



## Land and Environment Court New South Wales

**Medium Neutral Citation:**

**Doonside Holdings Pty Ltd v Woollahra Municipal Council [2023] NSWLEC 1343**

**Hearing dates:**

Conciliation conference held on 17 May 2023

**Date of orders:**

04 July 2023

**Decision date:**

04 July 2023

**Jurisdiction:**

Class 1

**Before:**

Bish C

**Decision:**

The Court orders:

- (1) The applicant's clause 4.6 written request prepared by GSA Planning dated May 2023 seeking to vary the height of building standard at clause 4.3 of the Woollahra Local Environmental Plan 2014 is upheld.
- (2) The Applicant's clause 4.6 written request prepared by GSA Planning dated May 2023 seeking to vary the floor space ratio standard at clause 4.4 of the Woollahra Local Environmental Plan 2014 is upheld.
- (3) The appeal is upheld.
- (4) Development Application 453/2022/1, as amended, seeking alterations and additions to the approved commercial development, by the addition of a new level on Lot 1 in Deposited Plan 796750, also known as 55 Bay Street, Double Bay NSW is determined by the grant of consent, subject to the conditions in Annexure A.

**Catchwords:**

DEVELOPMENT APPLICATION – additions and alterations to an existing commercial building – non compliance with height and floor space ratio standards – cl 4.6 variation of development standards – conciliation conference – 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 2021, ss 23, 37

Land and Environment Court Act 1979, s 34

State Environmental Planning Policy (Biodiversity and Conservation) 2021, ss 10.2, 10.10

State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 4, s 4.6

Woollahra Local Environmental Plan 2014, cl 2.3, 4.3, 4.4, 4.4A, 4.6, 5.21, 6.1, 6.2

**Texts Cited:**

Woollahra Community Participation Plan 2021  
Woollahra Development Control Plan 2015

**Category:**

Principal judgment

**Parties:**

Doonside Holdings Pty Ltd (Applicant)  
Woollahra Municipal Council (Respondent)

**Representation:**

Counsel:  
A Boskovitz (Solicitor) (Applicant)  
A Rutherford (Solicitor) (Respondent)

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

**File Number(s):**

2022/374698

**Publication restriction:**

Nil

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**JUDGMENT**

- 1 **COMMISSIONER:** This is an appeal against the subsequent refusal of Development Application 453/2022/1 (the DA) by Woollahra Municipal Council (the Council), which seeks the alterations and additions to the approved commercial development including a new level, on Lot 1 in Deposited Plan 796750, also known as 55 Bay Street, Double Bay NSW (the site).

## Background

- 2 The DA was lodged with Council on 21 October 2022. The original DA was notified to residents, with 22 submissions in objection received. The DA has been internally reviewed by Council and was referred to the Woollahra Local Planning Panel (the Panel). The Panel recommended to refuse the DA, which was determined on 4 May 2023.
- 3 The applicant appealed against the (deemed) refusal of the DA, pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 4 The Council agreed for the applicant to amend the plans and documents that support the DA, pursuant to s 37(1) of the Environmental Planning and Assessment Regulation 2021 (EPA Reg).
- 5 Pursuant to s 34(1) of the *Land and Environment Court Act 1979* (the LEC Act), the Court arranged a conciliation conference, which at the parties' request, commenced with a site view and then held in person. Three residents made an oral submission at the start of the conciliation, and the Court was also taken to view three resident properties. The issues raised by the resident objectors generally related to loss of views and privacy, breach in planning standards and controls, inconsistency with character and precedence.
- 6 Based on the amended DA and the agreed conditions of consent, the parties reached an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. The parties agreed that the contentions of Council have been considered in a merit assessment and are resolved, and the issues raised by objectors have also been considered. The agreed position of the parties is for the Court to grant consent to the amended Development Application 453/2022/1, with conditions.
- 7 Pursuant to s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision if it is a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court making a determination under s 4.16 of the EPA Act and being satisfied of all relevant jurisdictional requirements, to grant consent to Development Application 453/2022/1, subject to conditions in Annexure A.

## Jurisdictional prerequisites

- 8 Section 4.15(1) of the EPA Act establishes the matters to be considered in determining a development application. The following relevant jurisdictional requirements have been specifically addressed:
  - (1) Woollahra Local Environmental Plan 2014 (WLEP):
    - (a) Pursuant to cl 2.3 of the WLEP, the proposed development is situated over land zoned E1 Local Centre. The proposed development, as described to the Court, is permissible with consent and has had regard to the objectives of the zone. The amended application sufficiently

addresses all the relevant objectives, aims, standards and provisions of the WLEP, although it is noted there is a numerical breach of the height and floor space ratio (FSR) development standards, pursuant to cll 4.3 and 4.4 (plus 4.4A), respectively.

