



Land and Environment Court  
New South Wales

---

Case Name: Andrews v Woollahra Municipal Council

Medium Neutral Citation: [2023] NSWLEC 1797

Hearing Date(s): Conciliation conference on 21 November and 14 December 2023

Date of Orders: 22 December 2023

Decision Date: 22 December 2023

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:  
(1) The Applicant is granted leave to rely on the Amended Development Application in Annexure A.  
(2) The Applicant is to pay the Respondent's costs thrown away as a result of the Amended Application, pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 as agreed or assessed.  
(3) The appeal is upheld.  
(4) Development Application No DA 371/2022 for the demolition of existing buildings and construction of a new six storey commercial building with two levels of basement car parking, at 49-53 Bay Street, Double Bay 2028, is determined by the grant of consent subject to the conditions of consent in Annexure B.

Catchwords: DEVELOPMENT APPLICATION: commercial premises in E1 Local Centre – conciliation conference – agreement between the parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.16, 4.46, 4.47 8.7, 8.15  
Land and Environment Court Act 1979, s 34  
Woollahra Local Environmental Plan 2014, cll 4.3, 4.4, 4.4A, 4.6, 5.21, 6.1, 6.2

State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 10, s 10.10  
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6  
Water Management Act 2000  
Environmental Planning and Assessment Regulation 2021, s 38

Cases Cited: Wehbe v Pittwater Council (2007) 156 LGERA 446;  
[2007] NSWLEC 827  
Initial Action Pty Ltd v Woollahra Municipal Council  
(2018) 236 LGERA 256; [2018] NSWLEC 118

Texts Cited: Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Peter Andrews (First Applicant)  
Ricola Pty Ltd (Second Applicant)  
Irene Andrews (Third Applicant)  
Woollahra Municipal Council (Respondent)

Representation: Counsel:  
A Whealy (Solicitor) (Applicants)  
A Rutherford (Solicitor) (Respondent)

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

File Number(s): 2023/185363

Publication Restriction: Nil

## JUDGMENT

1 **COMMISSIONER:** This Class 1 appeal is brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the refusal by the Woollahra Local Planning Panel on behalf of the Woollahra Municipal Council (the Respondent) of development application DA 371/2022 seeking development consent for the demolition of existing buildings and construction of a new six storey commercial building with two levels of basement car parking at 49-53 Bay Street Double Bay.

- 2 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 21 November 2023, at which I presided.
- 3 At the conciliation conference, the parties reached in-principle agreement as to the scope of amendments required for the parties to reach terms of a decision in the proceedings that would be acceptable to the parties, subject to time being granted for certain amendments to the development the subject of the development application.
- 4 I granted the parties an adjournment to permit the preparation of amended plans and other documents. On 14 December 2023, I granted a further adjournment so that additional amendments agreed between the parties could be made to the proposal.
- 5 On the basis of those amended plans, and agreed conditions of consent, the parties reached agreement as to the terms of a decision in the proceedings that was acceptable to the parties.
- 6 A signed agreement prepared in accordance with s 34 (10) of the LEC Act was submitted to the Court on 18 December 2023.
- 7 The parties ask me to approve their decision as set out in the s 34 agreement before the Court. In general terms, the agreement approves the development subject to amended plans that were prepared by the Applicant, and noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s 34 agreement.
- 8 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. The parties' decision involves the Court exercising power under s 4.16 of the EPA Act. In this case, there are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 9 The parties explained to me during the conference as to how the jurisdictional prerequisites have been satisfied in order to allow the Court to make the agreed orders at [55], and I am satisfied for the reasons that follow.

- 10 The development application was lodged with the Respondent on 5 September 2022, and was notified in accordance with the Woollahra Community Participation Plan 2019 between 28 September and 28 October 2022 during which time fifteen public submissions were received.
- 11 The site is located within the E1 Local Centre zone, according to the Woollahra Local Environmental Plan 2014 (WLEP), in which commercial premises are permitted with consent where consistent with the objectives of the zone, that are:

### **Zone E1 Local Centre**

#### **1 Objectives of zone**

- To provide a range of retail, business and community uses that serve the needs of people who live in, work in or visit the area.
- To encourage investment in local commercial development that generates employment opportunities and economic growth.
- To enable residential development that contributes to a vibrant and active local centre and is consistent with the Council's strategic planning for residential development in the area.
- To encourage business, retail, community and other non-residential land uses on the ground floor of buildings.
- To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
- To ensure development is of a height and scale that achieves the desired future character of the local centre.
- To encourage development that is compatible with the local centre's position in the centres hierarchy.
- To ensure development provides diverse and active ground floor uses to contribute to vibrant and functional streets and public spaces.
- To maximise public transport patronage and encourage walking and cycling.
- To encourage the retention and planting of trees and other vegetation as part of development to minimise the urban heat island effect and to improve microclimates.

