



Land and Environment Court
New South Wales

Case Name:	Griffin v Council of the Municipality of Woollahra
Medium Neutral Citation:	[2023] NSWLEC 1656
Hearing Date(s):	Conciliation conference on 27 and 28 September 2023
Date of Orders:	07 November 2023
Decision Date:	7 November 2023
Jurisdiction:	Class 1
Before:	Kullen AC
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development consent is granted to Development Application DA 5/2023/1 for alterations and additions to the existing dwelling, including excavation for a new basement parking area with tennis court above, two swimming pools (indoor and outdoor), tree removal and associated landscaping at Lot 2 in DP 554201, also known as 14 Rosemont Avenue, Woollahra, subject to the conditions of consent in Annexure “A”.</p>
Catchwords:	DEVELOPMENT APPEAL – conciliation conference – agreement between the parties – orders – heritage general terms of approval
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, Pt 4, Div 4.8, ss 4.16, 4.17, 4.47, 7.12, 8.7, 8.14</p> <p>Land and Environment Court Act 1979, ss 34, 34AA, 39</p> <p>Heritage Act 1997, ss 57, 58, 63</p> <p>Environmental Planning and Assessment Regulation 2021, s 113</p> <p>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</p> <p>State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 4, s 4.6</p>

State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 2, s 2.3
Woollahra Local Environmental Plan 2014, cll 1.2, 2.2, 4.3, 4.6, 5.10, 6.1, 6.2

Texts Cited: Woollahra Contributions Plan 2022

Category: Principal judgment

Parties: Andrew Griffin (Applicant)
Council of the Municipality of Woollahra (Respondent)

Representation: Counsel:
H. Grace (Applicant)
S Patterson (Solicitor) (Respondent)

Solicitors:
Hall & Wilcox (Applicant)
Wilshire Webb Staunton Beattie Lawyers (Respondent)

File Number(s): 2023/176961

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the conditions of development consent No. DA 5/2023/1 (the DA) dated 24 July 2023 for the proposed alterations and additions to the existing dwelling including excavation for a new basement parking area with tennis court above, two swimming pools (indoor and outdoor), tree removal and associated landscaping at 14 Rosemont Avenue, Woollahra.
- 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 was held on 27 and 28 September 2023. I presided over the conciliation conference, which commenced with a site inspection. No objectors attended the on-site view.
- 3 At the conciliation conference following the on-site view, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. The hearing was adjourned and the matter proceeded under s 34 of the LEC Act. This decision involved the Court

upholding the appeal and granting development consent to the DA, subject to conditions.

- 4 Amended plans were filed with the Court on 28 September 2023 as an outcome of the conciliation conference.
- 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.
- 6 The parties' decision involves the Court exercising the functions under s 4.16 and s 8.14(4) of the EPA Act to grant consent to the DA.
- 7 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties have identified and explained how the jurisdictional prerequisites of relevance have been satisfied in a written submission accompanying the s 34 agreement, and those requirements have been satisfied as follows:
 - (1) The DA was lodged by the Applicant on behalf of the registered proprietor of the subject site who provided owner's consent;
 - (2) The DA was notified and advertised for a period of 30 days, from 25 January 2023 to 24 February 2023.
 - (3) The Woollahra Local Environmental Plan 2014 (WLEP) applies to the site; and
 - (a) The subject site is zoned R3 – Medium Density Residential Zone pursuant to the provisions of cl 2.2 of the WLEP; and
 - (i) The proposed development is permissible with consent in the R3 Zone within which the subject site is located;
 - (ii) I am satisfied that the proposed development is consistent with the objectives for development within the zone in which the development is proposed to be carried out;
 - (b) Pursuant to the WLEP, the site is located within the Woollahra Heritage Conservation Area, is identified as State Heritage Item SHR No.00294, and is identified as Local Heritage Item I603; and
 - (i) Owing to the status of the dwelling, the proposed alterations and additions are integrated development for the purpose of Div 4.8 of Pt 4 of the EPA Act as approval is required under the *Heritage Act 1997* (Heritage Act);

- (ii) Section 57 of the Heritage Act applies, among other things, to an item listed on the State Heritage Register and describes the circumstances where the consent authority must give regard to Subdiv 1 Applications generally as prescribed by s 58 of the Heritage Act. Consideration must be given where the proposal seeks to do or carry out an act, matter or thing referred to in s 57(1);
 - (iii) Pursuant to s 63 of the Heritage Act, the determination of an application in relation to integrated development is subject to Pt 4 of the EPA Act;
 - (iv) Section 4.47 of the EPA Act requires general terms of approval be obtained prior to development consent being granted to carry out the development. General terms of approval have been obtained from the Heritage Council (GTAs) in relation to the original DA (but not for the amended development application agreed through the s 34 process);
 - (v) Section 8.14(4) of the EPA Act describes the powers of the Court on appeals which relate to integrated development. Under s 8.14(4)(c), the Court may determine an appeal even though a development consent granted as a result of the appeal is inconsistent with the GTAs of the relevant approval body;
 - (vi) The parties have submitted that the amended development consent does not impact the general application of the GTAs and that all heritage considerations have been maintained and are subject to the Conditions of Consent;
 - (vii) The parties have further submitted that the development consent, as amended, does not require further approval from the Heritage Council pursuant to the Court's power under s 8.14 and, where issues of a heritage nature have remained consistent with the GTAs for the purposes of s 4.47 of the EPA Act;
 - (viii) I am satisfied that the Court has the power to determine the appeal pursuant to s 8.14 of the EPA Act (and pursuant to s 39(6) of the LEC Act, which also prescribes the powers of the Court on appeal). In doing so, I note that the scope and extent of the amended proposal has been reduced from the proposal for which the GTA's were obtained from the Heritage Council.
- (c) Clause 4.3 of the WLEP – Height of Buildings – the Height of Buildings map provides a maximum height control for the site of 10.5m; and

