



## Land and Environment Court New South Wales

**Medium Neutral Citation:**

**2 Bay Street Pty Ltd v Woollahra Municipal Council  
[2023] NSWLEC 1222**

**Hearing dates:**

Conciliation conference on 22 February 2023, 15 March 2023, 5 April 2023, final submissions on 9 May 2023

**Date of orders:**

11 May 2023

**Decision date:**

11 May 2023

**Jurisdiction:**

Class 1

**Before:**

Horton C

**Decision:**

See orders at [57].

**Catchwords:**

DEVELOPMENT APPLICATION — commercial premises in B2 Local Centre zone – conciliation conference – agreement between parties – orders

**Legislation Cited:**

Environmental Planning and Assessment Act 1979, ss 4.16, 4.46, 8.7, 8.15

Land and Environment Court Act 1979, s 34

State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 10, s 10.2

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.118, 2.119

Water Management Act 2000, s 4.47

Woollahra Local Environmental Plan 2014, cll 4.3, 4.4, 4.4A, 4.6, 5.21, 6.1, 6.2

**Cases Cited:**

Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

Woollahra Municipal Council v SJD DB2 Pty Limited [2020] NSWLEC 115

**Texts Cited:**

Woollahra Development Control Plan 2015

**Category:**

Principal judgment

**Parties:**

2 Bay Street Pty Ltd (Applicant)

Woollahra Municipal Council (Respondent)

**Representation:****Counsel:**

R Lancaster SC (Applicant), A Boskovitz (Solicitor) on 15 March 2023

A Kleiss (Solicitor) (Respondent)

**Solicitors:**

Boskovitz Lawyers (Applicant)

Lindsay Taylor Lawyers (Respondent)

**File Number(s):**

2022/291775

**Publication restriction:**

Nil

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**JUDGMENT**

- 1 **COMMISSIONER:** This Class 1 appeal is brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the refusal by the Woollahra Local Planning Panel, on behalf of the Woollahra Municipal Council (the Respondent), of development application DA 280/2022 seeking consent for the demolition of existing buildings and construction of a new commercial building with basement parking located at Nos 2, 4-10 Bay Street, 294-296 and 298 New South Head Road, Double Bay.
- 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 22 February 2023, and at which I presided.
- 3 At the conciliation conference, the parties reached an in-principle agreement as to the scope of amendments required for the parties to reach the terms of a decision in the proceedings that would be acceptable to the parties, subject to time being granted for certain amendments to the development the subject of the development application.
- 4 I granted the parties an adjournment to permit the preparation of amended plans and other documents. On 15 March 2023, I granted a further adjournment so that additional amendments agreed between the parties could be made to the proposal.
- 5 This decision involved the Court upholding the appeal pursuant to s 4.16 of the EPA Act and granting development consent to the development application subject to conditions.
- 6 A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 5 April 2023, and certain clarifications were provided to the Court on 17 April 2023 in response to queries as to material on which the Court should rely in respect of jurisdictional matters. A final amended agreement was filed with the Court on 28 April 2023.
- 7 The parties ask me to approve their decision as set out in the s34 agreement before the Court. In general terms, the agreement approves the development subject to amended plans that were prepared by the Applicant, noting that the final detail of the works and

plans are specified in the agreed conditions of development consent annexed to the s34 agreement.

8 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 power under s 4.16 of the EPA Act. In this case, there are jurisdictional prerequisites that must be satisfied before this function can be exercised.

9 The parties explained to me during the conference as to how the jurisdictional prerequisites have been satisfied in order to allow the Court to make the agreed orders at [57], and I am satisfied for the reasons that follow.

10 The development application was lodged with the Respondent on 7 July 2022, and was notified in accordance with the Respondent's Community Participation Plan 2021 between 27 July 2022 and 26 August 2022.

11 The site is located within the B2 Local Centre zone, identified by the Woollahra Local Environmental Plan 2014 (WLEP) in which commercial premises are permitted with consent. The Dictionary of the WLEP defines commercial premises as business premises; office premises and retail premises that are all applicable in the circumstances of the development the subject of the development application.