- (b) The site is within an area mapped as flood prone, pursuant to cl 5.21 of the WLEP. The DA is supported by a Flood Study and Flood Risk Management Plan prepared by Martens Consulting Engineering, dated 29 January 2021. The requirements of cl 5.21 are sufficiently addressed by the proposed development, noting that the DA does not seek any works located within the area of the building subject to flooding.
- (c) The site is within an area mapped as being Class 2 Acid Sulphate Soils, pursuant to cl 6.1 of the WLEP. The DA is supported by a geotechnical report by Geotechnique Pty Ltd, dated 20 January 2021. The requirements of cll 6.1 and 6.2 (earthworks) are sufficiently addressed by the proposed development, noting that the DA does not seek any subsurface works.
- (d) It is accepted that a cl 4.6 written request, is required pursuant to cl 4.6 of the WLEP, seeking a variation of the non-compliant height and FSR, established in cll 4.3 and 4.4 plus 4.4A of the WLEP, respectively. The Court must be satisfied that relevant requests to vary the standards are appropriately addressed, pursuant to cl 4.6, to grant consent to the DA.
- (e) The cl 4.6 written request for a FSR variation explains that the proposed development exceeds the cl 4.4 requirement with a bonus for a corner building as provided in cl 4.4A of the WLEP, thereby having a FSR development standard of 3:1. The amended building design exceeds the FSR by being 3.85:1, a 39.93% variation.
- (f) The cl 4.6 written request for height variation explains that the proposed development exceeds the (cl 4.3 of the WLEP) height development standard, established at 18.1m. The amended DA proposes a building with a maximum height of 21.6m, creating a variation of 23.48% from the height standard.
- (g) It is noted that the existing approved building on the site has a height exceedance up to 20.3m and FSR of 3.65:1.
- (h) The cl 4.6 written requests explain that the non-compliance in the height and FSR development standards do not result in a development that is incompatible with the character of the surrounding area or results in adverse amenity including view loss.
- (i) It is explained in the (cl 4.6) written submissions that the site still references the historic and approved development on the street, recognising previous non-compliances in approved developments along the street and that the proposed development addresses the topographic

and existing street form. The elements of the proposed development that result in the non-compliances will not perceptibly change the presentation of the proposed building to the streetscape or result in adverse bulk/scale impacts to adjoining developments. The exceedance in the relevant standards does not result in a development that is out of character with the local area, or existing and emerging in the streetscape. There are sufficient environmental planning grounds for a variation in the height and FSR development standards.

- (j) According to the cl 4.6 written requests, there are no adverse impacts to solar access, view loss or privacy as a result of the non-compliance with the development standards for the proposed development. The proposed development is consistent with the zone objectives and relevant development standards for cl 4.3 and 4.4, including bonus from 4.4A of the WLEP. The proposed building is compatible with existing and future buildings in the surrounding area, that have been consistently approved to breach the height development standard. Compliance with the standards of non-compliance would therefore be unreasonable and unnecessary.
- (k) The (cl 4.6) written requests consider that a variation of the height and FSR development standards is appropriate, and flexibility of the standards is justified. There is no public benefit in maintaining these standards on the site, as the proposed development is consistent with the character, bulk and scale of the surrounding context.
- (l) The Court must be satisfied, to grant consent to the application, that the cl 4.6 request to vary the development standard is appropriately assessed, pursuant to the requirements set out in cl 4.6 of the WLEP. Having reviewed the evidence before the Court, I am satisfied that the written requests seeking variation of the height and FSR development standards sufficiently describe the environmental planning grounds to justify the non-compliances, and that strict compliance of the standards would be both unreasonable and unnecessary. The proposed development, as described to the Court, is consistent with the objectives of the zone (E1), as well as height (cl 4.3) and FSR (cl 4.4 plus 4.4A) standards. The breach in the development standards will not cause further impact to (existing and future) surrounding residents and the streetscape.
- (m) The (cl 4.6) written requests address that a variation of the height and FSR development standards is appropriate, and flexibility of the standards is justified. There is no public benefit in maintaining these standards on the site, as the proposed development is consistent with the character, bulk and scale of the surrounding context. The proposed variation in the development standards is in the public interest. I accept

that there is no significant consequence to State or Regional environmental planning matters as a result of varying the development standards in this instance, and that there is no public benefit to maintaining the height and FSR standards for the proposed development.

- (n) I am satisfied that the requirements of cl 4.6 of the WLEP have been addressed, and that a variation in the cl 4.3 (height) and 4.4 (plus 4.4A) (FSR) development standards should be granted.

