



Land and Environment Court New South Wales

Medium Neutral Citation:

**Moshav Development Bondi Pty Ltd v Woollahra
Municipal Council [2021] NSWLEC 1179**

Hearing dates:

Conciliation conference held on 7 April 2021

Date of orders:

16 April 2021

Decision date:

16 April 2021

Jurisdiction:

Class 1

Before:

Morris AC

Decision:

The Court orders that:

Proceedings No 2020/266979 (Lot A)

(1) The appeal is upheld.

(2) Development Application D/108/2020, as amended, for the construction of a residential dwelling including basement garage, swimming pool and associated landscaping and site works at proposed Lot A, approved under DA29/2019/1 on 21 May 2019, being part of Lot 5 DP 17954 (8 Hillside Ave, Vacluse) and Lot 1 in DP 501531 (9 Hillside Ave, Vacluse) is approved subject to the conditions annexed to this agreement at Annexure A.

Proceedings No 2020/267030 (Lot B)

(1) The appeal is upheld.

(2) Development Application D/110/2020, as amended, for the construction of a residential dwelling including basement garage, swimming pool and associated landscaping and site works at proposed Lot B, approved under DA29/2019/1 on 21 May 2019, being part of Lot 5 DP 17954 (8 Hillside Ave, Vacluse) and Lot 1 in DP 501531 (9 Hillside Ave, Vacluse) is approved subject to the conditions annexed to this agreement at Annexure B.

Proceedings No 2020/267031 (Lot C)

(1) The appeal is upheld.

(2) Development Application D/111/2020, as amended, for the construction of a dual occupancy including basement garage, inground private spas and associated landscaping and site works at proposed Lot C, approved under DA29/2019/1 on 21 May 2019, being part of Lot 5 DP 17954 (8 Hillside Ave, Vacluse) and Lot 1 in DP 501531 (9 Hillside Ave, Vacluse) is approved subject to the conditions annexed to this agreement at Annexure C.

Catchwords:

DEVELOPMENT APPLICATION – dwelling houses and dual occupancy development – view loss – conciliation conference – agreement between the parties

Legislation Cited:

Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7
Land and Environment Court Act 1979, ss 34, 34AA
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy No. 55 – Remediation of Land, cl 17
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005, cll 13, 25, 26
Woollahra Local Environmental Plan 2014, cll 4.3, 4.4, 5.10

Category:

Principal judgment

Parties:

Moshav Development Bondi Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation:

Counsel:
A Galasso SC (Applicant)
D Le Breton (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
HWL Ebsworth (Respondent)

File Number(s):

2020/266979; 2020/267030; 2020/267031

Publication restriction:

Nil

JUDGMENT

1 **COMMISSIONER:** Moshav Development Bondi Pty Ltd (Moshav) lodged three development applications with Woollahra Council on land that currently comprises two allotments. Those lots are the subject of a development consent granted by the Council on 22 May 2019 which provides for the subdivision of the two lots into three lots. That consent applies to land described as Lot 5 DP 17954 and Lot 1 DP 501531 and known as Nos 8 and 9 Hillside Avenue, Vacluse.

