



Land and Environment Court

New South Wales

Case Name: Kew Bellevue Hill Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1431

Hearing Date(s): Conciliation conference on 16 May, 22 June and 5 July 2023

Date of Orders: 08 August 2023

Decision Date: 8 August 2023

Jurisdiction: Class 1

Before: Washington AC

Decision: The Court Orders
(1) The Applicant is to pay those costs of the Respondent that have been thrown away as a result of the amendment of the application for development consent, pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, as agreed or assessed.
(2) The appeal is upheld
(3) Development application DA335/22 for demolition of existing dwellings and construction of a residential flat building, basement parking and landscaping works at Lot 1 in DP34743, Lot 1 in DP105443 and Lot 88 in DP1039955 (also known as 84, 86 and 88 Birriga Road, Bellevue Hill, NSW) is determined by the grant of consent, subject to the conditions set out in Annexure A to this agreement.

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – construction of residential flat buildings – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979 ss 4.16, 8.7, 8.15

Environmental Planning and Assessment Regulation
2021, s 37
Land and Environment Court Act 1979 s 34
Woollahra Local Environmental Plan 2014 cll 4.1, 4.3,
4.4, 6.1, 6.2
State Environmental Planning Policy (Resilience and
Hazards) 2021

Category: Principal judgment

Parties: Kew Bellevue Hill Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Gadiel (Solicitor)(Applicant)
S Patterson (Solicitor)(Respondent)

Solicitors:
Mills Oakley (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2022/372313

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These Class 1 proceedings have arisen as a result of the deemed refusal by Woollahra Municipal Council of development application DA335/22, which seeks consent for the demolition of existing dwellings and construction of a residential flat building, basement parking and landscaping works. The subject site is currently described as Lot 1 in DP34743, Lot 1 in DP105443 and Lot 88 in DP1039955, however these lots will be consolidated in to two lots as a result of a recent consent, DA126/22. The site is known as 84, 86 and 88 Birriga Road, Bellevue Hill.
- 2 These proceedings have been brought to the Court pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 3 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 16 May, 22 June and 5 July 2023. I presided over the conciliation conference.

- 4 After 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 one 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 development application. 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, and for the following reasons, I am satisfied that these matters of jurisdiction have been satisfied.
- 6 The Woollahra Local Environmental Plan 2014 (WLEP) applies to the development. Pursuant to this, I note the following:
 - (1) The site is zoned R3 Medium Density Residential within which residential flat buildings are permitted with development consent.
 - (2) Based on the information contained in the Statement of Environmental Effects (SEE) the parties submit, and I accept, that the proposed development meets the objectives of this zone.
 - (3) WLEP cl 4.1 sets a minimum lot size for a residential flat building of 700m². This development complies based on the impending lot sizes as per approved DA126/22, which results in Lot A being 700m² and Lot B being 2193m².
 - (4) The maximum building height allowed under WLEP cl 4.3 is 13.5m for Building A and 9.5m for Building B. The proposed building heights comply with this standard as demonstrated by drawing DA9003 by MHNDUNION dated 23 May 2023.
 - (5) The maximum FSR established under WLEP cl 4.4 is 0.9:1, to which this development aligns with an FSR of 0.9:1.
 - (6) The site is mapped as Class 5 on the Acid Sulfate Soils map, however the proposed development will not lower the watertable below 1 metre Australian Height Datum on the site or adjacent land, and therefore meets the requirements of WLEP cl 6.1.
 - (7) The proposed development includes earthworks. The parties submit, and I accept, that the matters listed in WLEP cl 6.2(3) have been considered and that the proposed development will not have a detrimental impact on environmental functions and processes,

neighbouring uses, cultural or heritage items or features of the surrounding land.

- 7 Pursuant to State Environmental Planning Policy (Resilience and Hazards) 2021, I must consider whether the land is suitable for its intended use in terms of contamination. The parties submit and, based on this and the information contained in the SEE, I accept that the site is suitable for the intended use as the historic use of the land has been residential and there is no evidence to suggest that the site is contaminated.
- 8 The proposed development has been adequately notified to surrounding residents. The parties submit, and I accept, that of the 52 objections received, the relevant issues raised have been taken into consideration in the assessment and amendment of this application.
- 9 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.
- 10 As the parties' decision is one 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.
- 11 The Court notes:
- (1) that the Respondent has agreed under section 37(1) of the Environmental Planning and Assessment Regulation 2021 to the Applicant amending development application DA335/22 to include the following:
- (a) architectural drawings prepared by MHNDUNION in replacement of corresponding earlier drawings as follows:

Drawing No.	Rev.	Title	Date
DA 0000	G	Coverpage	28 June 2023
DA 1000	F	Site Context	23

			May 2023
DA 1001	F	Photomontage	23 May 2023
DA 1002	F	Site Analysis Plan	23 May 2023
DA 1003	G	Site & Roof Plan	28 June 2023
DA 1004	G	Demolition/Tree Removal Plan	16 June 2023
DA 1005	F	Setbacks Diagram	23 May 2023
DA 1006	F	Public Domain Diagram	23 May 2023
DA 2000	F	Basement 03 – Key Plan	23 May 2023
DA 2001	F	Basement 02/B: Lower Ground Floor – Key Plan	23 May 2023

DA 2002	F	Basement 01/B: Ground Floor – Key Plan	23 May 2023
DA 2003	F	A: Lower Ground 02/ B: Level 01 Floor - Key Plan	23 May 2023
DA 2004	F	A: Lower Ground 01/B: Level 02 Penthouse Floor – Key Plan	23 May 2023
DA 2005	G	A: Ground Floor Plan/B: Roof – Key Plan	28 June 2023
DA 2006	G	A: Level 01 Floor – Key Plan	28 June 2023
DA 2007	G	A: Level 02 Penthouse Floor – Key Plan	28 June 2023
DA 2008	G	Roof – Key Plan	28 June 2023
DA 2100	F	Basement 03 Plan	23 May 2023
DA 2101	F	Basement 02/B: Lower ground Floor Plan	23 May

			2023
DA 2102	F	Basement 01/B: Ground Floor Plan	23 May 2023
DA 2103	F	A: Lower Ground 02/B: Level 01 Floor Plan	23 May 2023
DA 2104	F	A: Lower Ground 01/B: Level 02 Penthouse Floor Plan	23 May 2023
DA 2105	G	A: Ground Floor Plan/B: Roof Plan	28 June 2023
DA 2106	G	A: Level 01 Floor Plan	28 June 2023
DA 2107	G	A: Level 02 Penthouse Floor Plan	28 June 2023
DA 2108	G	Roof Plan	28 June 2023
DA 3000	G	Building A: Elevation South	28 June 2023
DA 3001	F	Building A: Elevation North	23

			May 2023
DA 3002	F	Building A: Elevation East	23 May 2023
DA 3003	G	Building A: Elevation West	28 June 2023
DA 3004	F	Building B: Elevation North	23 May 2023
DA 3005	F	Building B: Elevation East	23 May 2023
DA 3006	F	Building B: Elevation West	23 May 2023
DA 3007	F	Window Schedule	23 May 2023
DA 3100	F	Site Section – Building A & B	23 May 2023
DA 3101	G	Building A: Short Section	28 June 2023

DA 3102	F	Building B: Long Section	23 May 2023
DA 3103	F	Building B: Short Section	23 May 2023
DA 3104	F	Building B: Boundary Sections	23 May 2023
DA 6000	F	External Finishes & Materials	23 May 2023
DA 7000	F	Adaptable Layouts – B202, B302	23 May 2023
DA 7001	F	Cross Ventilation/Solar Access 01	23 May 2023
DA 7002	F	Cross Ventilation/Solar Access 02	23 May 2023
DA 7003	F	Storage and Parking Assessment 01	23 May 2023
DA 7003	F	Storage and Parking Assessment 02	23 May

			2023
DA 7003	F	Storage and Parking Assessment 03	23 May 2023
DA 9000	F	GFA Diagrams 01	23 May 2023
DA 9001	F	GFA Diagrams 02	23 May 2023
DA 9002	G	Landscape Area Calculation	28 June 2023
DA 9003	F	Height Plane Diagrams	23 May 2023
DA 9004	F	Waste Mgt Plan	23 May 2023
DA 9005	F	Excavation Diagram 01	23 May 2023
DA 9006	F	Excavation Diagram 02	23 May 2023
DA 9007	F	Excavation Diagram – Parking	23

		Breakdown	May 2023
DA 9100	F	Solar Access 9am – 11am – June 21st	23 May 2023
DA 9101	F	Solar Access 12pm – 3pm – June 21st	23 May 2023
DA 9200	F	Notification Plan 01	23 May 2023
DA 9201	F	Notification Plan 02	23 May 2023
SK-01A	G	82 Birriga_Boundary Stair Elevation	28 June 2023
SK-01B	G	Boundary Fence Details	28 June 2023
SK-02A	G	Boundary Stair 3D_Comparison with DA Scheme	28 June 2023
SK-02B	G	Boundary Stair 3D_Comparison with DA Scheme	28 June 2023

