



Land and Environment Court
New South Wales

Case Name:	Nahum v Council of the Municipality of Woollahra
Medium Neutral Citation:	[2023] NSWLEC 1332
Hearing Date(s):	Conciliation Conference 8 and 9 June 2023
Date of Orders:	29 June 2023
Decision Date:	29 June 2023
Jurisdiction:	Class 1
Before:	Espinosa C
Decision:	<p>The Court orders:</p> <p>(1) The Appeal is upheld.</p> <p>(2) The amended clause 4.6 of the Woollahra Local Environmental Plan 2014 written request prepared by Tony Moody dated 7 June 2023 is upheld.</p> <p>(3) Development Application No. 165/2022/1 lodged on 10 May 2022, as amended, for extensive alterations and additions to an existing three-storey dwelling, to increase the floorplate to accommodate a 6 ensuite-bedroom dwelling and a new above ground swimming pool at 19 Cranbrook Lane, Bellevue Hill, is determined by grant of consent, subject to the conditions in Annexure A.</p>
Catchwords:	DEVELOPMENT APPEAL – residential development – alterations and additions – justification of contravention of height of building development standard – conciliation conference – 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 38</p> <p>Land and Environment Court Act 1979, ss 34, 34AA</p>

Woollahra Local Environmental Plan 2014, cll 4.3, 4.6,
5.10, 5.21, 6.1, 6.2
State Environmental Planning Policy (Building
Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Biodiversity and
Conservation) 2021, Part 6.2, Div 2 s 6.65, Ch 10
State Environmental Planning Policy Amendment
(Water Catchments) 2022
State Environmental Planning Policy (Resilience and
Hazards) 2021, s 4.6

Category: Principal judgment

Parties: Roger Nahum (Applicant)
Council of the Municipality of Woollahra (Respondent)

Representation: Counsel:
B Dyer (Solicitor)(Applicant)
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Solicitors:
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Lindsay Taylor Lawyers (Respondent)

File Number(s): 22/387920

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 DA165/2022/1 for extensive alterations and additions to an existing three storey dwelling, to increase the floorplate to accommodate a 6 ensuite-bedroom dwelling and a new above ground swimming pool (the Proposed Development) at 19 Cranbrook Lane Bellevue Hill legally described as Lot 1606 in DP 752011 and Lot A in DP 420609 (the Site).
- 2 The Court arranged a conciliation conference under s 34AA(2) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which has been held on 8 and 9 June 2023. I have presided over the conciliation conference.

3 On 13 February 2023, the Respondent filed a Statement of Facts and Contentions (SOFAC). The parties' experts participated in without prejudice discussions to discuss the SOFAC. The Parties reached an agreement as to the resolution of those contentions, which has resulted in the following amendments to the Proposed Development:

- (1) Revisions to the architectural drawings submitted with the proposed Development Application, including:
 - (a) the reduction in the height of the parapet over the entrance foyer to the building from RL 51.800 to RL 50.900, and a reduction in the roof of the entrance foyer from RL 51.600 to RL 50.700,
 - (b) reducing the height of the side wall to the entrance to Cranbrook Lane, from RL 48.700 to RL 47.950,
 - (c) reducing the height of the parapet over the garage from RL 47.950 to RL 47.500,
 - (d) the reduction in the height of the parapet over the dining room and living area from RL 50.300 to RL 49.60,
 - (e) reduction in the gross floor area of the building on the lower ground level by 13.7m²,
 - (f) increasing the depth of the pool from 1.2m to 1.5m to prevent overlooking into adjoining properties from the pool,
 - (g) raising the eastern external wall of the pool by 300mm to prevent overlooking into adjoining properties,
 - (h) locating pool plant and equipment within the existing subfloor of the dwelling,
 - (i) planting of 2 additional trees in accordance with Council's recommended tree species, one tree to be planted in the front setback, and one to be planted in the rear garden as shown on the revised Landscape Plan.
- (2) Submission of further plans and drawings with the proposed Development Application, including:
 - (a) shadow diagrams, including elevations views, to ascertain the impact of the proposed development on solar access to the adjoining buildings;
 - (b) survey plans indicating the extent of the subfloor area;
 - (c) designs showing the treatment of the South-facing elevations of the proposed above-ground swimming pool structure, in terms of fencing and finishes; and
 - (d) a Site Waste Minimisation Management Plan.

