



Land and Environment Court
New South Wales

Case Name:	Ibrahim v Woollahra Municipal Council
Medium Neutral Citation:	[2023] NSWLEC 1697
Hearing Date(s):	Conciliation conference on 16 November 2023
Date of Orders:	16 November 2023
Decision Date:	16 November 2023
Jurisdiction:	Class 1
Before:	Gray C
Decision:	<p>The Court orders that:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development Application DA118/2023/1 for the replacement of the existing dwelling house with a part two and part three storey dwelling house with a basement garage level, swimming pool and associated landscape works on land identified as Lot 1 in DP 7523 located at 136 Bellevue Road, Bellevue Hill is determined by the grant of consent subject to conditions contained in Annexure A.</p>
Catchwords:	APPEAL – development application – dwelling house – conciliation conference – agreement reached – orders made
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7</p> <p>Environmental Planning and Assessment Regulation 2021, ss 27, 37, 38</p> <p>Land and Environment Court Act 1979, ss 34, 34AA</p> <p>State Environmental Planning Policy (Biodiversity and Conservation) 2021, ss 6.6, 6.7, 6.9</p> <p>State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6</p> <p>Woollahra Local Environmental Plan 2014 (Amendment</p>

No 33)
Woollahra Local Environmental Plan 2014, cll 1.8A, 4.3,
6.2

Category: Principal judgment

Parties: Bashar Ibrahim (First Applicant)
Attena Group Pty Ltd (Second Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
J Smith (Applicants)
J Zorzetto (Solicitor) (Respondent)

Solicitors:
Boskovitz lawyers (Applicants)
HWL Ebsworth (Respondent)

File Number(s): 2023/185388

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This appeal concerns a development application for the demolition of an existing dwelling house and the construction of a part two and part three storey dwelling house with a basement garage level, swimming pool and associated landscape works at 136 Bellevue Road, Bellevue Hill. The development application was refused by the respondent on 22 May 2023. The applicant appeals against that decision, pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act). In exercising the functions of the consent authority on the appeal, the Court has the power to determine the development application pursuant to ss 4.15 and 4.16 of the EPA Act. The final orders in this appeal, outlined in [9] below, are made as a result of an agreement between the parties that was reached at a conciliation conference.
- 2 The Court was required to arrange a conciliation conference between the parties, pursuant to s 34AA(2)(a) of the *Land and Environment Court Act 1979* (LEC Act). The conciliation conference commenced on 16 November 2023. I presided over the conciliation conference.

- 3 At the conciliation conference, an agreement under s 34(3) of the LEC Act was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties. The signed agreement was submitted on the same date, following the Council's approval of an application for an amendment to the development application pursuant to ss 37 and 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation 2021). The amendments change the orientation of the swimming pool, make landscaping changes to retain the existing ground surface at the rear of the property, change the privacy screens at the upper level to prevent overlooking of the adjacent property, and make changes to the vehicular access to meet the gradient and transition criteria in AS2890.1:2004. The amendments allow Trees 6, 7 and 8 to be retained and conserve a greater amount of existing tree canopy. The amended development application also includes updated stormwater design plans, an arboricultural impact assessment report and a BASIX certificate.
- 4 The decision agreed upon is for the grant of development consent subject to conditions of consent pursuant to s 4.16(1) of the EPA Act. The signed agreement is supported by an Agreed Statement of Jurisdictional Prerequisites that sets out the jurisdictional prerequisites to the exercise of the power to grant a development consent. I have considered the contents of the Agreed Statement, together with the documents referred to therein, the Class 1 Application and its attachments, the documents that are referred to in condition A3 and the joint reports filed in the proceedings. Based on those documents, I have considered the matters required to be considered pursuant to s 4.15(1) of the EPA Act.
- 5 As the presiding Commissioner, I am satisfied that the decision to grant development consent to the application subject to conditions of consent is a decision 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 formed this state of satisfaction as each of the jurisdictional preconditions identified by the parties is met, for the following reasons:

- The development is for the purpose of a dwelling house, which is a permissible use in the R3 Medium Density Residential zone in which the site is located pursuant to the Woollahra Local Environmental Plan 2014 (WLEP).
- The proposed development complies with the height development standard that applies pursuant to cl 4.3 of the WLEP.
- There is no floor space ratio (FSR) development standard that applies to the development proposed in this development application. A FSR development standard that applies to the site and a new provision concerning tree canopy cover (cl 6.9) were introduced pursuant to the Woollahra Local Environmental Plan 2014 (Amendment No 33) which commenced on 14 July 2023, but the savings provision in cl 1.8A(2) of the WLEP specifies that Amendment No 33 does not apply to development applications lodged before the date of commencement.
- The development application includes earthworks for the provision of car parking and to enable the dwelling to step down with the site topography. Based on the Geotechnical Site Investigation report dated 21 February 2023, the Construction Methodology Plan dated 12 March 2023, and the changes to the rear yard to retain the existing ground surface, I have considered the matters set out in cl 6.2(3) of the WLEP.
- Consideration has been given as to whether the subject site is contaminated as required by s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021. As the site has a history of use for the purposes of residential premises, it is unlikely to be contaminated.
- The site falls within the Sydney Harbour Catchment, such that Part 6.2 of the State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP B&C) applies to the development application. Based on the stormwater drainage plans, the joint report of the engineers, the Statement of Environmental Effects dated April 2023 and the Flood Risk Management Report, I am satisfied of the matters in ss 6.6(2) and 6.7(2). Further, the development will not change any public access to recreational areas of waterbodies, and I am therefore satisfied of the matters in s 6.9(2).
- Consistent with the requirements of s 27 of the EPA Regulation 2021, the development application is accompanied by the BASIX certificate dated 6 November 2023.
- The development application was notified from 3 to 18 May 2023, and two submissions were received. I have considered the issues raised in those submissions, which the parties agree have been addressed through the amendments to the development application.

6 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)).

7 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

8 The Court notes:

- (1) The Respondent, Woollahra Municipal Council, as the relevant consent authority, has agreed, under s 38(1) of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending Development Application No DA118/2023/1 to rely on the documents listed below

Reference	Description	Author/Drawn	Date(s)
Architectural Plans			
A000 Rev 13	Cover Sheet	Attena Group	31/10/2023
A102 Rev 13	Site Plan	Attena Group	31/10/2023
A103 Rev 12	Level 4 Plan	Attena Group	24/10/2023
A104 Rev 11	Level 3 Plan	Attena Group	23/10/2023
A106 Rev 7	Level 1 Plan	Attena Group	01/09/2023
A107 Rev 10	Section 1	Attena Group	20/10/2023
A108 Rev 13	Section 2	Attena Group	31/10/2023

A109 Rev 12	East Elevation	Attena Group	24/10/2023
A110 Rev 7	West Elevation	Attena Group	01/09/2023
A111 Rev 13	North Elevation	Attena Group	31/10/2023
A112 Rev 13	South Elevation	Attena Group	31/10/2023
A115 Rev 13	Height Limit Diagram	Attena Group	31/10/2023
A116 Rev 6	Landscape Diagram	Attena Group	21/08/2023
A117 Rev 6	Excavation Diagram	Attena Group	21/08/2023
A122 Rev 13	Window Schedule	Attena Group	31/10/2023
A122a Rev 4	Materials Schedule	Attena Group	07/03/2023
A124 Rev 7	3D View 2	Attena Group	01/09/2023
A126 Rev 12	Ramp Section	Attena Group	24/10/2023
A127 Rev 11	Ramp Section	Attena Group	23/10/2023

A128 Rev 9	Backyard Layout	Attena Group	17/10/202 3
230069	Civil Works Plan		
C00-A	COVER SHEET, LOCALITY PLAN & DRAWING SCHEDULE	SMART Structures Australia	18/10/202 3
C01-B	CIVIL WORKS LAYOUT PLAN	SMART Structures Australia	20/10/202 3
C03-B	DRIVEWAY LONGITUDINA L SECTIONS	SMART Structures Australia	20/10/202 3
C10-A	TYPICAL DETAILS	SMART Structures Australia	18/10/202 3
Stormwater Plans			
D01 - Rev C	LEVEL 1 STORMWATE R DRAINAGE PLAN	SMART Structures Australia	5 October 23
D02 - Rev C	LEVEL 2 STORMWATE	SMART Structures	18 October

	R DRAINAGE PLAN	Australia	23
D03 - Rev C	LEVEL 3 STORMWATE R DRAINAGE PLAN	SMART Structures Australia	18 October 23
D04 - Rev C	LEVEL 4 STORMWATE R DRAINAGE PLAN	SMART Structures Australia	18 October 23
D05 - Rev C	ROOF STORMWATE R DRAINAGE PLAN	SMART Structures Australia	18 October 23
D10 - Rev B	STORMWATE R DRAINAGE SECTIONS AND DETAILS	SMART Structures Australia	18 October 23
No reference	Arboricultural Impact Assessment Report (including Tree Management Plan and Specifications)	Jacksons Nature Works	3 Septembe r 2023
1377327S_0 3	BASIX Certificate	NSW Department of	6 November

		Planning and Environment	2023
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Final orders

9 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Application DA118/2023/1 for the replacement of the existing dwelling house with a part two and part three storey dwelling house with a basement garage level, swimming pool and associated landscape works on land identified as Lot 1 in DP 7523 located at 136 Bellevue Road, Bellevue Hill is determined by the grant of consent subject to conditions contained in Annexure A.

J Gray

Commissioner of the Court

Annexure A

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