confirming that the amended DA achieves 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 achieved.
- 30 The parties agree, and I am satisfied, that State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP Biodiversity and Conservation) is an additional relevant environmental planning instrument. The site comprises land within

- the Sydney Harbour catchment but is situated outside the identified Foreshores and Waterways Area. Accordingly, pursuant to Chapter 10 of SEPP Biodiversity and Conservation, I am satisfied there are no further specific matters for consideration.
- 31 The parties agree, and I am satisfied, that State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP Infrastructure) is an additional relevant environmental planning instrument. In accordance with s 2.119 of SEPP Infrastructure, the DA was referred to Transport for NSW which has provided its concurrence. Agreed conditions of consent are imposed to reflect the terms of concurrence.
- 32 In accordance with s 2.120 of SEPP Infrastructure, the Applicant has provided an Acoustic Report prepared by Koikas Acoustics, which specifies appropriate construction standards to achieve the required internal sound levels. Agreed conditions of consent are imposed to reflect the recommendations of the report.
- 33 The parties agree, and I am satisfied, that the amended DA is subject to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. A BASIX certificate (dated 29 November 2022) has been submitted with the amended DA. Agreed conditions of consent are to be imposed to ensure compliance with the BASIX certificate.
- 34 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.
- 35 The Court notes that:
- (1) Leave is granted to the Applicant to amend Development Application DA373/2021 and rely upon the amended plans and documents referred to in condition A.4 at Annexure A.
 - (2) Pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is to pay the Respondent's costs thrown away as a result of amending the Development Application as agreed or assessed.
 - (3) The Applicant's written request, pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP), seeking to vary the development standard for minimum lot size as set out at clause 4.1A of the WLEP, is upheld.
 - (4) The Applicant's written request, pursuant to clause 4.6 of the WLEP, seeking to vary the development standard for height of buildings as set out at clause 4.3 of the WLEP, is upheld.
 - (5) The Applicant's written request, pursuant to clause 4.6 of the WLEP, seeking to vary the development standard for floor space ratio as set out at clause 4.4 of the WLEP, is upheld.
 - (6) The appeal is upheld.
 - (7) Consent is granted to Development Application DA373/2021 (as amended) for the substantial demolition of the existing commercial building and construction of

a 5-storey residential apartment building comprising 8 units, with basement parking, and for strata subdivision at 491 New South Head Road, Double Bay, subject to the conditions of consent at Annexure A.

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M Pullinger

Acting Commissioner of the Court

[329091.22 Annexure A \(848876,.pdf\)](#)

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Decision last updated: 29 March 2023