- (i) The proposed development is less than the maximum building height;
- (d) Clause 4.6 of the WLEP – Exceptions to development standards – where compliance with a development standard is unreasonable or unnecessary in the circumstances of the case; and
 - (i) The proposed development complies with development standards in the WLEP and therefore a cl 4.6 variation is not required;
- (e) Clause 5.10 of the WLEP concerns heritage conservation and applies to the site as the dwelling is of state significance and is a local contributory item to the Woollahra heritage conservation area; and
 - (i) the proposal is in receipt of the Heritage Council of NSW – Revised General Terms of Approval: Integrated Development Application dated 14 April 2023;
 - (ii) a Heritage Impact Statement prepared for the DA concluded that the proposal is consistent with the objectives of cl 5.10 of the WLEP;
- (f) Clause 6.1 of the WLEP – Acid sulphate soils – applies to the site which is identified as Class 5 of the Acid Sulphate Soils map; and
 - (i) the application does not propose works within 500 metres of adjacent Class 1, 2, 3 or 4 land that is below 5 metres Australian Height Datum and by which the watertable is likely to be lowered below 1 metre Australian Height Datum on adjacent Class 1, 2, 3 or 4 land;
- (g) Clause 6.2 of the WLEP - Earthworks - applies to the site; and
 - (i) The parties submit that the proposal will not cause detrimental environmental effect; and that the amended DA has taken into consideration the impact on neighbouring properties and has facilitated methods to avoid, minimise or mitigate the impacts of the development;
- (4) In relation to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (BASIX SEPP), the proposal is a development that is subject to the BASIX SEPP; and
 - (i) the Applicant's amended DA is accompanied by a BASIX certificate (Certificate No. A481367_02, prepared by Efficient Living, dated 28 September 2023) which is consistent with the amended application;
- (5) Chapter 4 of the State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience SEPP) applies to the proposed development. Section 4.6 of the Resilience SEPP requires that a

consent authority must not consent to the carrying out of any development on land unless it has considered whether the land is contaminated; and if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which development is proposed to be carried out; and if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose; and

- (a) The Statement of Environmental Effects (SEE) prepared by Weir Phillips Heritage and Planning accompanied the Class 1 Application. The parties advise that the SEE concludes that the site has a long-standing history of residential use and therefore does not appear to be subject to the uses listed in Table 1 of the contaminated land planning guidelines and is suitable for the proposed use;
 - (b) The development consent contains a number of conditions relating to the excavation of the site for the underground garage which address any contamination of the site that might be discovered during the course of the excavation;
 - (c) The Court is satisfied for the purposes of s 4.6 of the Resilience SEPP that the site is suitable for the proposed development;
- (6) The provisions in Ch 2 of the SEPP (Biodiversity and Conservation) 2021 (Biodiversity SEPP) aim to protect the biodiversity values of trees and other vegetation and preserve the amenity of non-rural area of the State through the preservation of trees and other vegetation. Chapter 2 applies to the Woollahra local government area pursuant to s 2.3 of the Biodiversity SEPP; and
- (a) The parties advise that through the imposition of condition A.7 in the development consent, existing trees and other vegetation will be retained as described in the arborist report prepared by Jackson Nature Works dated 22 December 2022 which was submitted with the Class 1 application.
- 8 Pursuant to ss 4.17(1) and 7.12 of the EPA Act and Woollahra Development Contributions Plan 2022, a local infrastructure contribution of \$42,672.96 has been calculated by Council as being payable to Council.
- 9 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.
- 10 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the parties.

11 The Court notes:

- (1) The Council of the Municipality of Woollahra, as the relevant consent authority, has agreed under s 113 of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending the development application to rely upon the following documents:
 - (a) Amended architectural plans prepared by Innovate Architects listed as follows:
 - (i) Architectural Plan numbered 06 Issue C prepared by Innovate Architects dated 25 August 2023;
 - (ii) Architectural Plan numbered 20 Issue A prepared by Innovate Architects dated 25 August 2023;
 - (iii) Architectural Plans numbered 08 and 08.B, both Issue B prepared by Innovate Architects both dated 27 September 2023;
 - (iv) Architectural Plan numbered 09 Issue C prepared by Innovate Architects dated 27 September 2023;
 - (v) Architectural Plans numbered 01, 02, 03, 04, and 07 all Issue D prepared by Innovate Architects all dated 27 September 2023; and
 - (vi) Staff Accommodation 3D Images 1-4 prepared by Innovate Architects.
 - (b) BASIX Certificate No. A481367_02, prepared by Efficient Living, dated 28 September 2023.
- (2) The amended application was filed with the Court on 28 September 2023.

12 The Court orders:

- (1) The appeal is upheld.
- (2) Development consent is granted to Development Application DA 5/2023/1 for alterations and additions to the existing dwelling, including excavation for a new basement parking area with tennis court above, two swimming pools (indoor and outdoor), tree removal and associated landscaping at Lot 2 in DP 554201, also known as 14 Rosemont Avenue, Woollahra, subject to the conditions of consent in Annexure "A".

G Kullen

Acting Commissioner of the Court

Annexure A

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