12 The objectives for development in the B2 zone are:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To attract new business and commercial opportunities.
- To provide active ground floor uses to create vibrant centres.
- To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

### *The height of building standard is exceeded*

13 The proposed development exceeds the height of building standard at cl 4.3 of the WLEP, which permits a maximum building height of 14.7m.

14 The proposal is for development with a maximum height of 20.15m measured from the surveyed level of the existing basement slab associated with the previous structure on the site.

15 The height exceedance is supported by a written request prepared in accordance with cl 4.6 of the WLEP by GSA Planning dated March 2023 (height request).

16 The height request relies on the first test as it is expressed in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (*Wehbe*), in asserting compliance with the height standard is unreasonable and unnecessary as the

objectives of the standard are achieved notwithstanding the non-compliance with the standard.

17 The objectives of the standard, at cl 4.3 of the WLEP, are as follows:

(1) The objectives of this clause are as follows—

(a) to establish building heights that are consistent with the desired future character of the neighbourhood,

(b) to establish a transition in scale between zones to protect local amenity,

(c) to minimise the loss of solar access to existing buildings and open space,

(d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,

(e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

18 In respect of objective (a), the height request asserts:

(1) The proposal's height is consistent with the built form in the Double Bay Centre area, as articulated in *Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115, at [63], wherein desired future character is understood to be shaped by both development standards, and approved development that contravenes the standard, such as those depicted in the visual catchment, at Figure 6 of the height request.

(2) Relatedly, the proposed built form steps back at upper levels to present a predominantly four-storey form when viewed from the public domain, and fully complies with the height standard at the New South Head Road frontage.

19 In respect of objective (b), the height request asserts:

(1) The site is adjacent to the R3 Medium Density zone that permits a height of 19.5m. Any areas of additional height are well setback from the boundary so that a transition in height, bulk and scale is achieved to surrounding development.

20 In respect of objective (c), the height request asserts:

(1) Shadow diagrams representing the effect of the proposed development on solar access and overshadowing on adjoining development at hourly intervals demonstrate a similar or improved outcome to a built form envelope that complies with that anticipated in the Woollahra Development Control Plan 2015, and maintains the requirement for three hours of solar access to habitable rooms at the winter solstice.

21 In respect of objective (d), the height request asserts:

(1) The development application is supported by a View Impact Assessment prepared by Dr Richard Lamb (View Assessment), cited by the height request. Views from Nos 290 and 337 New South Head Road have been particularly considered, taking into account the proposed development, and approved developments at Nos 14, 24, and recently constructed development at 30-36 Bay Street. On the basis of the View Assessment, the height request demonstrates the recently constructed development at 30-36 Bay Street, and

not the proposed development, obstructs water views from No 337 New South Head Road and any obstruction resulting from the proposal is no greater than would be obstructed by a development that complies with the height standard.

- (2) The impact on privacy to adjoining and nearby development is achieved by setting back windows within the exceedance, and through which a view or sightline can be obtained, greater than 12m from neighbouring residential development, and by avoiding any external terraces within the exceedance.
- (3) Visual intrusion resulting from the exceedance is minimised by the setback of upper levels, articulated facades and the inclusion of soft landscaping in planters and on external terraces.

22 In respect of objective (e), the height request asserts that as no public views are identified from the subject site, the objective is not applicable.

23 Next, the height request advances environmental planning grounds it considers sufficient to justify the contravention off the height standard. Those grounds are summarised as follows:

- (1) As a part four, part five storey development, the proposal is consistent with recently approved and constructed developments in the immediate vicinity of the site, identified in the height request, that also exceed the height standard.
- (2) Recently approved development includes development approved for the subject site (the original consent), that is now sought to be amended by the development the subject of this development application. The proposal, as did the original consent, provides a strong corner, consistent with the desired future character.
- (3) The proposal responds to the sloping topography of around 6m along Bay Street by arranging the highest built form at the corner of New South Head Road, with the remainder of the built form stepping down the slope in a northerly direction.
- (4) The proposal provides commercial floor space for which there is a recognised demand in the Double Bay Centre, bringing local employment and day time activation to the area.

