



Land and Environment Court
New South Wales

Case Name: Hass v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1169

Hearing Date(s): Conciliation conference held 24 March 2023, final agreement filed 16 March 2023

Date of Orders: 12 April 2023

Decision Date: 12 April 2023

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:
(1) Leave is granted to the Applicant to amend Development Application DA571/2021 and rely upon the amended plans and documents referred to in Condition 1 at Annexure A.
(2) 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 height of building as set out at clause 4.3 of the WLEP, is upheld.
(3) The appeal is upheld.
(4) Consent is granted to Development Application DA571/2021 (as amended) for alterations and additions to the existing dwelling house for the construction of a new lift and roof top terrace at 49 Derby Street, Vaucluse, subject to the conditions of consent in Annexure A.

Catchwords: DEVELOPMENT APPLICATION – alterations and additions – dwelling house – Applicant's dissatisfaction with conditions of consent – agreement between the parties – orders

Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7 Environmental Planning and Assessment Regulation 2000, cl 55 Land and Environment Court Act 1979, ss 34, 34AA State Environmental Planning Policy (Biodiversity and Conservation) 2021, s 6.6 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6 Woollahra Local Environmental Plan 2014, cll 2.3, 4.3, 4.6, 5.1, 5.10, 5.21, 6.1, 6.2, 6.4
Texts Cited:	NSW Department of Planning and Environment, Planning Circular PS 18-003, February 2018
Category:	Principal judgment
Parties:	Allan Hass (Applicant) Woollahra Municipal Council (Respondent)
Representation:	Counsel: J Oldknow (Solicitor) (Applicant) P Rigg (Respondent) Solicitors: Mills Oakley (Applicant) Peter R Rigg (Respondent)
File Number(s):	2022/168683
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 Applicant's dissatisfaction with certain conditions of consent imposed at the time of the determination of Development Application DA571/2021 (the DA) by Woollahra Municipal Council (the Respondent).
- 2 On 21 June 2022, the Respondent granted consent for alterations and additions to the existing dwelling house for the construction of a new lift and roof top terrace at 49 Derby Street, Vaucluse (the site), subject to conditions of

consent. A particular condition of consent, the subject of this appeal, would require amendment to the proposal having the effect of deleting the roof top terrace and means of access. The Respondent imposed this condition with the stated intention of achieving view sharing and to maintain visual and acoustic privacy between neighbouring properties.

- 3 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 24 March 2023. I presided over the conciliation conference.
- 4 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 consent to an amended DA.
- 5 Of particular note, the proposal has been amended by agreement to resolve the contentions initially raised by the Respondent, which relate to the stated issues of view impacts and visual and acoustic privacy. The roof top terrace design has been amended to situate the access hatch within an area of the roof that mitigates against view impacts, and in a manner which sets back the area of trafficable roof terrace and balustrading sufficiently from the building perimeter to resolve cross viewing and acoustic privacy impacts.
- 6 The effect of these design amendments also bring about an exceedance of the height of building development standard, which is agreed to be resolved by way of the Applicant's written request to vary the height of building development standard as set out at cl 4.3 of the Woollahra Local Environmental Plan 2014 (WLEP).
- 7 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, subject to conditions.
- 8 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.

- 9 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.
- 10 The DA was publicly notified from 19 January to 3 February 2022. Thirteen submissions were received by the Respondent. The parties agree that the amendments made to the DA, which provide for an additional 1m front setback for the roof terrace, do not warrant further notification due to their lesser impacts.
- 11 The parties agree the amended DA now satisfactorily resolves matters raised in public submissions. Accordingly, I am satisfied that s 4.15(1)(d) of the EPA Act has been appropriately addressed.
- 12 The parties agree, and I am satisfied, that the WLEP is the relevant local environmental planning instrument. The site is zoned R2 Low Density Residential, and the proposed development - characterised as alterations and additions to an existing dwelling house - is permissible with consent.
- 13 The parties agree, and I am satisfied, that pursuant to cl 2.3 of the WLEP, the proposed development is consistent with the R2 Low Density Residential zone objectives, which include providing for the housing needs of the community within a low density residential environment, providing for development that is compatible with the character and amenity of the surrounding neighbourhood, and ensuring that development is of a height and scale that achieves the desired future character of the neighbourhood.
- 14 The parties agree, and I am satisfied, that all principal development standards of the WLEP have been met by the amended DA with the exception of cl 4.3, Height of buildings, which establishes a maximum height of building development standard of 9.5m for the site.
- 15 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.