(2) State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience):

- (a) Pursuant to Ch 4 of the SEPP Resilience, the contamination status of the site must be considered, prior to grant of consent. Based on the use of the site being historically for commercial purposes, as assessed by Council, together with the agreed conditions of consent, the relevant requirements of s 4.6 of the SEPP Resilience are addressed. It is noted that the DA does not propose any works that are at or below ground surface.

(3) State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP Biodiversity):

- (a) The site is located within the Sydney Harbour Catchment pursuant to s 10.2(2)(a) of the SEPP Biodiversity. There is no assessed impact from the proposed development to the Sydney Harbour Catchment, pursuant to s 10.10.

(4) Woollahra Development Control Plan 2015 (WDCP):

- (a) The original DA was publicly notified in accordance with the WDCP and relevant Council's Community Participation Plan , with 22 submissions received. The issues raised by the objectors in written and oral submission have been considered by the Council in undertaking its merit assessment of the DA. It was explained that the Council is satisfied that the issues raised by residents have been addressed, and where appropriate amendments made to the DA. The protection, where possible, of views to the water interface and headland from surrounding properties have been considered in the amended DA.
- (b) The relevant requirements of the WDCP are generally complied with, based on the amended plans and supporting documents to the amended DA, and described in the agreed conditions of consent.

9 Pursuant to s 23 of the EPA Reg, the application has satisfied the Court with the provision of consent from relevant landowners. All proposed works are contained within the site.

## Grant of consent

- 10 Based on the amended plans and supporting documents to the DA, the parties explained to the Court that there are no jurisdictional impediments to the making of the agreement or for the Court in making the orders, as sought.
- 11 The Council has undertaken an appropriate merit assessment of the proposed development. The Court is advised that the issues raised in contention have been addressed by the amendments made to the DA and supporting documents.
- 12 I am satisfied, based on the evidence before me and as explained by the parties, that there are no jurisdictional impediments to this agreement and that Development Application 453/2022/1 should be granted consent.
- 13 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.
- 14 The Court notes that:
- (1) Woollahra Municipal Council as the relevant consent authority has agreed, pursuant to section 37(1) of the Environmental Planning and Assessment Regulation 2021, to the applicant amending Development Application 453/2022/1 and to rely on the following documents:

Architectural		
Site Plan	Rev C prepared by Stafford Architects	22.05.23
Basement	Rev C prepared by Stafford Architects	22.05.23
Ground Floor Plan	Rev C prepared by Stafford Architects	22.05.23
Level 1 Floor Plan	Rev C prepared by Stafford Architects	22.05.23
Level 2 Floor Plan	Rev C prepared by Stafford Architects	22.05.23
Level 3 Floor Plan	Rev C prepared by Stafford Architects	22.05.23
Level 4 Floor Plan	Rev C prepared by Stafford Architects	22.05.23
Level 5 Floor Plan	Rev C prepared by Stafford Architects	22.05.23
Roof Plan	Rev C prepared by Stafford Architects	22.05.23
North Elevation	Rev C prepared by Stafford Architects	22.05.23

West Elevation	Rev C prepared by Stafford Architects	22.05.23
South Elevation	Rev C prepared by Stafford Architects	22.05.23
East Elevation	Rev C prepared by Stafford Architects	22.05.23
Section AA	Rev C prepared by Stafford Architects	22.05.23
<b>Landscape</b>		
Landscape Plan	DA2 Rev E prepared by Volker Klemm Landscape Design	05.23
<b>View Analysis</b>		
View Analysis	Rev C prepared by Stafford Architects	05.23
<b>Acoustic Assessment</b>		
DA Acoustic Assessment	Acoustic Logic	17.04.23
<b>Shadow Analysis</b>		
Shadow Analysis	Cad Draft P/L	24.5.23
<b>Clause 4.6 Requests</b>		
Clause 4.6 Request Building Height	GSA Planning	May 2023
Clause 4.6 Request Floor Space Ratio	GSA Planning	May 2023

- (2) The applicant has filed the amended documents described above with the Court on 13 June 2023, as described above.

15 The Court orders that:

- (1) The applicant's clause 4.6 written request prepared by GSA Planning dated May 2023 seeking to vary the height of building standard at clause 4.3 of the



Woollahra Local Environmental Plan 2014 is upheld.

- (2) The Applicant's clause 4.6 written request prepared by GSA Planning dated May 2023 seeking to vary the floor space ratio standard at clause 4.4 of the Woollahra Local Environmental Plan 2014 is upheld.
- (3) The appeal is upheld.
- (4) Development Application 453/2022/1, as amended, seeking alterations and additions to the approved commercial development, by the addition of a new level on Lot 1 in Deposited Plan 796750, also known as 55 Bay Street, Double Bay NSW is determined by the grant of consent, subject to the conditions in Annexure A.

**Sarah Bish**

**Commissioner of the Court**

374698.22 Annexure A

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Decision last updated: 04 July 2023