- 2 The development applications propose the construction of dwelling houses on proposed Lots A and B and a dual occupancy development on proposed Lot C. The Council did not determine the applications within the prescribed period and Moshav is appealing the deemed refusal of the three applications pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 3 The Court ordered the three applications be consolidated and any one of the proceedings will be taken to be evidence in all the proceedings. The matters are considered pursuant to the provisions of s 34AA of the *Land and Environment Court Act 1979* (LEC Act).
- 4 On 12 March 2021, the Court granted the applicant leave to rely on amended plans and additional information. The amendments were made in response to the respondent's Statement of Facts and Contentions filed on 4 November 2020 and in particular, the bulk and scale of the proposed buildings and the issues raised by objectors to the proposal in response to view loss.
- 5 The height of the buildings has been reduced to improve iconic views that are available from the site and the adjoining properties to the east. Those views include the Sydney Opera House, Harbour Bridge, Harbour and CBD. The scale of the buildings has also been reduced with amenity issues considered.
- 6 The Court arranged a conciliation conference under s 34(1) of the LEC Act between the parties, which was held on 7 April 2021. I presided over the conciliation conference and participated in a site view and heard submissions from residents who had lodged objections to the proposals with the Council. That evidence was heard on the objectors' properties which provided for an understanding of the location of the proposed buildings and an assessment of the impact of those buildings on views from those properties.
- 7 Through the conciliation process, the parties have agreed that the amended plans address the contentions in the case and, subject to imposition of appropriate conditions, consent to each of the applications should be granted. Importantly, the conditions address concerns raised by objectors in regard to landscaping, in particular, height of proposed plantings.
- 8 Following the conciliation, 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 would be acceptable to them. The decision agreed upon is to uphold the appeals and to grant development consent subject to conditions of consent, pursuant to s 4.16 of the EPA Act.
- 9 As the presiding Commissioner, I am satisfied that the decision is one 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 have formed this state of satisfaction for the following reasons:
- (1) Dwelling houses and dual occupancy development are permissible with consent in the R2 Low Density Residential pursuant to the Woollahra Local Environmental Plan 2014 (WLEP).

- (2) The site is subject to a maximum height control of 9.5m pursuant to cl 4.3 of the WLEP. The Development Applications comply with this control.
- (3) The site is not subject to a floor space ratio control pursuant to cl 4.4 of the WLEP.
- (4) The site is not a heritage item, nor does it adjoin any heritage items. The site is not located within a Heritage Conservation Area. Accordingly, the requirements under cl 5.10(4) of the WLEP are not enlivened by these applications.
- (5) With respect to acid sulfate soils, pursuant to cl 6.1 of the WLEP, the site is classified as Class 5 however the site is not located within 500m of adjacent Class 1, 2, 3, or 4 land (see cl 6.1(2) of the WLEP). Accordingly, the requirements under cl 6.1 are not enlivened by these applications.
- (6) Pursuant to cl 6.2 of the WLEP, a Geotechnical Investigation prepared by Asset Geo dated 5 December 2018 confirms that appropriate measures are proposed to avoid, minimise or mitigate the impact of the development on adjacent properties and accordingly the parties agree the proposals satisfy the matters outlined in cl 6.2(3) of the WLEP. I accept that submission.
- (7) The site is not identified as a Flood Planning Area. Accordingly, the requirements under cl 6.3 of the WLEP are not enlivened by these applications.
- (8) The site is not identified as a foreshore area. Accordingly, the requirements under cl 6.4 of the WLEP are not enlivened by these applications.
- (9) As mentioned above at [1] the site benefits from an unregistered Torrens title subdivision approved by Development Consent No. DA29/2019 which granted consent to the subdivision of Lot 1 in DP 501531 and Lot 5 in DP 17954 into three lots (Lots A, B and C) along with the demolition of the two existing dwellings on the site.
- (10) A Preliminary Detailed Contamination Site Investigation prepared by AssetGeo, dated 14 December 2018, was submitted with development application DA/29/2019 which confirms that the site is suitable for the proposed subdivision and future use as a residential dwelling. Accordingly, the parties agree that the proposals satisfy the matters outlined in cl 7 of the State Environmental Planning Policy No. 55 – Remediation of Land. I accept that submission.
- (11) Pursuant to the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, an amended BASIX Certificate has been issued with respect to each of the Development Applications.
- (12) Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP) applies to the site as it is within the Sydney Harbour Catchment. However, the site is not within the corresponding 'Critical Habitat Map', 'Foreshores and Waterways Map', 'Heritage Map', 'Sydney Opera House Buffer Zone Map', 'Strategic Foreshore Sites', 'Wetlands Protection Area Map'. With respect to provisions of the SREP, the View Sharing Assessment Report prepared by Richard Lamb and addendum letter, which is currently before the Court, confirms that the Amended Application maintains and protects views to and from Sydney Harbour and minimises impact on views by virtue of its compliance with the height control under cl 4.3 of the WLEP. Specifically, the View Sharing Assessment Report concludes the following:
 - (a) The Development Applications, as amended, presents a skilful design, providing view sharing and retaining development potential;
 - (b) The Development Applications, as amended, can be supported on view sharing grounds;
 - (c) There would be no significant impact on view sharing with 6 Black Street;
 - (d) There would be minor to moderate impacts on some views from 4 Black Street and a low impact overall; and
 - (e) There would be low to negligible impacts on views from 1-2/2A Black Street, taking into consideration view gains.