- 16 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.
- 17 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.
- 18 As required by cl 4.6 of the WLEP, the Applicant has provided a written request (prepared by ABC Planning and dated February 2023) seeking to vary the height of building development standard set out at cl 4.3.
- 19 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 9.5m. The development proposes a maximum height of 10.9m above existing ground level, which is 1.4m greater than the standard, or a variation of approximately 14.7%.
 - (2) Of note, the extent of the building height exceedance is limited to a roof top access hatch and associated enclosure. This portion of the building tends to recede from view when observed from vantage points in the immediate vicinity, and I am satisfied it brings with it no material additional impacts of overshadowing, view loss or loss of privacy.
 - (3) The objectives of the WLEP Zone R2 Low Density Residential land use zone include providing for the housing needs of the community within a low density residential environment, providing for development that is compatible with the character and amenity of the surrounding neighbourhood, 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.

- (4) The objectives of cl 4.3 of the WLEP include establishing building heights that are consistent with the desired future character of the neighbourhood, minimising the loss of solar access to existing buildings and open space, and minimising 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.
- 20 Consequently, I am satisfied the Applicant's cl 4.6 written request adequately justifies the proposed variation to the height of building development standard and I find to uphold the written request.
- 21 The parties agree, and I am satisfied, that pursuant to cl 5.1 of the WLEP, Relevant acquisition authority, the site is not identified as land within the Land Reservation Acquisition Map.
- 22 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.
- 23 The parties agree, and I am satisfied, that pursuant to cl 5.21 of the WLEP, Flood planning, the site is not land identified as flood prone.
- 24 The parties agree, and I am satisfied, that pursuant to cl 6.1 of the WLEP, Acid sulfate soils, the site is identified as being within a Class 5 Acid Sulfate Soils area. However, I am satisfied the amended DA will not lower the watertable below 1.0m Australian Height Datum.
- 25 The parties agree, and I am satisfied, that pursuant to cl 6.2 of the WLEP, Earthworks, the amended DA proposes an extension of the existing basement in a form which will not adversely impact the environmental functions and processes of the site or neighbouring properties. The matters set out at cl 6.2(3) have been assessed by the Respondent and I am satisfied they have been appropriately considered.
- 26 The parties agree, and I am satisfied, that pursuant to cl 6.4 of the WLEP, Limited development on foreshore area, the site is not identified as being located on the foreshore area.

- 27 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.
- 28 Pursuant to s 6.6 of SEPP Biodiversity and Conservation, the consent authority must consider the impacts of the development on the waterways of Sydney Harbour. The parties agree and I am satisfied, the site is not visible from the Harbour nor will the amended DA affect any public access to the foreshore or waterways.
- 29 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.
- 30 The parties agree, and I am satisfied, that pursuant to s 4.6 of SEPP Resilience and Hazards, 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.
- 31 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 (SEPP BASIX). A BASIX certificate (number A436530) has been provided by the Applicant fulfilling the requirements of SEPP BASIX. Agreed conditions of consent are to be imposed to ensure compliance with the BASIX certificate.
- 32 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.
- 33 The Court notes that:
- (1) Pursuant to cl 55(1) of the Environmental Planning and Assessment Regulation 2000, the Applicant has amended the DA with the agreement of the Respondent.
 - (2) The Applicant has uploaded the amended DA to the NSW Planning Portal on 17 March 2023

- (3) The Applicant has filed the amended DA with the Court on 16 March 2023.

Orders

34 The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application DA571/2021 and rely upon the amended plans and documents referred to in Condition 1 at Annexure A.
- (2) 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 height of building as set out at clause 4.3 of the WLEP, is upheld.
- (3) The appeal is upheld.
- (4) Consent is granted to Development Application DA571/2021 (as amended) for alterations and additions to the existing dwelling house for the construction of a new lift and roof top terrace at 49 Derby Street, Vaucluse, subject to the conditions of consent in Annexure A.

M Pullinger

Acting Commissioner of the Court

168683.22 Annexure A (634973, pdf)

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