24 Finally, the height request asserts consistency with the objectives of the zone, at [12], because the ground floor retail tenancies activate the street and promote the vibrancy of Double Bay, and upper level commercial floor plates contribute to the range of service and business uses in the area, and provide employment opportunities within an area serviced by bus and ferry networks. The proposed commercial tenancies will attract new business and commercial opportunities, and the proposal's bulk and scale are compatible with the desired future character for reasons outlined at [18(1)].

25 I note here that the Respondent is satisfied that the height request adequately addresses the matters required to be demonstrated by cl 4.6(3) of the WLEP, and that the proposed development, as amended, will be in the public interest because it

is consistent with the objectives of the height development standard and the objectives for development in the B2 Local Centre zone.

26 Furthermore, the Respondent does not contend that the contravention of the development standard raises any matter of significance for State or regional environmental planning, or that there is any public benefit in maintaining the development standard, pursuant to cl 4.6(5) of the WLEP.

27 Accordingly, the Respondent raises no issue regarding cl 4.6 and accepts that a variation of the height development standard under cl 4.3 is justified.

28 I am satisfied under cl 4.6(4) that the height request has adequately addressed the matters required to be demonstrated by subcl (3) and that the proposed development will be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development within the B2 Zone, for the reasons given in the request.

29 I have also considered whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP and I find no grounds on which the Court should not uphold the height request.

*The floor space ratio development standard is exceeded*

30 The proposed development exceeds the floor space ratio (FSR) standard at cll 4.4 and 4.4A of the WLEP.

31 It is relevant to record here that a FSR standard of 2.5:1 applies to the site at Nos 294-296 New South Head Road and 2-10 Bay Street, and, because it is identified 'Area 1' on the relevant Map at cl 4.4A(2), a FSR standard of 3:1 applies to the site at No 298 New South Head Road.

32 The FSR of the proposal is 2.77:1 when the gross floor area is considered across the amalgamated site of 5,151m<sup>2</sup>. When allocated across the sites to which varying FSR standards apply, the proposal results in an FSR of 3.13:1 to No 298 New South Head Road, and 2.66:1 to those sites at Nos 294-298 New South Head Road.

33 The FSR exceedance is supported by a written request prepared in accordance with cl 4.6 of the WLEP by GSA Planning dated March 2023 (FSR request).

34 The FSR request relies on the first test as it is expressed *Wehbe*, in asserting compliance with the height standard is unreasonable and unnecessary as the objectives of the standard are achieved notwithstanding the non-compliance with the standard.

35 The relevant objective at cl 4.4 of the WLEP is:

(b) for buildings in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, and Zone B4 Mixed Use—to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.

36 The FSR request asserts that the objective is achieved notwithstanding the non-compliance, for reasons summarised as follows:

- (1) Given the similarity in the objective, with that at objective (a) of cl 4.3, the FSR request relies on grounds that are similar to those at [18(1)], but for Table 1 of the FSR request that documents consent for development exceeding the standard in the vicinity, and visual catchment, of the site.
- (2) The bulk and scale is compatible with the desired future character because the proposal responds to the sloping topography of the site by stepping down the slope in a northerly direction, and by setting back upper levels to conceal the topmost levels from view from the public domain.
- (3) As with other recent approvals in the vicinity of the site, the wholly commercial use proposed, unlike shop top housing, does not rely upon large external terraces to provide residential amenity, and which do not count towards FSR.

37 Where the FSR standard at cl 4.4A, of 3:1, applies to No 298 New South Head Road, the objective is to encourage the development of prominent corner buildings in Double Bay.

38 The FSR request asserts the objective is achieved by the arrangement of built form that results in prominence at the corner of Bay Street and New South Head Road. A reduction in built form and bulk at this intersection would result in a numerically complying proposal, that would not achieve the prominence otherwise proposed.

39 Next, the FSR request advances environmental planning grounds that it asserts are sufficient to justify the contravention of the standard. The grounds are essentially identical to those at [23], but for strict compliance which would require the removal of 247m<sup>2</sup> of commercial floor space that would diminish the prominence of the development on the corner of Bay Street and New South Head Road.

40 Finally, the FSR request asserts consistency with the objectives of the zone, at [12], for reasons that are identical to those advanced at [24].

