



Land and Environment Court
New South Wales

Case Name: Peen v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1446

Hearing Date(s): Conciliation conference 24 and 25 July 2023

Date of Orders: 11 August 2023

Decision Date: 11 August 2023

Jurisdiction: Class 1

Before: Dickson C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development Application No DA/40/2022/01 for alterations and additions to a residential dwelling house including first floor addition to an existing dwelling on Lot 2 in DP218700, also known as 5 Bell Street, Vaucluse, is determined by the grant of consent subject to conditions contained in Annexure 'A'.

Catchwords: DEVELOPMENT APPLICATION – alterations and additions to residential dwelling – amended plans – agreement between the parties – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 8.7
Environmental Planning and Assessment Regulation 2000, cll 3, 49, 55
Environmental Planning and Assessment Regulation 2021, Sch 6, Pt 1, s 3
Land and Environment Court Act 1979, s 34AA
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chs 2, 6, 10, ss 6.65, 10.2, 10.10, 10.11, 10.19, 10.20, 10.21, 10.22, 10.23, 10.24, 10.25, 10.26, 10.27
State Environmental Planning Policy (Resilience and

Hazards) 2021, s 4.6
State Environmental Planning Policy No 55—
Remediation of Land 1998
Sydney Regional Environmental Plan (Sydney Harbour
Catchment) 2005, cl 13
Woollahra Local Environmental Plan 2014 (Amendment
No 33)
Woollahra Local Environmental Plan 2014, cll 1.8A, 2.7,
5.10, 5.21, 6.1, 6.2

Cases Cited: CK Design Pty Ltd v Penrith City Council (No 2)
[2022] NSWLEC 97
Omid Mohebati-Arani v Ku-ring-gai Council [2017]
NSWLEC 143

Texts Cited: Woollahra Community Participation Plan 2017

Category: Principal judgment

Parties: Katie Qi Peen (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
J Farrell (Applicant)
J Zorzetto (Solicitor) (Respondent)

Solicitors:
Boskovitz Lawyers (Applicant)
HWL Ebsworth (Respondent)

File Number(s): 2023/43847

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal bought pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) by Katie Qi Peen (the Applicant) against the actual refusal of development application number DA 40/2002/1. The application, as amended, seeks consent for alterations and additions to an existing residential dwelling at 5 Bell Street, Vaucluse (Lot 2 in DP 218700).
- 2 A conciliation conference was held between the parties pursuant to s 34AA of the *Land and Environment Court Act 1979* (LEC Act) on 25 July 2023. I

presided over the conciliation conference. At the conciliation conference, the parties reached an agreement based on amended plans and documents. The parties' agreement is for the grant of consent to the application, as amended, subject to conditions. The amendments to the development application include a reduction in the height of the roof pitch by 300mm, a reduction in building bulk, a reduction in the area of the west facing balcony and landscaping requirements.

3 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I form this state of satisfaction on the basis that:

- (1) The development application was made with the consent of the owner of the land: cl 49 of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation 2000). As the development application was lodged on 15 February 2022, the EPA Regulation 2000 continues to apply to the development application: Sch 6, Pt 1, s 3 of the Environmental Planning and Assessment Regulation 2021.
- (2) The development application was notified to adjoining and nearby properties on 23 February 2022 for a period of 15 days in accordance with the Woollahra Community Participation Plan 2017. Further, a number of residents addressed the Court at the commencement of the proceedings. I am satisfied the amended development application does not require readvertising because the environmental impact of the amendments will be the same or lesser than the original proposal. I am satisfied that the submissions have been considered in the determination of the development application by either amendment to the application or in the imposition of conditions of consent: s 4.15(1)(d) of the EPA Act.
- (3) Pursuant to Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP), the site is located within the Sydney Harbour Catchment, outside the Foreshores and Waterways Area of the Catchment. The proposal is considered to be satisfactory in terms of the applicable cl 13 planning principles for land located within the Sydney Harbour Catchment and is consistent with the terms of the SREP and the associated development control plan.
- (4) The Development Application is for 'BASIX development' as it involves the alteration of a BASIX building where the estimated construction cost is greater than \$50,000, see cl 3 of the EPA Regulation 2000. The Development Application is supported by an updated BASIX Certificate. This certificate confirms that the project passes the BASIX requirements.

