



Land and Environment Court  
New South Wales

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Case Name:	Polese v Woollahra Municipal Council
Medium Neutral Citation:	[2021] NSWLEC 1264
Hearing Date(s):	Conciliation conference on 19 and 20 April 2021
Date of Orders:	20 May 2021
Decision Date:	20 May 2021
Jurisdiction:	Class 1
Before:	Bindon AC
Decision:	<p>The Court Orders:</p> <p>(1) The Applicant is given leave to amend its application to rely on the amended drawings DA2-111D Revision 1 dated 19 April 2021, DA2 201 Revision 2 dated 20 April 2021, DA2 301 Revision 2 dated 20 April 2021 and DA2 302 Revision 2 dated 20 April 2021 and revised BASIX Certificate (certificate number 1163063S).</p> <p>(2) The appeal is upheld.</p> <p>(3) Development Application DA 357/2020 for the excavation of basement level and modified vehicle and pedestrian access at 4 Queens Avenue, Vaucluse (the site) is approved, subject to the conditions of consent at “Annexure A”.</p>
Catchwords:	DEVELOPMENT APPLICATION – basement level excavation – amended vehicle and pedestrian access to basement – conciliation conference – agreement between the parties – orders
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7</p> <p>Land and Environment Court Act 1979, s 34</p> <p>State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004</p> <p>State Environmental Planning Policy No 55—</p>

Remediation of Land, cl 7  
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005, cll 25, 26  
Woollahra Local Environmental Plan 2012, cll 4.3, 4.4, 5.10, 6.1, 6.2

Texts Cited: Woollahra Development Control Plan 2015, clauses A1.1.9, B3.4, B3.7.3

Category: Principal judgment

Parties: Marc Polese (Applicant)  
Woollahra Municipal Council (Respondent)

Representation: Counsel:  
R White (Applicant)  
D Le Breton (Solicitor) (Respondent)

Solicitors:  
Dentons Australia Limited (Applicant)  
HWL Ebsworth (Respondent)

File Number(s): 2020/309669

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal brought to the Court under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by the Woollahra Municipal Council (Council) of Development Application No DA 357/2020 (the DA). In exercising the functions of consent authority on the appeal, the Court has the power to determine the DA pursuant to ss 4.15 and 4.16 of the EPA Act.
- 2 The DA relates to a 630.8m<sup>2</sup> parcel of land identified as Lot 1 in DP 935339 at 4 Queens Avenue Vaucluse (the site). The DA as submitted to the Council on 16 September 2020 sought consent for the extension of the basement level to accommodate new water tanks, servicing and equipment storage areas to an approved, but not constructed, dwelling house. The development application for the approved dwelling house, Council reference DA 279/2019, (the original DA) obtained development consent from the Council on 14 July 2020.

- 3 The DA was notified and exhibited between 30 September 2020 and 12 October 2020, with one submission received during the exhibition period. On 22 October 2020 the DA was refused by Council officers under authority delegated by Council and on 29 October 2020 the Applicant lodged this Class 1 Application with the Court. On 18 November 2020 the Council filed its Statement of Facts and Contentions (SOFC).
- 4 The Court arranged a conciliation conference between the parties pursuant to s 34AA of the *Land and Environment Court Act 1979* (LEC Act). In preparation for the s34AA conciliation conference and potential hearing, the town planning experts Mr Stephen Kerr (for the Applicant) and Mr George Lloyd (for the Council) conferred and produced a joint report. The planning joint report dated 22 March 2021 was filed with the Court on 23 March 2021. A further expert report by Mr Michael Martin, Engineer for the Applicant was filed with the Court on 1 April 2021. Council filed a "Court Bundle of Documents" (Council bundle) on 13 April 2021.
- 5 I presided over the s34AA conciliation conference held on 19 and 20 April 2021. The proceedings commenced with a site view attended by me and representatives of the parties. No oral submissions were taken, although the written submission of the adjoining neighbour was provided to the Court prior to the conference.
- 6 Amendments to the architectural plans prepared by Tzannes, dated 17 and 20 April 2021, (the final plans) were made to address the matters raised in the SOFC, concerns raised by Council during the s34 conference and in the public submission. On 20 April 2021 the parties advised the Court that they had reached an agreement and provided to the Court a copy of that draft agreement along with draft conditions. On 21 April 2021 the final s34 agreement and conditions at Annexure A to the agreement, a set of the final plans and a revised BASIX Certificate were filed with the Court.
- 7 The main changes between the original plans filed with the Class 1 Application and the final plans the subject of the s34 agreement are:
  - (1) the wine cellar is removed,
  - (2) two water tanks relocated and one added,