- 4 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.
- 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. 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.
- 6 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application.
- 7 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 cl 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP) to vary a development standard. The parties explained how the jurisdictional prerequisites have been satisfied in an agreed Jurisdictional Note from which I have summarised in this judgment as relevant as reasons for my decision.
- 8 Owner's consent was provided for the lodgement of the Development Application on the Site filed with the Class 1 Application.
- 9 The Proposed Development was notified and advertised for 14 days between 1 June 2022 and 16 June 2022. Five submissions were received by the Respondent which raised a number of concerns. The matters raised by the resident objectors have been considered by the parties, and the parties have agreed that the matters raised where relevant have been satisfactorily addressed through the Applicant's Development Application, as amended and through conditions of development consent.
- 10 In compliance with the relevant requirements under the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, the Applicant has

included a BASIX Certificate No. A450091_02 filed with the Class 1 Application.

- 11 The Site is identified as being within the Sydney Harbour Catchment. Part 6.2, Div 2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP) sets out matters that require assessment, however, these matters do not apply to the Proposed Development due to the savings provision in s 6.65 of the Biodiversity and Conservation SEPP.
- 12 The State Environmental Planning Policy Amendment (Water Catchments) 2022 commenced on 21 November 2022 whereas DA165/2022/1 was lodged on 10 May 2022. Chapter 10 of the Biodiversity and Conservation SEPP, as in force immediately before 21 November 2022, applied to the Site. The Site was not located within the Foreshores and Waterways Area within the meaning of Ch 10 and therefore there are no specific matters for consideration in Ch 10.
- 13 Pursuant to s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP), a consent authority must be satisfied that appropriate consideration has been given to whether the Site is contaminated, the suitability of the Site to the proposed development and whether satisfactory measures are put into place to remediate the land should it be required to do so. The Applicant's Statement of Environmental Effects (SEE) prepared by MJB Urban Planning dated May 2022 and filed with the Class 1 Application, concludes that the Site has been historically used for residential purposes and that the Site is therefore not considered to be contaminated. Accordingly, there is nothing to warrant further investigation in relation to contamination and the parties are satisfied the Site does not require remediation prior to the Proposed Development being carried out.
- 14 "Dwelling houses" is a nominate use permitted with consent in the "R2 Low Density Residential" under the WLEP being the zone of the Site.
- 15 A 9.5m height of building development standard (HOB Standard) pursuant to cl 4.3 of the WLEP applies to the Site. Clause 4.6 of the WLEP relates to Exceptions to development standards, and seeks to provide an appropriate degree of flexibility in applying certain development standards, and to achieve

better outcomes for and from development by allowing flexibility in particular circumstances. Development consent will not be granted for development that contravenes a development standard, unless the Applicant has provided a written request demonstrating 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.

- 16 The Proposed Development will contravene the HOB Standard and the Applicant relies on a cl 4.6 written request prepared by Tony Moody filed 9 June 2023 (Written Request), to justify the contravention of that development standard.
- 17 The parties agree that the Applicant's Written Request has justified an exception to the HOB Standard for the following reasons:
 - (1) The parties note the Joint Expert Report (JER) prepared by Frederica Stano and Tony Moody filed 19 May 2023 and the Written Request.
 - (2) the exceedance to the HOB Standard caused by the Proposed Development is acceptable, as the portion of the development in exceedance is a result of the steep topography of the land.
 - (3) the exceedance is minor in nature and the remainder of the Proposed Development in the amended application is significantly below the HOB Standard. The heights of the Proposed Development facing Cranbrook Lane are very significantly below the HOB Standard.
 - (4) the exceedance does not result in adverse impacts to neighbouring properties.
- 18 In addition, the Court as the consent authority must not grant consent for development that contravenes a development standard unless the Court is satisfied that the Written Request has adequately addressed the matters referred to in par [17] above (cl 4.6(4)(a)(i), WLEP), and that the Proposed Development will be in the public interest because it is consistent with the objectives of the height of building development standard and with the objectives of the R2 Low Density Residential zone (cl 4.6(4)(a)(ii), WLEP).
- 19 The objectives of the development standard in cl 4.3 of the WLEP are to establish building heights that are consistent with the desired future character of the neighbourhood, protect local amenity, minimise the loss of solar access,

and minimise the impacts of new development on adjoining or nearby properties. The Written Request addresses how the Proposed Development is consistent with these objectives at pp 7 to 9.

- 20 The objectives of the R2 Zone as set out in the WLEP as follows:

Zone R2 Low Density Residential

1 Objectives of zone

- 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.