- (5) The State Environmental Planning Policy (Biodiversity and Conservation) 2021 (BC SEPP) is relevant in respect of those matters in Ch 2 and Ch 10 of the instrument. I accept that the proposed development does not seek any consent which might contribute to the loss of biodiversity.
- (6) Chapter 10 of the BC SEPP applies to the Sydney Harbour Catchment and was repealed in November 2022 and replaced by Ch 6. Chapter 6, at s 6.65, contains a savings and transitional provision that has the effect that the development application should be determined as though this amendment was not in effect: *CK Design Pty Ltd v Penrith City Council (No 2)* [2022] NSWLEC 97 at [48] (Robson J).
- (7) The Site is located within the Sydney Harbour Catchment as determined by s 10.2(a) of the BC SEPP. The Site is also within the Foreshores and Waterways Area pursuant to s 10.2(2)(a) of the BC SEPP. In determining the development application, I have given consideration to the principles listed in ss 10.10, cl 10.11 and 10.19-10.27. I am satisfied none of these matters raise concerns that would warrant the refusal of the development application.
- (8) Section 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH) requires a consent authority to consider the contamination of land when determining a development application. There is no evidence within Council's records that the land has been used for any purposes listed in table 1 of the Managing Land Contamination Planning guidelines in the State Environmental Planning Policy No 55—Remediation of Land. Further, the heritage impact assessment documents the historic use of the site as residential and it is proposed to remain as residential. I can be satisfied that the land will be suitable for the purpose for which the development is proposed to be carried out under the application.
- (9) The site is zoned R2 Low Density Residential under the Woollahra Local Environmental Plan 2014 (LEP 2014). Development for the purposes of a dwelling house is permitted with consent in the zone. Demolition is permitted with consent pursuant to cl 2.7 of LEP 2014. In determining the development application, I have given consideration to the objectives of the R2 Low Density Residential zone.
- (10) The amended plans do not result in an exceedance of the maximum building height standard in LEP 2014.
- (11) Woollahra Local Environmental Plan 2014 (Amendment No 33) (Amendment 33) commenced on 14 July 2023 and introduced a floor space ratio control. The parties agree, and I accept, that the development application has the benefit of the savings and transitional provision in cl 1.8A(2) of the LEP 2014, and that Amendment 33 does not apply. As a result of the savings and transitional provision in cl 1.8A(2), a requirement to consider the LEP 2014 Amendment does not arise pursuant to s 4.15(1)(a)(ii) of the EPA Act: *Omid Mohebat-Arani v Ku-ring-gai Council* [2017] NSWLEC 143.

- (12) Pursuant to cl 6.1 'Acid sulfate soils' of LEP 2014, the consent authority is required to consider any potential acid sulfate soils affectation so that it does not disturb, expose or drain acid sulfate soils and cause environmental damage. The parties agree, and I accept, that the site is located within a Class 5 area as specified in the Acid Sulfate Soils Map. However, the subject works are not likely to lower the water table below 1m AHD on any land within 500m of a Class 1, 2 and 3 land classifications. Accordingly, a preliminary assessment is not required and there is unlikely to be any acid sulfate affectation.
 - (13) The amended development application does not propose any bulk earthworks or excavation. Pursuant to cl 6.2 'Earthworks', I have considered the matters arising in cl 6.2(3) as part of the determination of the development application and found it to be acceptable.
 - (14) The development site is identified as being within a flood planning area, however, no objections to the approval of the development application have been raised by the Respondent subject to the imposition of the annexed conditions. In determining the development application, I have considered the matters at subcl (3) of cl 5.21 and formed the view that the requirements of cl 5.21(2) of LEP 2014 are satisfied.
 - (15) The subject site is located within the Bell Street Heritage Conservation Area (HCA). The development application is supported by a Heritage Impact Statement prepared by Weir Phillips (HIA). As required by subcl (4) of cl 5.10 Heritage Conservation of LEP 2014, in determining the development application I have reviewed the HIA and considered the effect of the proposed development on the heritage significance of the HCA.
- 4 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to "dispose of the proceedings in accordance with the decision". The LEC Act also requires me to "set out in writing the terms of the decision" (s 34(3)(b)).
- 5 In making the orders to give effect to the agreement between the parties, the parties have not raised, and I am not aware of any jurisdictional impediment to the making of these orders. Further, I was not required to make, and have not made, any assessment of the merits of the DA against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.
- 6 The Court notes that Woollahra Municipal Council as the relevant consent authority has agreed, under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending Development Application No. DA/40/2022 in accordance with the documents listed below:

Amended Architectural Plans		
Plan	Prepared by	Dated
Cover Sheet/Locality/BASIX A001 Issue A-DA-09	Dimension Five Design	24/07/2023
Site plan A002 Issue A-DA-09	Dimension Five Design	24/07/2023
Existing Lower Ground Plan A101 Issue A-DA-09	Dimension Five Design	24/07/2023
Existing Ground Floor Plan A102 Issue A-DA-09	Dimension Five Design	24/07/2023
Existing Roof and Demolition Plan A103 Issue A-DA-09	Dimension Five Design	24/07/2023
Proposed Lower Ground Floor Plan A104 Issue A-DA-09	Dimension Five Design	24/07/2023
Proposed Ground Floor Plan A105 Issue A-DA-09	Dimension Five Design	24/07/2023
Proposed First Floor Plan A106 Issue A-DA-09	Dimension Five Design	24/07/2023
Proposed Roof Plan A107 issue A- DA-09	Dimension Five Design	24/07/2023
Landscape and Hedge Plan A108 Issue A-DA-09	Dimension Five Design	24/07/2023
Floorplate Area Calculation Plan	Dimension	24/07/2023

A115 Issue A-DA-09	Five Design	
Floorplate & Setback Calculations A116 Issue A-DA-09	Dimension Five Design	24/07/2023
Gross Floor Area Calculation Plan - Original Proposed DA A118 Issue A- DA-09	Dimension Five Design	24/07/2023
Gross Floor Area Calculation Plan - Final Section 34 Plans A119 Issue A-DA-09	Dimension Five Design	24/07/2023
Section 1 A201 Issue A-DA-09	Dimension Five Design	24/07/2023
Section 2 A202 Issue A-DA-09	Dimension Five Design	24/07/2023
Section 3 A203 Issue A-DA-09	Dimension Five Design	24/07/2023
Section 4 A204 Issue A-DA-09	Dimension Five Design	24/07/2023
Front Elevation A301 Issue A-DA-09	Dimension Five Design	24/07/2023
Right Side Elevation A302 Issue A- DA-09	Dimension Five Design	24/07/2023
Rear Elevation A303 Issue A-DA-09	Dimension Five Design	24/07/2023
Left Side Elevation A304 Issue A-	Dimension	24/07/2023

DA-09	Five Design	
External materials and Colours schedule A350 Issue A-DA-09	Dimension Five Design	24/07/2023
Supporting Documentation		
Survey Plan	C.M.S. Surveyors Pty Limited	2/07/19 - 18/07/22
Site Minimisation and Management Plan	Dimension 5 Design	15 December 2021
BASIX Certificate No.	LC Consulting Engineers	

- 7 The amended development application documents listed above are to be lodged on the NSW Planning Portal.
- 8 The Court orders that:
- (1) The appeal is upheld.
 - (2) Development Application No DA/40/2022/01 for alterations and additions to a residential dwelling house including first floor addition to an existing dwelling on Lot 2 in DP218700, also known as 5 Bell Street, Vacluse, is determined by the grant of consent subject to conditions contained in Annexure 'A'.

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D Dickson

Commissioner of the Court

Annexure A (657719, pdf)

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