SK-02C	G	Boundary Stair 3D_Additional Proposed Images	28 June 2023
SK-02D	F	Boundary Stair 3D_Views From Units	23 May 2023
SK-03	F	Building B Ground Floor Plan_Egress Path Detail	23 May 2023
SK-04A	F	Egress Path 3D Images	23 May 2023
SK-04B	F	Egress Path 3D Images	23 May 2023
SK-04C	F	Egress Path 3D Images	23 May 2023
SK-04D	F	Egress Path Plan and Section	23 May 2023
SK-04E	F	Egress Path Sections	23 May 2023

(b) BASIX stamped architectural drawings (stamped 8 June 2023) prepared by MHNDUNION in replacement of corresponding earlier BASIX stamped drawings as follows:

Drawing No.	Rev.	Title	Date
DA 1003	F	Site & Roof Plan	23 May 2023
DA 2000	F	Basement 03 – Key Plan	23 May 2023
DA 2001	F	Basement 02/B: Lower Ground Floor – Key Plan	23 May 2023
DA 2002	F	Basement 01/B: Ground Floor – Key Plan	23 May 2023
DA 2003	F	A: Lower Ground 02/ B: Level 01 Floor - Key Plan	23 May 2023
DA 2004	F	A: Lower Ground 01/B: Level 02 Penthouse Floor – Key Plan	23 May 2023
DA 2005	F	A: Ground Floor Plan/B: Roof – Key Plan	23 May 2023
DA 2006	F	A: Level 01 Floor – Key Plan	23 May 2023

DA 2007	F	A: Level 02 Penthouse Floor – Key Plan	23 May 2023
DA 2008	F	Roof – Key Plan	23 May 2023
DA 2100	F	Basement 03 Plan	23 May 2023
DA 2101	F	Basement 02/B: Lower ground Floor Plan	23 May 2023
DA 2102	F	Basement 01/B: Ground Floor Plan	23 May 2023
DA 2103	F	A: Lower Ground 02/B: Level 01 Floor Plan	23 May 2023
DA 2104	F	A: Lower Ground 01/B: Level 02 Penthouse Floor Plan	23 May 2023
DA 2105	F	A: Ground Floor Plan/B: Roof Plan	23 May 2023
DA 2106	F	A: Level 01 Floor Plan	23 May

			2023
DA 2107	F	A: Level 02 Penthouse Floor Plan	23 May 2023
DA 2108	F	Roof Plan	23 May 2023
DA 3000	F	Building A: Elevation South	23 May 2023
DA 3001	F	Building A: Elevation North	23 May 2023
DA 3002	F	Building A: Elevation East	23 May 2023
DA 3003	F	Building A: Elevation West	23 May 2023
DA 3004	F	Building B: Elevation North	23 May 2023
DA 3005	F	Building B: Elevation East	23 May 2023
DA 3006	F	Building B: Elevation West	23

			May 2023
DA 3007	F	Window Schedule	23 May 2023
DA 3100	F	Site Section – Building A & B	23 May 2023
DA 3101	F	Building A: Short Section	23 May 2023
DA 3102	F	Building B: Long Section	23 May 2023
DA 3103	F	Building B: Short Section	23 May 2023
DA 3104	F	Building B: Boundary Sections	23 May 2023
DA 6000	F	External Finishes & Materials	23 May 2023

(c) landscape architectural drawings prepared by GROUPGSA in replacement of corresponding earlier drawings as follows:

Drawing No.	Rev.	Title	Date
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L-0000	05	Cover Sheet	27 June 2023
L-2200	07	Overall Landscape Plan	27 June 2023
L-2201	04	Ground Level – Landscape Plan	27 June 2023
L-2202	02	Roof Level – Landscape Plan	30 May 2023
L-5000	05	Planting Schedule	31 May 2023
L-5001	04	Ground Level – Planting Plan	27 June 2023
L-5002	02	Communal Roof – Planting Plan	30 May 2023
L-5003	02	Materials Schedule	30 May 2023
L-5004	02	Ground Level – Alternative Planting Plan	27 June 2023
L-6001	05	Building A Elevation East	30 May 2023
L-6002	06	Building A Elevation West	27 June 2023
L-6003	05	Building B Boundary Section	30 May 2023