#### *The height of building standard is exceeded*

- 12 The proposed development exceeds the height of building standard at cl 4.3 of the WLEP, which permits a maximum building height of 18.1m
- 13 The proposal is for development with a maximum height of 21.79m at the location of the lift overrun.

- 14 The height exceedance is supported by a written request prepared in accordance with cl 4.6 of the WLEP by GSA Planning dated December 2023 (height request).
- 15 The height request relies on the first test as it is expressed in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (Wehbe), in asserting compliance with the height standard is unreasonable and unnecessary as the objectives of the standard are achieved notwithstanding the non-compliance with the standard.
- 16 The objectives of the standard, at cl 4.3 of the WLEP, are as follows:

#### **4.3 Height of buildings**

(1) The objectives of this clause are as follows—

- (a) to establish building heights that are consistent with the desired future character of the neighbourhood,
- (b) to establish a transition in scale between zones to protect local amenity,
- (c) to minimise the loss of solar access to existing buildings and open space,
- (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,
- (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.

- 17 In respect of objective (a), the height request asserts:
  - (1) The proposal's height is consistent with the built form in the Double Bay Centre generally, and the southern side of Cross Street specifically, which it adjoins along the Bay Street frontage. Such an assertion is supported by recent approvals in the vicinity, and by reference to the relevant provisions of the WLEP.
- 18 In respect of objective (b), the height request asserts as the site does not adjoin other zones, the objective is not relevant. Instead the proposal is consistent with the built form envisaged in the E1 zone in which it is sited.
- 19 In respect of objective (c), the height request asserts:
  - (1) That notwithstanding the height exceedance, the proposed development complies with solar access provisions of the Woollahra Development Control Plan 2015. In particular, the proposal retains solar access enjoyed by windows and private open space in surrounding residential development at 9am, 12 noon and 3pm, and has only negligible effect

on windows to the hotel at 41-45 Bay Street, south-facing terraces to 28-34 Cross Street and a small portion of roadway in Knox Lane when compared to a compliant envelope. As such, the proposal minimises the loss of solar access to existing building and open space.

20 In respect of objective (d), the height request asserts:

- (1) The impact of the proposal on views has been minimised when the view analysis prepared in support of the amended proposal is referred to, and when the impact of the approved development at 53 Cross Street and 55 Bay Street is understood.
- (2) There are no impacts on water views or district views to Darling Point as a result of the portion of the building above the height standard. Views of water from Units 7A, 7B and 7C at 2 Knox Street are impacted by the proposal, however the impact does not arise from the exceedance.
- (3) Privacy impacts have been minimised by orienting glazing towards Bay Street and Knox Lane, away from adjoining development to the north and east. Likewise, a roof adjoining the development to the east is non-trafficable to avoid overlooking, and the trafficable roof terrace is the subject of a Plan of Management limiting use.
- (4) Visual intrusion is minimised by stepping back the uppermost floor and bulk to the south east corner of the site to align to the lower built form evident in the adjoining development at 28-34 Cross Street.
- (5) Overshadowing impacts have been minimised for the reasons set out at [19].

21 In respect of objective (e), the height request asserts the exceedance has no impact on public views of the harbour from the public domain or beyond those surrounding areas already discussed.

22 The height request also relies on the third test in *Wehbe*, asserting that the underlying objective or purpose would be defeated or thwarted if compliance was required. However, it is not necessary to establish all of the ways, and is sufficient to establish one way in which compliance with the standard is unreasonable or unnecessary: *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118, at [22].

23 I accept compliance with the height standard is unreasonable or unnecessary in the circumstances of this case, as the objectives of the height standard are achieved notwithstanding the non compliance, for the reasons set out in the height request. Most relevantly, as the setback of the uppermost floor is established by connecting the uppermost built form of adjoining properties, the exceedance is wholly within the 'shadow' of built form that is already the

subject of development consent. Adopting such a geometry results in the minimising of impacts sought by the objectives, and demonstrates building heights that are consistent with the desired future character of the neighbourhood.

24 Next, the height request advances environmental planning grounds it considers sufficient to justify the contravention of the height standard. Those grounds are summarised as follows:

- (1) The proposed development is similar to that in recent approvals for development adjoining the site, and so is compatible with the desired future character of the area.
- (2) The site is a corner site with a height standard and FSR standard greater than adjoining areas in recognition that development on the site should act as a gateway.
- (3) Urban design benefits derive from the development.
- (4) The commercial uses proposed respond to a recognised demand for commercial floor space in the Double Bay Centre, but requires a high floor-to-floor that contributes to the exceedance.
- (5) Notwithstanding the height non compliance, adverse environmental impacts do not result.