- 21 I have read and considered the Written Request and the JER. The Written Request demonstrates adequately that compliance with the HOB Standard is unreasonable or unnecessary because the Proposed Development achieves the objectives of the R2 Low Density Residential zone notwithstanding non-compliance with the HOB Standard (Written Request, p 10). Sufficient environmental planning grounds to justify the contravention of the HOB Standard are set out in the Written Request at pp11 and 12, including the fact that the breach is a result of the particular topography of the Site in that location.
- 22 The Court is satisfied that the Applicant's written request seeking to justify the contravention of the development standard in cl 4.3 of the WLEP has adequately addressed the matters required to be demonstrated by cl 4.6(3) of the WLEP and that the Proposed Development would be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 23 The Site is not a heritage item nor in a heritage conservation area. The Site adjoins a heritage item, but that does not give rise to consideration pursuant to Clause 5.10(4) of the WLEP which requires the consent authority to consider

certain matters in respect of a heritage item or heritage conservation area before granting development consent.

- 24 The Site is mapped as being flood prone land. Clause 5.21 of the WLEP relates to flood planning and seeks to minimise the flood risk to life and property associated with the use of land; to allow development on land that is compatible with the flood function and behaviour on the land; to avoid adverse or cumulative impacts on flood behaviour and the environment; and to enable the safe occupation and efficient evacuation of people in the event of a flood.
- 25 Pursuant to cl 5.21(2) of the WLEP, prior to the grant of development consent the Court must be satisfied that the Proposed Development:
 - (a) is compatible with the flood function and behaviour on the land, and
 - (b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and
 - (c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and
 - (d) incorporates appropriate measures to manage risk to life in the event of a flood, and
 - (e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.
- 26 The Court can be satisfied of the matters listed in cl 5.21(2) of the WLEP as set out above, having regard to the material submitted with the Development Application, including the Flood Risk Management Report and Stormwater Drainage Design prepared by R. Balas Consulting P/L. It is relevant that the Flood Risk Management Report is incorporated into Condition 1 of the conditions of consent.
- 27 The Site is mapped as containing Class 5 acid sulfate soils. Clause 6.1 of the WLEP imposes requirements relating to acid sulfate soils. The Proposed Development is not likely to lower the water table below 1.0m AHD on any land within 500m of a Class 1, 2, 3 and 4 land classifications and therefore the further matters required in cl 6.1 of the WLEP do not apply.

28 Clause 6.2(3) of the WLEP specifies matters for consideration when a consent authority decides whether to grant development consent for earthworks and associated construction dewatering. The Court notes the advice of the parties that the Respondent's development engineer was satisfied that:

"The proposed alterations and additions will not involve significant earthworks other than minor site preparation. Further, the proposed swimming pool will involve minimal excavation. Given that the proposed excavation will be at least 1.5m from any property boundary and not deeper than 2 metres, the submission of a geotechnical report at the DA stage is not required as per Chapter B3.4 of Council's DCP."

29 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.

30 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:

31 The Court notes that:

- (1) The Applicant has applied to, and Woollahra Municipal Council as the relevant consent authority has agreed, pursuant to section 38 of the Environmental Planning and Assessment Regulation 2021, to amend Development Application No. 165/2022/1 to incorporate the following amended plans and additional information filed with the Court on 9 June 2023:
 - (a) Architectural plans prepared by Brewster Murray, dated 8 and 9 June 2023
 - (b) Shadow diagrams, dated 1 June 2023
 - (c) Revised detailed survey plans, dated 21 April 2023
 - (d) Amended written request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 prepared by Tony Moody dated 7 June 2023
 - (e) Site Waste Minimisation Management Plan prepared by Roger Nahum, dated 6 June 2023

Orders:

32 The Court orders:

- (1) The Appeal is upheld.

- (2) The amended written request pursuant to clause 4.6 of the Woollahra Local Environmental Plan 2014 prepared by Tony Moody dated 7 June 2023 is upheld.
- (3) Development Application No. 165/2022/1 lodged on 10 May 2022, as amended, for extensive alterations and additions to an existing three-storey dwelling, to increase the floorplate to accommodate a 6 ensuite-bedroom dwelling and a new above ground swimming pool at 19 Cranbrook Lane, Bellevue Hill, is determined by grant of consent, subject to the conditions in Annexure A.

E Espinosa

Commissioner of the Court

Annexure A

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