L-6004	05	Building B Communal Roof Terrace Section	30 May 2023
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(d) revised engineering drawings prepared by WMS in replacement of corresponding earlier drawings as follows:

Drawing No.	Rev.	Title	Date
20027-LAY-001	B	Cover Sheet	5 June 2023
2027-LAY-002	B	Overall Layout Plan	5 June 2023
2027-LAY-003	B	Layout Plan (Sheet 1 of 4)	5 June 2023
2027-LAY-004	B	Layout Plan (Sheet 2 of 4)	5 June 2023
2027-LAY-005	B	Layout Plan (Sheet 3 of 4)	5 June 2023
2027-LAY-006	B	Layout Plan (Sheet 3 of 4)	5 June 2023
2027-LAY-007	B	Detail (Sheet 1 of 2)	5 June 2023
2027-LAY-008	B	Detail (Sheet 2 of 2)	5 June 2023
2027-LAY-009	B	Drainage Long Section (Sheet 1 of 2)	5 June 2023

2027-LAY-010	B	Detail (Sheet 2 of 2)	5 June 2023
2027-LAY-011	B	Calculations	5 June 2023

- (e) schedule of architectural amendments prepared by MHNDUNION dated 28 June 2023;
- (f) schedule of architectural amendments 'SK Drawings' prepared by MHNDUNION dated 28 June 2023;
- (g) BASIX certificate '132657AM_02' prepared by Gradwell Consulting dated 13 June 2023 in replacement of the earlier BASIX certificate;
- (h) NatHERS Certificate No 0007939520 prepared by Gradwell Consulting dated 8 June 2023 in replacement of the earlier NatHERS certificate;
- (i) 'Assessor Construction Summary' prepared by Gradwell Consulting dated 8 June 2023;
- (j) letter prepared by Melrose Cranes and Rigging Pty Ltd dated 7 June 2023;
- (k) peer review of the transplant methodology plan for palms prepared by Colin Wilson dated 11 June 2023;
- (l) ADG compliance checklist prepared by MHNDU dated 10 July 2023 in replacement of the earlier ADG compliance checklist;
- (m) Design Verification Statement prepared by Brian Meyerson dated 29 May 2023 in replacement of the earlier design verification statement;
- (n) Noise Impact Assessment prepared by Stantec dated 29 March 2023 in replacement of the earlier noise impact assessment;
- (o) letter titled 'RE: Response to Council's Minimum Lot Width Comments' prepared by GSA Planning dated 28 April 2023;
- (p) letter titled 'RE: Response to Council's Excavation Comments' prepared by GSA Planning dated 1 May 2023;
- (q) Preliminary Engineering Design Report prepared by Stantec (undated);
- (r) Structural Engineering Statement prepared by Dunning's Consulting Engineers dated 26 April 2023;
- (s) Arboriculture Impact Assessment and Management Plan prepared by George Palmer, Botanics Pty Ltd dated June 2023

in replacement of the arboriculture impact assessment and management plan;

- (t) Transplant Methodology Plan prepared by George Palmer, Botanics Pty Ltd dated March 2023;
- (u) Tree Table prepared by George Palmer, Botanics Pty Ltd (undated);
- (v) Visual Impact Study prepared by CMS Surveyors Pty Ltd dated 14 April 2023;
- (w) View Impact Assessment prepared by AE Design dated 1 May 2023;
- (x) Photomontages prepared by AE Design and CMS Surveyors dated 1 May 2023 in replacement of the earlier photomontages;
- (y) Demolition Report prepared by Architectural Projects dated 5 August 2022 in replacement of the earlier demolition report;
- (z) Traffic Impact Statement prepared by Traffix dated 4 August 2022 in replacement of the earlier traffic impact statement;
- (aa) Geotechnical Investigation Report prepared by Stantec dated 19 June 2023,

(the amended application).

12 The Court orders:

- (1) The Applicant is to pay those costs of the Respondent that have been thrown away as a result of the amendment of the application for development consent, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, as agreed or assessed.
- (2) The appeal is upheld.
- (3) Development application DA335/22 for demolition of existing dwellings and construction of a residential flat building, basement parking and landscaping works at Lot 1 in DP34743, Lot 1 in DP105443 and Lot 88 in DP1039955 (also known as 84, 86 and 88 Birriga Road, Bellevue Hill, NSW) is determined by the grant of consent, subject to the conditions set out in Annexure A to this agreement.

E Washington

Acting Commissioner of the Court

Annexure A

any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.