41 I note here that the Respondent is satisfied that the height request adequately addresses the matters required to be demonstrated by cl 4.6(3) of the WLEP, and that the proposed development, as amended, will be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development in the B2 Local Centre zone.

42 Furthermore, the Respondent does not contend that the contravention of the development standard raises any matter of significance for State or regional environmental planning, or that there is any public benefit in maintaining the development standard, pursuant to cl 4.6(5) of the WLEP.

43 Accordingly, the Respondent raises no issue regarding cl 4.6 and accepts that a

variation of the height development standard under cl 4.3 is justified.

- 44 I am satisfied under cl 4.6(4) that the height request has adequately addressed the matters required to be demonstrated by subcl (3) and that the proposed development will be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development within the B2 Zone, for the reasons given in the request.
- 45 I have also considered whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP and I find no grounds on which the Court should not uphold the height request.

*Other provisions of the Woollahra Local Environmental Plan 2015*

- 46 On the basis of the Flood Risk Assessment prepared by Catchment Simulation Solutions dated 27 May 2022, which provides an assessment against those matters about which the Court must be satisfied at cl 5.21(2) of the WLEP, I am so satisfied. In particular, I note the flood behaviour and flood function are addressed, as is the evacuation of people in the event of flood, and measures to manage risk to life in the event of flood, in a manner that I consider appropriate.
- 47 The site is located on what appears to be the boundary between Class 2 and Class 5 acid sulfate soils. On the basis of the Memorandum prepared by Douglas Partners dated 14 April 2023, summarising the results of the Preliminary Site Investigation for Contamination (PSI) dated 3 June 2022, and the Report on Geotechnical and Hydrogeological Investigation of the same author dated 3 June 2022, I accept that an acid sulfate soils management plan is not required, in accordance with cl 6.1(4) of the WLEP.
- 48 Having had regard to the Geotechnical and Hydrogeological Monitoring Program dated 31 January 2023, and the letter titled 'Response to Council Matters for Consideration' prepared by Douglas Partners, dated 20 January 2023, and the Structural Statement prepared by Webber Design Consulting Engineers dated 19 January 2023, I consider those matters at cl 6.2(3) of the WLEP to be adequately addressed.

*State Environmental Planning Policy (Resilience and Hazards) 2021*

- 49 The development application is accompanied by the PSI, and a Conceptual Remediation Action Plan (Conceptual RAP) prepared by Douglas Partners dated August 2022. On the basis of the recommendations and conclusions of these reports, and the agreed conditions of consent in respect of contamination and remediation, I am satisfied the site will be made suitable for the purpose for which development is proposed to be carried out, pursuant to s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021.



***State Environmental Planning Policy (Transport and Infrastructure) 2021***

- 50 As the site has a frontage to New South Head Road, being a classified road, ss 2.118 and 2.119 of State Environmental Planning Policy (Transport and Infrastructure) 2021 (Infrastructure SEPP) apply. Accordingly, concurrence of Transport for NSW is required, and was granted on 11 August 2022. General Terms of Approval, provided by Transport for NSW, are incorporated in the agreed conditions of consent.
- 51 Vehicle access to the site is provided via Brooklyn Lane, that I regard to be practicable and safe within the terms of s 2.199(2)(a) of the Infrastructure SEPP, and to safeguard the safety, efficiency and ongoing operation of New South Head Road without adverse affect of the sort at subs (2)(b).
- 52 Measures contained in the Acoustic Specification, prepared by Acoustic Logic dated 6 March 2023, and cited in the agreed conditions of consent, satisfy me that the development includes measures to ameliorate potential traffic noise within the site arising from vehicle movements on New South Head Road, in accordance with s 2.119(2)(c) of the Infrastructure SEPP.

***State Environmental Planning Policy (Biodiversity and Conservation) 2021***

- 53 Chapter 10 of State Environmental Planning Policy (Biodiversity and Conservation) 2021 applied at the time of lodgement of the development application. However, as the site does not fall within areas defined at s 10.2(2), there are no provisions that apply to the site.

***Water Management Act 2000***

- 54 The Proposed Development is integrated development pursuant to s 4.46 of the EPA Act as a Water Supply Work Approval is required under the *Water Management Act 2000*. Section 4.47(3) provides that consent must be consistent with the general terms of approval of an approval body. Conditions detailing the general terms of approval, issued by Water NSW on 19 December 2022, are incorporated in the agreed conditions of consent.

