



## Land and Environment Court New South Wales

**Medium Neutral Citation:**

**Woollahra Developments Pty. Limited v Council of the Municipality of Woollahra [2023] NSWLEC 1579**

**Hearing dates:**

Conciliation conference on 21 September 2023

**Date of orders:**

05 October 2023

**Decision date:**

05 October 2023

**Jurisdiction:**

Class 1

**Before:**

Dixon SC

**Decision:**

The Court orders:

- (1) The appeal is upheld.
- (2) Development Consent No. 607/2021 for the demolition of, and alterations and additions to, existing buildings and the construction of a residential flat building development across multiple lots, including land remediation and consolidation of lots at 2A James Street and 60-80 Oxford Street, Woollahra, is modified in the terms in Annexure 'A'.
- (3) Development Consent No. 607/2021 as modified by the Court is set out in Annexure 'B'.

**Catchwords:**

APPEAL – modification application – conciliation conference – agreement between the parties – orders

**Legislation Cited:**

Environmental Planning and Assessment Act 1979, ss 4.15(1), 4.55(2), Div 4.8  
Environmental Planning and Assessment Regulation 2000, cl 115(3B)  
Environmental Planning and Assessment Regulation 2021, ss 102, 113; Sch 7  
State Environmental Planning Policy (Biodiversity and Conservation) 2021  
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004  
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6

State Environmental Planning Policy No 65 – Design  
Quality of Residential Apartment Development, cl 29  
Water Management Act 2000  
Woollahra Local Environmental Plan 2014, cl 4.3, 4.4, 4.6,  
5.10, 6.2, Sch 5 Pt 2

**Cases Cited:** SDHA Pty Ltd v Waverley Council (2015) 209 LGERA 233;  
[2015] NSWLEC 65

**Texts Cited:** Apartment Design Guide  
Woollahra Community Participation Plan  
Woollahra Development Control Plan 2015

**Category:** Principal judgment

**Parties:** Woollahra Developments Pty. Limited (Applicant)  
Council of the Municipality of Woollahra (Respondent)

**Representation:** Counsel:  
A Whealy (Solicitor) (Applicant)  
L Taylor (Solicitor) (Respondent)

Solicitors:  
Mills Oakley (Applicant)  
Lindsay Taylor Lawyers (Respondent)

**File Number(s):** 2023/35800

**Publication restriction:** Nil

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## JUDGMENT

- 1 These proceedings concern an application for the modification of a development consent (DA 607/2021/3) approved by the respondent for a residential flat building on a large site in Darlinghurst known as 2A James Street and 60-80 Oxford Street (the site). The site has a total area of 3,452m<sup>2</sup> and a slight incline (approximately 1m) from the north to the south.
- 2 The site is currently occupied by the following buildings and land uses:
  - 2A James Street: Vacant, with the exception of encroaching outbuildings pertaining to 76 and 78 Oxford Street.
  - 60-62 Oxford Street: A commercial building circa 1923. Originally a mechanical workshop, currently a paint store (a contributory item to the Woollahra Heritage Conservation Area (HCA)).
  - 64-66 Oxford Street: A contemporary single storey commercial storage building.
  - 68 to 78 Oxford Street: Residential dwelling houses, characterised by multi-storey terrace houses ranging the Georgian, Victorian and Federation eras, and associated outbuildings (all contributory items to the Woollahra HCA).

- 80 Oxford Street: A vacant commercial building circa 1890s, originally a gymnasium converted to a theatre (a contributory item to the Woollahra HCA).
- 3 The applicant has obtained owners' consent from the relevant registered proprietors of 70, 74, 76 and 80 Oxford Street and 2A James Street (see Annexure C). The applicant is the registered proprietor of the other lots comprising the site.
- 4 The site is located in a R3 Medium Density Residential zone pursuant to the Woollahra Local Environmental Plan 2014 (WLEP).
- 5 The site is located within the Woollahra HCA under Sch 5, Pt 2 of the WLEP (Item C15).