25 Finally, the height request asserts consistency with the objectives of the zone, at [11], because of the mix of retail and office accommodation that serve the needs of people in the area, offer employment opportunities, economic growth and active ground floor frontages within a development that is consistent with the height and scale of the desired future character of the neighbourhood.

26 I note here that the Respondent is satisfied that the height request adequately addresses the matters required to be demonstrated by cl 4.6(3) of the WLEP, and that the proposed development, as amended, will be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development in the E1 Local Centre zone.

27 Furthermore, the Respondent does not contend that the contravention of the development standard raises any matter of significance for State or regional environmental planning, or that there is any public benefit in maintaining the development standard, pursuant to cl 4.6(5) of the WLEP.

- 28 Accordingly, the Respondent raises no issue regarding cl 4.6 and accepts that a variation of the height development standard under cl 4.3 is justified.
- 29 I am satisfied under cl 4.6(4) that the height request has adequately addressed the matters required to be demonstrated by subcl (3) and that the proposed development will be in the public interest because it is consistent with the objectives of the height development standard and the objectives for development within the E1 Zone, for the reasons given in the request.
- 30 I have also considered whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP and I find no grounds on which the Court should not uphold the height request.

*The floor space ratio standard is exceeded*

- 31 The proposal exceeds the floor space ratio (FSR) standard that applies to the site by virtue of cll 4.4 and 4.4A of the WLEP, and a written request prepared by GSA Planning dated December 2023 accompanies the amended DA (FSR Request).
- 32 The FSR Request identifies two FSR standards apply to the site. The FSR Standard applicable to 49 Bay Street is 3:1, while the FSR Standard applying to 51-53 Bay Street is 2.5:1.
- 33 The FSR Request asserts compliance with the FSR Standard is unreasonable or unnecessary as the development is consistent with the objectives of the standard, notwithstanding the non compliance.
- 34 As the site is located within the E1 zone, the relevant objective under cl 4.4 of the WLEP seeks to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.
- 35 The arguments advanced by the FSR Request in respect of this objective are similar to those put at [17(1)] of the height request inasmuch as recent approvals in the vicinity are indicative of the desired future character of the neighbourhood.



- 36 The objective of cl 4.4A is to encourage the development of prominent corner buildings in Double Bay which the FSR Request asserts is achieved by aligning the proposed bulk to that of adjoining development that is likewise corner site development.
- 37 Strict compliance with the FSR Standard would result in development up to two storeys lower in height. Such an outcome would be inconsistent with the emerging character of the streetscape when adjoining development at 28-34 Cross Street and 55 Bay Street are considered, and would defeat or thwart the underlying objective or purpose of the FSR standard to encourage prominent corner buildings.
- 38 The FSR Request argues there are sufficient environmental planning grounds to justify the contravention of the FSR that are virtually identical to those at [24], but for reference to achieving development of prominent corner buildings.
- 39 I accept the grounds advanced in the FSR request as to why compliance with the FSR standards applicable to the site is unreasonable or unnecessary, pursuant to cl 4.6(3)(a) of the WLEP, and I am satisfied that compliance is unreasonable or unnecessary in the circumstances of the case. I also accept, and am satisfied, that the environmental planning grounds are sufficient to justify the contravention of the FSR standard, pursuant to cl 4.6(3)(b) of the WLEP.
- 40 Finally, the FSR Request asserts consistency with the objectives of the zone, at [11], for reasons that are identical to those at [25].
- 41 I note here that the Respondent is satisfied that the FSR Request adequately addresses the matters required to be demonstrated by cl 4.6(3) of the WLEP, and that the proposed development, as amended, will be in the public interest because it is consistent with the objectives of the FSR standard and the objectives for development in the E1 Local Centre zone.
- 42 Furthermore, the Respondent does not contend that the contravention of the FSR development standard raises any matter of significance for State or regional environmental planning, or that there is any public benefit in maintaining the development standard, pursuant to cl 4.6(5) of the WLEP.

- 43 Accordingly, the Respondent raises no issue regarding cl 4.6 and accepts that a variation of the FSR development standard under cll 4.4 and 4.4A is justified.
- 44 I am satisfied, under cl 4.6(4), that the FSR request has adequately addressed the matters required to be demonstrated by subcl (3) and that the proposed development will be in the public interest because it is consistent with the objectives of the FSR standard and the objectives for development within the E1 Zone, for the reasons given in the request.
- 45 I have also considered whether the contravention of the development standard raises any matter of significance for State or regional environmental planning, and the public benefit of maintaining the development standard, pursuant to cl 4.6(5) of the WLEP and I find no grounds on which the Court should not uphold the FSR request.

