



Land and Environment Court
New South Wales

Case Name: Brewster Murray Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1159

Hearing Date(s): Conciliation conference on 19 March 2021

Date of Orders: 31 March 2021

Decision Date: 31 March 2021

Jurisdiction: Class 1

Before: Walsh C

Decision: The Court orders that:
(1) The Applicant's written request to vary the height standard in clause 4.3 of the Woollahra Local Environmental Plan 2014, prepared by Elton Consulting and dated 18 June 2020 is upheld.
(2) The appeal is upheld.
(3) The development application DA495/2019 for the construction of a new dwelling with basement carparking, swimming pool and landscaping at Lot 501, DP 735510 (Nos 17-19) Cranbrook Road, Bellevue Hill NSW is approved, subject to the conditions at Annexure A.

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – dwelling house – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 8.7, 4.15, 4.16
Environmental Planning and Assessment Regulation 2000, cl 3(1)
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy No 55—
Remediation of Land, cl 7

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005, cll 3, 20
Woollahra Local Environmental Plan 2014, cll 4.3, 4.6, 6.1

Cases Cited: Baron Corporation Pty Limited v Council of the City of Sydney (2019) 243 LGERA 338; [2019] NSWLEC 61
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

Texts Cited: Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Brewster Murray Pty Ltd Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
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L Mulligan (Solicitor) (Respondent)

Solicitors:
McCabe Curwood (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2020/268479

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** These proceedings, brought under Class 1 of the Court's jurisdiction, are an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against Woollahra Municipal Council's refusal of Development Application No. DA495/2019 (DA).
- 2 The DA, with modifications incorporated into amending plans, seeks approval for construction of a new dwelling with basement carparking, swimming pool, landscaping and associated works, at 17-19 Cranbrook Road, Bellevue Hill, legally identified as Lot 501 in DP 735510 (site).
- 3 The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), which was held on 19 March 2021, and at which I presided.

- 4 Prior to the conference, the parties had filed an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. Under s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, provided it is a decision that the Court could have made in the proper exercise of its functions.
- 5 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. There are certain jurisdictional pre-requisites which require attention before this function can be exercised. The parties outlined jurisdictional matters of relevance in these proceedings (in a communication titled: "Statement of Reasons - Jurisdictional Prerequisites" filed 16 March 2021). Regarding jurisdiction, and noting this advice and other advice provided during the conference, I am satisfied in regard to the matters indicated below.

Woollahra Local Environmental Plan 2014

- 6 The proposed development is permissible with consent within the applicable R2 – Low Density Residential zone under the Woollahra Local Environmental Plan 2014 (WLEP).
- 7 The proposed development exceeds the 9.5m height of buildings standard under cl 4.3 of WLEP. The applicant is seeking an exception to compliance with the development standard under cl 4.6 of WLEP. In accordance with cl 4.6(3), the applicant has filed a written request seeking to justify the contravention of the building height standard (WR). The WR, prepared by Elton Consulting and dated 18 June 2020, indicates a height contravention of up to 900mm in a relatively confined area in the north-eastern corner of the proposed building (reference WR Fig 1 and Drawing A504 LEC1 filed 11 February 2021). The parties agree that the WR is well founded and that the facultative powers of cl 4.6 of WLEP should be deployed in this case.
- 8 I have reviewed the WR and other matters related to whether the powers of cl 4.6 of WLEP should be available. I am satisfied in regard to the matters listed below, as explained.
- 9 The WR demonstrates that compliance with the development standard is unreasonable and unnecessary in the circumstances of the case (cl 4.6(3)(a) of

the WLEP). It does so mindful of Preston CJ's finding in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 (*Wehbe*). Among other approaches, the WR adopts the first "*Wehbe way*", successfully showing how, otherwise, the development, relevantly, achieves the objectives of cl 4.3.

10 I reproduce the list of objectives of the clause below:

(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.

11 For me, both objectives (a) and (b), are the kind of development standard objective considered in *Baron Corporation Pty Limited v Council of the City of Sydney* (2019) 243 LGERA 338; [2019] NSWLEC 61 (*Baron*) to be "explanatory of the purpose of the ... development standard" (*Baron* at [32]). Objective (a) explains an intention behind the "establishment" of the building height controls. That is to say, objective (a) is already achieved. Similarly, objective (b) is also achieved with the varying height controls in WLEP's Building Height maps near zone boundaries.

12 Nonetheless, I do accept the WR's position that the development, as now proposed, has considerable points of consistency with the established built form and character, and is sympathetic to the neighbourhood character both existing and that desired in the future under the pertinent controls. I also accept that the minor scale of the height contravention in this sloping setting means the height of the development would be consistent itself with the desired future character of the neighbourhood. The building is not located at the zone boundary.

13 The WR indicates that: (1) there is a reduction in solar access impact compared to the existing setting but that the requirements of Woollahra

Development Control Plan 2015 (WDCP) are met in regard to overshadowing, (2) the particulars of the proposed design, including changes accommodated in amended plans, minimise visual intrusion and privacy impacts, and (3) the proposal provides for reasonable view sharing and would not affect harbour views experienced from the public domain. Mindful of the arguments put in the WR, Council's Delegated Assessment Report (Respondent's Bundle of Documents filed 16 March 2021, behind Tab 6 (Council Assessment Report)), and the changes to the proposal subsequent to the preparation of Council's Assessment Report, I am satisfied that the WR adequately demonstrates objectives (c), (d) and (e) are achieved notwithstanding the contravention of the development standard.