## History

- 6 On 15 September 2022, the respondent determined to approve development application no. 607/2021 for the demolition of, and alterations and additions to, existing buildings and the construction of a residential flat building development across multiple lots, including remediation of land and consolidation of lots (Original Consent).
- 7 On 22 December 2022, this modification application was lodged with the respondent.
- 8 On 12 April 2023, the respondent determined to approve modification application No. 607/2021/2 for modifications to Conditions A.11, C.9, C.11 and C.12 of the Original Consent.
- 9 Between 25 January 2023 to 24 February 2023, the modification application was notified by the respondent. No submissions were made in response to the notification.
- 10 On 6 February 2023, the applicant filed Class 1 proceedings in the Land and Environment Court appealing the respondent's deemed refusal of the modification application.
- 11 On 2 March 2023, at the First Directions Hearing, the Court listed the matter for a s34 conciliation conference on 18 July 2023.
- 12 On 6 April 2023, the Woollahra Local Planning Panel (Panel) determined to refuse the modification application.
- 13 Prior to the s34 conference, the applicant provided the respondent with a suite of amended plans and materials.
- 14 On 18 July 2023, the parties participated in a s34 conciliation conference before me. The s34 conference was adjourned on a number of occasions to allow the parties to continue without prejudice discussions. As it happened, the discussions proved fruitful and have resulted in a series of amendments and the provision of additional material which has satisfactorily addressed the respondent's contentions as raised by the Panel (Annexure B).
- 15 The key changes made to the form of the building include:
- lowering of the roof height by 450mm from RL 82.500 to RL 82.050;

- raising of the FFL of the residential flat building (apartments G01-G05) by 50mm to account for updated overland flow and lowering of the FFL of residential flat building (apartments 101-106) by 150mm and the FFL of residential flat building (apartments 201-104) by 300mm;
- privacy screens to be added to southern facade of apartments 102-106 and north-west balcony of apartment 101;
- an inclined mansard form roof re-introduced to the south and eastern facades and the James Street entry link area;
- chamfering of the eastern edge of apartments 202 + 204 with a planter introduced; and
- an increase in the separation distance between the south facing apartments (G02, G03, G05) and rear of the Oxford Street terraces increased;
- a reduction in the GFA from 3,925m<sup>2</sup> to 3,671m<sup>2</sup>

16 Following the Registrar's amendment of the application to incorporate the amended plans and additional information the parties now request that I exercise the function under s 4.55(2) of the *Environmental Planning and Assessment Act 1979* (EPA Act) to approve the modification of the original consent in accord with the terms in their signed agreement dated 21 September 2023 subject to the conditions in Annexure A.

17 Under s 34(3) of the LEC Act, I am required to dispose of the proceedings in accordance with the parties' agreed decision if that decision is one that the Court could have made in the proper exercise of its functions.

18 In this case there are jurisdictional preconditions that must be satisfied before the application can be approved. These matters have been identified and addressed by the parties in their joint jurisdictional submission filed with the s34 agreement. After having considered these written submissions and the evidence before me I accept that there is no jurisdictional impediment to the approval of the proposed modifications. In that regard, I note the following matters.

## EPA Act

19 The modification application is made pursuant to s 4.55(2) of the EPA Act and I am satisfied that the development to which the consent as modified relates is substantially the same as the development for which consent was originally granted and before that consent as originally granted was modified for the following reasons:

- (1) The proposed amendments are generally internal. They are located within the basement of the buildings or behind the front and rear facades and are not be visible from the street. That said, where changes are proposed to the approved

roof form, these modifications are inset from the respective boundaries to limit their visual intrusion so as to ensure compatibility with the originally approved building envelope.

- (2) Despite infilling of part of the private open spaces and voids throughout the development, after comparison between the Original Consent and the proposed modifications I am satisfied that the design of the proposal will remain substantially the same as the design of the approved scheme.
- (3) Qualitatively, the proposed modifications will continue to provide a three-storey residential flat building and two-storey multi-dwelling housing, with two levels of basement parking largely within the approved building footprint.
- (4) There is no relevant approval body required to be consulted under s 4.55(2)(b). The modification application does not relate to, or change, any conditions imposed as a requirement of concurrence or in accordance with general terms of approval by another approval body.
- (5) The modification application was initially notified between 25 January 2023 to 24 February 2023, and no submissions were made.
- (6) The amended modification application is not required to be re-notified in accordance with the Woollahra Community Participation Plan dated June 2023; and

I understand that the respondent/the Panel has considered such matters referred to in s 4.15(1) as are of relevance to the proposed development and are satisfied with the amendments proposed.

