



Land and Environment Court
New South Wales

Case Name: Mikhail v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1097

Hearing Date(s): Conciliation Conference 21 and 22 February 2023

Date of Orders: 07 March 2023

Decision Date: 7 March 2023

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development Application DA331/2020 for the demolition of an existing dwelling house and ancillary structures and the construction of a new dwelling house with attached swimming pool and garaging, landscaping and site works at 5A Vaucluse Road, Vaucluse is granted development consent subject to the conditions contained in the annexure marked "A".

Catchwords: DEVELOPMENT APPEAL – residential development– demolition of existing building – conciliation conference – agreement between the parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.16, 8.7
Environmental Planning and Assessment Regulation 2000, cl 55, Sch 1
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 10, Pt 10.3, s 6.65
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
Woollahra Local Environmental Plan 2014, cll 2.3, 2.7,

4.3, 5.10, 6.1, 6.2

Texts Cited: Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Nagi Mikhail (First Applicant)
Kate Mikhail (Second Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
M Staunton (Applicant)
J Ede (Solicitor)(Respondent)

Solicitors:
Pikes and Verekers Lawyers (Applicant)
Wilshire Webb Staunton Beattie Lawyers (Respondent)

File Number(s): 22/246653

Publication Restriction: No

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. DA 331/2020 (Development Application) for the demolition of an existing dwelling house and ancillary structures, and the construction of a new dwelling house with attached swimming pool and garaging, landscaping and site works (the Proposed Development) at 5A Vaucluse Road, Vaucluse legally described as Lot X in DP 403176 (the 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 21 and 22 February 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 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.
- 5 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application.
- 6 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 various provisions in the Woollahra Local Environmental Plan 2014 (WLEP) and other planning instruments.
- 7 The parties explained how the jurisdictional prerequisites have been satisfied in an agreed jurisdictional note which I have considered and summarise as relevant below.
- 8 The Development Application was made by the existing owners of the Site being the Applicants of these proceedings.
- 9 The Proposed Development is for the purposes of a dwelling house as defined in the Dictionary to the WLEP. The Site is situated within the Zone R2 Low Density Residential pursuant to the provisions of the WLEP and the Proposed Development is permitted with consent.
- 10 The parties have considered the objectives of the R2 Low Density Residential zone which are as follows:
 - 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.

- 11 As required by cl 2.3(2) of the WLEP, the Court has had regard to the objectives of the zone. The objectives of the zone are addressed in the Applicant's Statement of Environmental Effects (SEE) filed 2 September 2022.
- 12 Development consent for demolition is sought by the Applicant as required by cl 2.7 of the WLEP.
- 13 The Proposed Development complies with the maximum height of buildings development standard of 9.5 metres (m) found in cl 4.3 of the WLEP.
- 14 The Site is not heritage affected. The Proposed Development is considered to be satisfactory with regard to the provisions of cl 5.10 of the WLEP as referenced in the Development Assessment Report filed with the Respondent's Bundle of Documents at Tab 3, page 12 (DA Report).
- 15 The Site is mapped for the purpose of acid sulfate soils as Class 5, pursuant to cl 6.1 of the WLEP. I am satisfied that no works are proposed which would invoke the provisions of this clause and I have referred to the DA Report, page 13.
- 16 The Court must be satisfied in relation to the relevant earthworks considerations pursuant to clause 6.2(3) of the WLEP. These considerations are addressed by the Geotechnical and Hydrogeological Report prepared by JK Geotechnics dated 11 August 2020 filed with the Class 1 Application at Tab 6. I also note the various conditions of consent such as A.3, C8 & E5-9 which satisfy cl 6.2(3) of the WLEP regarding earthworks.
- 17 Consideration has been given to whether the Site is contaminated as required by s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021. Given the historical use of the Site for residential purposes, there is no reason to believe that the Site may be contaminated, and I note that conditions of consent E21-24 have been agreed in any event.
- 18 The State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP (Biodiversity and Conservation)) commenced on 11 March 2022 and was amended on 21 November 2022. The now-repealed ch 10 of the SEPP (Biodiversity and Conservation) applies to the Proposed Development by virtue of s 6.65 of the SEPP (Biodiversity and Conservation) as the Site is within the

Sydney Harbour Catchment. The Site is outside the Foreshores and Waterways Area of the Catchment. The Proposed Development is considered to be satisfactory in terms of the applicable Matters for Consideration in Division 2 of Part 10.3 of the SEPP (Biodiversity and Conservation) and the associated Woollahra Development Control Plan 2015 (WDCP).

- 19 A BASIX Certificate dated 17 August 2022 has been provided to satisfy the requirement in Schedule 1 of the Environmental Planning and Assessment Regulation 2000.
- 20 Finally, the Proposed Development was advertised and notified between 28 October 2020 and 11 November 2020 and 4-18 November 2020. Ten (10) submissions were received. Notification requirements under the EPA Act have been satisfied. The submissions, to the extent that they are relevant, have been considered in the agreement reached between the parties.
- 21 The parties have taken into consideration the relevant provisions of the WDCP including Chapter B3 General Residential – General Development Controls.
- 22 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. I adopt the reasons given by the parties as set out in this judgment above.
- 23 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:

- 24 The Court notes that:
 - (1) Woollahra Municipal Council as the relevant consent authority has agreed, under clause 55(1) of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending Development Application 331/2020 to rely upon the following amended plans:
 - (a) Architectural Plans numbered LEC.1.101, LEC.1.102, LEC.1.103, LEC.1.100, LEC.1.201, LEC.1.202, LEC.1.203 all Revision D dated 22 February 2023 prepared by Mathieson;
 - (2) The Applicant filed the amended development application in Court on 22 February 2023.

Orders:

25 The Court orders:

- (1) The appeal is upheld.
- (2) Development Application DA331/2020 for the demolition of an existing dwelling house and ancillary structures and the construction of a new dwelling house with attached swimming pool and garaging, landscaping and site works at 5A Vacluse Road, Vacluse is granted development consent subject to the conditions contained in the annexure marked "A".

E Espinosa

Commissioner of the Court

Annexure A

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