**Conclusion**

- 55 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.
- 56 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.

Orders

57      The Court orders that:

- (1)      The Applicant is granted leave to amend the development application to rely on those documents referred to in the table below, filed with the Court on 12 April 2023.

Reference	Description	Author/Drawn	Date(s)
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Dwg. No.	Architectural Plans	All prepared by LawtonHurley Architecture Interiors Planning	All dated March 2023
DA00 F	Site + Site Analysis Plan		
DA01 C	Basement 2 Plan		
DA02 C	Basement 1 Plan		
DA03 D	Ground Lower Plan		
DA04 D	Ground Upper Plan		
DA05 E	Level 1 Plan		
DA06 D	Level 2 Plan		
DA07 D	Level 3 Plan		
DA08 E	Level 4 Plan		
DA09 E	Roof Plan		
DA10 E	Streetscape Elevations		
DA11 E	East Elevation		
DA12 E	North Elevation		
DA13 D	West Elevation		
DA14 D	South Elevation		
DA15 D	Section Looking West		
DA16 D	Section Looking North		
DA17 C	External Finishes		

DA50 D	Part Section Looking North		
DA51 D	Part Section Looking West		
Ref No- 2223	Street Tree Arboricultural Pruning Specification Report	Mark Kokot – Rain Tree Consulting Arboricultural Management	15 March 2023
Plan No. s DA_01/03, DA_02/03, DA_03/03, DA_04/03, DA_05/03 (Rev 4)	Landscape Plan	Wyer & CO.	30 March 2023
Ref No: 5122	Arboricultural Impact Assessment Report (AIA)	Mark Kokot – Rain Tree Consulting Arboricultural Management	10 August 2022
22023	Traffic Letter – Memorandum	TTPP	15 March 2023
20220527.1/0106A/R1/JHT, Revision 1	Acoustic Report	Acoustic Logic	1 June 2022
20220527.2/0803A/R1JHT	Acoustic Addendum Letter	Acoustic Logic	6 March 2023
20220527.2/0603A/R2/JHT, Revision 2	Acoustic Specification	Acoustic Logic	6 March 2023
SYD2118 - 2-10 Bay Street, Double Bay rev: 01	ESD Statement - Project alignment with the provisions in Part E6.2 of the Woollahra DCP 2015	ADP Consulting Engineering	8 March 2023
Rev G	Operational Waste Management Plan (OWMP)	Elephants Foot Consulting	7 March 2023

P3144	Public Art Plan	UAP	May 2022
	Height 4.6	GSA Planning	April 2023
	FSR 4.6	GSA Planning	March 2023
41419 Revision C	Survey Plan	Norton Survey Partners	2 November 2020

- (2) The Applicant is granted leave to amend the Details of the Application filed with the Court on 30 September 2022 as shown in strike out:

*~~“Application for Commercial Building Demolition of existing buildings and cConstruction of a new commercial building with basement parking”~~*

- (3) The Applicant is to pay the Respondent’s costs thrown away pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* as a result of the amendment to the development application in the agreed amount of \$22,000 within 14 days of these orders.
- (4) The Applicant’s written request under cl 4.6 of the *Woollahra Local Environmental Plan 2014* (WLEP) to vary the height of buildings development standard under cl 4.3 of the WLEP is upheld.
- (5) The Applicant’s written request under cl 4.6 of the WLEP to vary the floor space ratio development standard under cl 4.4 of the WLEP is upheld.
- (6) The appeal is upheld.
- (7) Development application DA280/2022 for the construction of a five-storey commercial building over three levels of car parking at 2 and 4-10 Bay Street and 294-296 and 298 New South Head Road, Double Bay, contained in Lots 24 and 25 in DP4606, Lot 100 in DP712017, and Lots B and C in DP955406 is determined by the grant of consent subject to the conditions set out in Annexure A.

**T Horton**

**Commissioner of the Court**

[291775.22 Annexure A \(803630,.pdf\)](#)

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Decision last updated: 11 May 2023