- 20 Pursuant to Div 4.8 of the EPA Act, and the provisions of the *Water Management Act 2000*, WaterNSW provided general terms of approval in relation to the Original Consent.
- 21 On 24 January 2023 the modification application was referred to WaterNSW, in accordance with s 4.55(2)(b) of the EPA Act.
- 22 On 2 February 2023 a response was provided by WaterNSW advising no objection is raised to the modification application, subject to the general terms of approval contained in the conditions of consent (see Condition A.4).
- 23 On 16 March 2023 WaterNSW was notified of these proceedings. On 27 March 2023 WaterNSW advised that it did not intend to make an application to be heard in these proceedings.

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

- 24 Section 4.6 of SEPP RH requires that a consent authority must not grant consent to any development on the land unless it has considered whether a site is contaminated or potentially contaminated land, and if it is, that it is satisfied that the land is suitable (or will be suitable after undergoing remediation) for the proposed use.
- 25 The preliminary site investigation was submitted with the Original Consent indicated that the site may be potentially contaminated. A remediation action plan was prepared and approved by the Original Consent.
- 26 Accordingly, I am satisfied of the matters set out in s 4.6 of SEPP RH.

**State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65)**

- 27 SEPP 65 was gazetted on 26 July 2002 and applies to the modification application.
- 28 Clause 29 of SEPP 65 relates to the determination of application for development consent modifications. The clause applies if a consent authority is required by cl 115(3B) of the Environmental Planning and Assessment Regulation 2000 (EPA Reg 2000) to refer an application for the modification of development consent for advice on the modification.
- 29 The consent authority must take into consideration the advice (if any) obtained from the design review panel, the design quality of the development (as modified) when evaluated in accordance with the design quality principles and the Apartment Design Guide (ADG).
- 30 The respondent does not have a design review panel, and therefore no referral occurred.
- 31 Notwithstanding this, the respondent has considered the overall design quality of the proposed modification, as amended, when evaluated in accordance with the design quality principles and the ADG. The respondent accepts that the amended modification application offers a more desirable design solution and that there is no detrimental impact to compliance with the Design Quality Principles in SEPP 65 or the ADG.
- 32 Section 102 of Environmental Planning and Assessment Regulation 2021 (EPA Reg 2021) (being equivalent to the provisions of cl 115(3B) of EPA Reg 2000) relevantly requires that:
- (1) A modification application under the Act, section 4.55(2) or 4.56(1), where the original development application was required to be accompanied by a statement by a qualified designer under section 29, must be accompanied by—
    - (a) the additional fee specified in Schedule 4, and
    - (b) a statement by a qualified designer.
  - (2) The statement must—
    - (a) verify that the qualified designer designed, or directed the design of, the modification of the development, and

(b) verify if the qualified designer designed, or directed the design of, the development for which the original development consent was granted (the original development), and

(c) explain how the development addresses—

(i) the design quality principles, and

(ii) the objectives in the Apartment Design Guide, and

(d) verify that the modification does not—

(i) diminish or detract from the design quality of the original development, or

(ii) compromise the design intent of the original development.

33 The amended modification application is accompanied by an Amended SEPP 65 Statement, including an ADG Design Objective Assessment (Design Statement and ADG Assessment), prepared by Brian Meyerson, a qualified designer for the purposes of s 102 of EPA Reg 2021, of MHND Union located at Annexure B. The Design Statement and ADG Assessment complies with the requirements at s 102(2) of EPA Reg 2021.

34 I am satisfied that the modification application is consistent with the provisions of SEPP 65, as it demonstrates that adequate regard has been given to:

- the design quality principles, and
- the relevant objectives specified in the ADG.

#### **State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004**

35 The proposal is a BASIX affected building falls within the meaning of a BASIX affected building in accordance with Sch 7 of the EPA Reg 2021.

36 An amended BASIX Certificate has been provided – see Annexure B.

#### **State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP BC)**

37 The site is located within the Sydney Harbour Catchment but is outside the Foreshores and Waterways Area.

38 There are no jurisdictional matters under the SEPP BC that apply to the modification of a development consent for the carrying out of development within the Sydney Harbour Catchment.

#### **WLEP**

39 Development for the purposes of a residential flat building is permitted with consent in the R3 Medium Density Residential zone.