- 14 The WR adequately demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case through satisfying the requirements of the first *Wehbe* way.
- 15 The WR outlines certain environmental planning grounds seen as justifying the contravention. The planning grounds of particular pertinence to me, mentioned in the WR, are in respect to (1) the relatively minor scale and confined area of the contravention and (2) how, notwithstanding the contravention, the development would bring reasonable outcomes for neighbours in regard to what might be generally understood to be building height-related concerns (solar access, privacy and view loss). I am satisfied that the WR adequately demonstrates that there are sufficient environmental planning grounds to justify contravening the development standard.
- 16 Together the above findings mean the applicant's WR has adequately addressed the matters required to be demonstrated by cl 4.6(3) of the LEP. It follows that the test of cl 4.6(4)(a)(i) is satisfied.
- 17 I now turn to the test at cl 4.6(4)(a)(ii) of the LEP.
- 18 I rely on the written request's demonstration that the proposed development is consistent with the objectives of the applicable height standard (see [9]-[14]).
- 19 The zone objectives are as follows:

- To provide for the housing needs of the community within a low density residential environment.
- To enable other land uses that provide facilities or services to meet the day to day needs of residents.
- To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.
- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

- 20 I find the proposed development consistent with the objectives of the R2 Low Density Residential zone in WLEP. This is because the proposed development provides upgraded residential accommodation within the existing low density residential environment, consistent with the first zone objective. Through its architectural and landscape design, the proposed development gives reasonable consideration to the amenity and character of the surrounding neighbourhood, consistent with the third objective. I am satisfied that the development is of a height which achieves the desired future character of the neighbourhood based on my analysis of the proposal's achievement of the objectives to cl 4.3 of WLEP. While no floor space ratio standard applies to the site under WLEP, I am satisfied that the proposed development is of a scale which achieves the desired future character of the neighbourhood given its general satisfactory configuration in regard to building envelope and floor plate controls (I rely here on Council Assessment Report, pp 10-12). The proposal is therefore also consistent with the fourth zone objective. The second zone objective is not relevant.
- 21 The proposed development will be in the public interest because it is consistent with the objectives of the building height standard and the objectives for development within the R2 Low Density Residential zone. On this basis, I am satisfied that the requirements of cl 4.6(4)(a)(ii) of the WLEP are met.
- 22 I do not need the concurrence of the Planning Secretary under cl 4.6(4)(b) of WLEP but note that I have considered the matters in cl 4.6(5) in coming to my conclusions in regard to the contravention. I find nothing of significance arises in regard to those matters.

- 23 The states of satisfaction required by cl 4.6 of the WLEP have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the building height control.
- 24 Clause 6.1 of the WLEP is concerned with Acid Sulfate Soils. The subject land is mapped as Class 5 land under WLEP's Acid Sulfate Soils Map. Clause 6.1 establishes certain jurisdictional prerequisites before any consent can be issued in regard to nominated works on site within Class 5 land, but only in certain nominated settings. In this instance the nominated settings are not established and the proposal is acceptable in regard to cl 6.1 of WLEP (I rely here on Council Assessment Report, p 8).

Other statutory instruments

- 25 In regard to cl 7(1) of the State Environmental Planning Policy No 55—Remediation of Land (SEPP 55), the Respondent is satisfied that the land is suitable for the proposed purpose because the land has always been used for residential purposes (Council Assessment Report, p 6). On these grounds, I am also satisfied that SEPP 55 does not preclude consent to this DA.
- 26 The application has been assessed under the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 which is applicable. The land is within the Sydney Harbour catchment but is outside the Foreshores and Waterways Area (cl 3(2)). I have given consideration to the matters I am required to under cl 20(a) and there is nothing which would trigger a jurisdictional concern for me in this matter.
- 27 The proposed development is a BASIX affected development as defined in cl 3(1) of the Environmental Planning and Assessment Regulation 2000. I accept the agreed advice of the parties that the BASIX certificate as provided (Certificate number 1056399S_02) is adequate for requirements.

Submissions

- 28 Mindful of s 4.15(1)(d) of the EPA Act, the parties advise the DA was appropriately notified by the Respondent and that at the end of the notification period, the Respondent received three submissions of objection. The parties agree that the substantive issues raised in the submissions are accommodated

and ameliorated by the amended plans and that the environmental impacts of the proposed development are acceptable.

- 29 I have worked through the objecting submissions with the parties and it is evident to me that these submissions have been taken into consideration by the parties. The submissions influenced the amendments to the originally proposed development and the suggested consent conditions. The requirements of me under s 4.15(1)(d) of the EPA Act have been satisfied.

Conclusion

- 30 With the above findings, I am satisfied that the jurisdictional pre-requisites have been met and the parties' decision is one that the Court could have made in the proper exercise of its functions. In turn, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 31 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. The LEC Act also required me to "set out in writing the terms of the decision" (s 34(3)(b)). The final orders have this effect.
- 32 The Court orders that:
- (1) The Applicant's written request to vary the height standard in clause 4.3 of the Woollahra Local Environmental Plan 2014, prepared by Elton Consulting and dated 18 June 2020 is upheld.
 - (2) The appeal is upheld.
 - (3) The development application DA495/2019 for the construction of a new dwelling with basement carparking, swimming pool and landscaping at Lot 501, DP 735510 (Nos 17-19) Cranbrook Road, Bellevue Hill NSW is approved, subject to the conditions at Annexure A.

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P Walsh

Commissioner of the Court

[Annexure A \(664659, pdf\)](#)

[Arch Plans \(27834511, pdf\)](#)

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