*Other provisions of the Woollahra Local Environmental Plan 2014*

- 46 On the basis of the Flood Risk Management Plan prepared by ACOR Consultants Pty Ltd dated 9 August 2022, which provides an assessment against those matters about which the Court must be satisfied at cl 5.21(2) of the WLEP, and the agreed conditions of consent, I am so satisfied. In particular, I note the following:
- (1) The site is located in an area identified as both low flood risk and medium flood risk resulting in a flood planning level of 4.1m AHD.
  - (2) As the proposed development is within the existing of development on the site, there is no change in flood storage volume or flood affectation elsewhere in the floodplain.
  - (3) Flood barriers and other measures, including provision for evacuation and shelter in place, appropriately manage risk to life in the event of flood.
- 47 The site is located in an area identified by the relevant map at cl 6.1(2) of the WLEP to be Class 2 acid sulfate soils (ASS). The DA is accompanied by an Acid Sulfate Soils Management Plan (ASS Plan) prepared by Douglas Partners dated October 2022 that forms a part of the agreed conditions of consent. Also relevantly, the Preliminary Site Investigation for Contamination prepared by the same author, dated December 2017 (PSI) records laboratory screening indicating ASS is unlikely, although further investigation is deemed warranted.

48 Having had regard to the Report on Preliminary Geotechnical and Hydrogeological Investigation prepared by Douglas Partners dated December 2017, and the Geotechnical and Hydrogeological Monitoring Plan by the same author dated 2 November 2022, I consider those matters at cl 6.2(3) of the WLEP to be adequately addressed. In particular, I note the following:

- (1) Groundwater monitoring boreholes have assisted to identify the underlying hydrogeological characteristics of the site that, in turn, determines that a tanked basement is appropriate.
- (2) The likely degree and means of de-watering on the site and the drawdown of groundwater on surrounding properties is identified.
- (3) The PSI concludes that the likelihood of significant contamination on the site is low, and the site can be made suitable for the proposed purpose, subject to implementation of the recommendations contained in the Remediation Action Plan, prepared by Douglas Partners dated November 2022 and incorporated into the agreed conditions of consent.
- (4) The statement prepared by Dunnings Consulting Engineers dated 28 November 2023 sets out geotechnical considerations that underlie structural advice as to excavation, shoring and restraint, consistent with details documented in drawings dated 29 November 2023.

*State Environmental Planning Policy (Biodiversity and Conservation) 2021*

49 Chapter 10 of State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity SEPP) applied at the time of lodgement of the development application. I have considered the planning principles at s 10.10 of the Biodiversity SEPP and accept the results of the MUSIC modelling prepared by ACOR Consultants Dwg No C08-301 that records a reduction of 87.7% in suspended solids, and 100% reduction in gross pollutants arising from the stormwater drainage proposed, and so improve the water quality of urban run-off. Additionally, as stated at [47], I consider the disturbance of ASS to be sufficiently addressed by the ASS Plan and agreed conditions of consent.

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

50 As stated at [48(3)], the development application is accompanied by the PSI, and a Remediation Action Plan that are incorporated into the agreed conditions of consent. On the basis of the recommendations and conclusions of these reports, and the agreed conditions of consent in respect of contamination and remediation, I am satisfied the site will be made suitable for the purpose for

which development is proposed to be carried out, pursuant to s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021.

### *Water Management Act 2000*

- 51 The Proposed Development is integrated development pursuant to s 4.46 of the EPA Act as a Water Supply Work Approval is required under the *Water Management Act 2000*. Section 4.47(3) provides that a consent must be consistent with the general terms of approval of an approval body. Conditions detailing the general terms of approval, issued by Water NSW on 19 December 2022, are incorporated in the agreed conditions of consent.

### **Conclusion**

- 52 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.
- 53 In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.
- 54 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 DA 371/2022 in accordance with the documents listed in Annexure A ('Amended Application').
  - (2) The Applicant submitted the Amended Application with the Court on 18 December 2023.

### **Orders**

- 55 The Court orders that:
- (1) The Applicant is granted leave to rely on the Amended Development Application in Annexure A.
  - (2) The Applicant is to pay the Respondent's costs thrown away as a result of the Amended Application, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* as agreed or assessed.
  - (3) The appeal is upheld.
  - (4) Development Application No DA 371/2022 for the demolition of existing buildings and construction of a new six storey commercial building with

two levels of basement car parking, at 49-53 Bay Street, Double Bay 2028, is determined by the grant of consent subject to the conditions of consent in Annexure B.

.....

**T Horton**

**Commissioner of the Court**

**Annexure A (100690, pdf)**

**Annexure B (624118, pdf)**

\*\*\*\*\*

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on 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.