40 The amended modification application is consistent with the objectives of the R3 Medium Density Residential zone.

41 In accordance with cl 4.3 of the WLEP, the height of a building on any land is not to exceed the maximum height shown for the land on the 'Height of Buildings Map'. The site is subject to a 10.5m height control. The Original Consent was compliant with the

maximum height. The modification application, as originally lodged proposes a maximum height of 11.08m (to the roof parapet). The amended application has reduced the original height by 450mm. This non-compliance with the height standard is limited to minor elements on the roof and the respondent is satisfied that it does not impact on the amenity of neighbouring properties. The parties note that a variation of development controls under cl 4.6 of the WLEP is not applicable to modification applications. This is because cl 4.6 relates to applications for development consent. A modification application (which is sought in these proceedings) is not an application for development consent as contemplated by cl 4.6 (see, e.g. *SDHA Pty Ltd v Waverley Council* (2015) 209 LGERA 233; [2015] NSWLEC 65). Notwithstanding, the fact that no cl 4.6 request is required for a modification of a development application I note that the respondent has assessed the proposed modifications against the objectives of the standard in the Statement of Environmental Effects and concluded they are acceptable (located at Tab 2 of the Class 1 Application (from p 27)).

- 42 Clause 4.4 of the WLEP provides that the maximum floor space ratio (FSR) for a building on any land is not to exceed the floor space ratio shown for the land on the 'Floor Space Ratio Map'. The site is subject to a maximum FSR of 0.9:1. The Original Consent was compliant with the maximum FSR. The modification application, as lodged proposes a maximum FSR of 0.137:1. The amended modification application has reduced the original FSR sought in these proceedings to 1.06:1. The respondent has formed the view that this non-compliance does not impact on the amenity of neighbouring properties and is acceptable.
- 43 Clauses 5.10 of the WLEP requires the consent authority to consider the effect of works proposed to a heritage item, building, work, relic or tree, within a heritage conservation area or new buildings or subdivision in a conservation area or where a heritage item is located. The site is located within the Woollahra HCA, with the properties along Oxford Street being considered contributory items. The modification application was accompanied by a Heritage Impact Statement prepared by Urbis dated 2 December 2022 (see Tab 11 of the Class 1 Application) which supported the proposed modifications. The respondent's Heritage Officer has undertaken an assessment and advised that the proposal is generally acceptable with regard to the heritage conservation provisions in cl 5.10 of the WLEP (see Woollahra Local Planning Panel (Electronic Meeting) Agenda 6 April 2023).
- 44 Clause 6.2 of the WLEP sets out the matters that the consent authority is required to consider before granted development consent for earthworks. The modification application proposes minor reconfigurations to the approved basement levels and approved excavation. The modification application was accompanied by a Geotechnical Opinion prepared by JK Geotechnics (see Tab 19 of the Class 1 Application) which supported the proposed modifications. The respondent's Development Engineering Officer has undertaken an assessment and advised that the proposed modifications are



acceptable with regard to the provisions in cl 6.2 of the WLEP, subject to the conditions imposed in the Original Consent (see Woollahra Local Planning Panel (Electronic Meeting) Agenda 6 April 2023).

### **Woollahra Development Control Plan 2015 (WDCP)**

- 45 The provisions of the WDCP are not jurisdictional. However, it is submitted that relevant provisions have been taken into account in assessing the amended modification application and the parties agree that subject to the imposition of the agreed conditions the revised plans demonstrate a satisfactory built form when measured against the applicable zoning objectives and WDCP and the development is in the public interest.
- 46 As the parties' decision is within power I now dispose of the proceedings in accordance with their decision as required by s 34(3) of the LEC Act.
- 47 The Court notes that:
- (1) The respondent, as the relevant consent authority has approved under s 113 of EPA Reg 2021, the applicant amending modification application no. 607/2021/3 to rely upon the amended plans and documents as set out in Annexure 'C'.
  - (2) The applicant is not required to lodge the amended modification application on the NSW Planning Portal pursuant to s 113(6) of EPA Reg 2021.
  - (3) The applicant has filed the amended modification application with the Court.
- 48 The Court orders that:
- (1) The appeal is upheld.
  - (2) Development Consent No. 607/2021 for the demolition of, and alterations and additions to, existing buildings and the construction of a residential flat building development across multiple lots, including land remediation and consolidation of lots at 2A James Street and 60-80 Oxford Street, Woollahra, is modified in the terms in Annexure 'A'.
  - (3) Development Consent No. 607/2021 as modified by the Court is set out in Annexure 'B'.

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**S Dixon**

**Senior Commissioner of the Court**

[Annexure A \(221587,.pdf\)](#)

[Annexure B \(927709,.pdf\)](#)

[Annexure C \(116899,.pdf\)](#)

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Decision last updated: 05 October 2023