(13)

As such, the respondent has considered the proposal to be satisfactory with respect to the cll 13, 25 and 26 of the SREP. Having considered the plans and viewed the proposal from the above properties and, having regard to the planning controls, I accept the conclusions drawn in regard to view sharing. The parties considered sketch plans prepared on behalf of the objectors and it was agreed that the amendments suggested would in fact increase the overall bulk of the proposed dwelling on Lot B and result in non-compliances with the Council's Development Control Plan requirements for maximum wall height control. Having regard to the fact that all proposed buildings are less than the maximum building height development standard and, in the case of the dual occupancy development on proposed Lot C, around one storey less than the maximum, I do not consider the proposed plans proffered on behalf of the objectors that would require reduction in the height of that building by a further 800mm approximately would be reasonable in the circumstances of the case.

(14) The conditions have been amended to reflect the suggestions of the objectors in regard to the height and species of landscaping.

10 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.

11 In making the orders to give effect to the agreement between the parties, the parties have not raised, and I am not aware of any jurisdictional impediment to the making of these orders. Further, 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.

12 The Court orders that:

Proceedings No 2020/266979 (Lot A)

- (1) The appeal is upheld.
- (2) Development Application D/108/2020, as amended, for the construction of a residential dwelling including basement garage, swimming pool and associated landscaping and site works at proposed Lot A, approved under DA29/2019/1 on 21 May 2019, being part of Lot 5 DP 17954 (8 Hillside Ave, Vaucluse) and Lot 1 in DP 501531 (9 Hillside Ave, Vaucluse) is approved subject to the conditions annexed to this agreement at **Annexure A**.

Proceedings No 2020/267030 (Lot B)

- (1) The appeal is upheld.
- (2) Development Application D/110/2020, as amended, for the construction of a residential dwelling including basement garage, swimming pool and associated landscaping and site works at proposed Lot B, approved under DA29/2019/1 on 21 May 2019, being part of Lot 5 DP 17954 (8 Hillside Ave, Vaucluse) and Lot 1 in DP 501531 (9 Hillside Ave, Vaucluse) is approved subject to the conditions annexed to this agreement at **Annexure B**.

Proceedings No 2020/267031 (Lot C)

- (1) The appeal is upheld.
- (2) Development Application D/111/2020, as amended, for the construction of a dual occupancy including basement garage, inground private spas and associated landscaping and site works at proposed Lot C, approved under DA29/2019/1 on 21 May 2019, being part of Lot 5 DP 17954 (8 Hillside Ave, Vaucluse) and Lot 1 in DP 501531 (9 Hillside Ave, Vaucluse) is approved subject to the conditions annexed to this agreement at **Annexure C**.

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Sue Morris**Acting Commissioner of the Court**

Proceedings No 2020/266979 (Lot A)

[Annexure A \(681566,.pdf\)](#)

[Architectural Plans \(15802469,.pdf\)](#)

Proceedings No 2020/267030 (Lot B)

[Annexure B \(692171,.pdf\)](#)

[Architectural Plans \(17503500,.pdf\)](#)

Proceedings No 2020/267031 (Lot C)

[Annexure C \(677026,.pdf\)](#)

[Architectural Plans \(12946038,.pdf\)](#)

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Decision last updated: 16 April 2021