- (3) two of the parking spaces are reoriented and the vehicle turning area reduced,
  - (4) storage, plant and equipment areas replanned and rationalised.
  - (5) With the reconfiguring of the basement plan the area of the basement has decreased, and the volume of excavated material reduced by 172.95 cubic metres.
- 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 the function under s 4.16 of the EPA Act to grant consent to the development application. There are jurisdictional prerequisites that must be satisfied before this function can be exercised. In oral submissions the parties identified the jurisdictional prerequisites of relevance in these proceedings and how they are satisfied. The parties agree that there are no jurisdictional prerequisites in these proceedings which would prevent the Court from exercising its function under s 34(3) of the LEC Act.

### **Satisfaction of jurisdiction**

- 9 In relation to the Woollahra Local Environmental Plan 2014 (WLEP) the relevant provisions have been considered as follows:
- (1) The development is for the purposes of a dwelling house, which is permissible with consent in the R2 Low Density Residential Zone (R2 Zone) and is consistent with the objectives of the R2 Zone.
  - (2) The development involves minor building works above "Ground Level Existing" in addition to those already approved under the original DA, and none of those works exceed the 9.5m height of buildings development standard at cl 4.3 of the WLEP. There is no floor space ratio (FSR) development standard (cl 4.4 of the WLEP) applicable to the site.
  - (3) The site is located within the vicinity of two heritage items: 6 Queens Avenue, and the Hermit Bay slipway and landing. As with the original DA the works do not detract from the heritage significance of either item. The provisions of cl 5.10 of the WLEP are therefore satisfied.
  - (4) With respect to cl 6.1 Acid Sulphate Soils and cl 6.2 Earthworks, these were addressed as part of the original DA as set out in the Council's assessment report for that development (Tab 10 of Council bundle). No further assessment is required as a result of the changes to the original DA.

- 10 Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP Sydney Harbour) is a deemed State Environmental Planning Policy (SEPP) applying to the site. Clauses 25 and 26 of the SREP Sydney Harbour set out the matters for consideration. The site is visible from Sydney Harbour, although the changes to the original DA's west elevation that would be visible from the Harbour are minor. The SREP Sydney Harbour matters for consideration were also addressed as part of the original DA as set out in the Council's assessment report for that development (Tab 10 of Council bundle) and in the Statement of Environmental Effects submitted with the DA.
- 11 State Environmental Planning Policy No 55—Remediation of Land (SEPP 55), applies to the land and cl 7 requires consideration of any contamination and associated remediation. This was addressed as part of the original DA as set out in the Council's assessment report for that development (Tab 10 of Council bundle) and the parties agree no further assessment is required as a result of the changes to the original DA.
- 12 In relation to the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (the BASIX SEPP), a BASIX Certificate number 1163063S dated 21 April 2021 has been provided demonstrating compliance with the BASIX SEPP, and is referenced in the conditions of consent.
- 13 The Woollahra Development Control Plan 2015 (WDCP) applies to the site. The development exceeds the maximum volume of excavation for the site (Control C1 of clause B3.4). The parties agree that the amount of excavation in the final plans is acceptable and Contention 1 of the SOFC is resolved. The extent and volume of excavation is satisfactory for the reasons as set out in the original DA assessment report (Tab 10 of Council bundle).
- 14 The WDCP was last amended on 12 April 2021 (WDCP Amendment 15), after the original DA assessment was made and after the DA was lodged with Council. Pursuant to the provisions of clause A1.1.9 of the WDCP there are no savings and transitional provisions relating to development applications. The WDCP Amendment 15 provisions are therefore a matter for consideration pursuant to s 4.15 of EPA Act. The provisions of the WDCP at B3.4 Excavation were unaltered from those applying prior to the coming into force of WDCP

Amendment 15. The provisions at B3.7.3 relating to Site Facilities, however, were amended. The new B3.7.3 provisions relevant to the DA are:

- (1) the new Objectives 07 and 08 for mechanical plant equipment location (not on roofs) and minimising visual and acoustic impacts; and
- (2) the new Control C7 regarding locating mechanical plant within the building envelope and within a suitably designed plant room.

The development is consistent with these new provisions of the WDCP.

### **Disposal of proceedings in accordance with the parties' decision**

15 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' agreement.

16 The Court orders:

- (1) The Applicant is given leave to amend its application to rely on the amended drawings DA2-111D Revision 1 dated 19 April 2021, DA2 201 Revision 2 dated 20 April 2021, DA2 301 Revision 2 dated 20 April 2021 and DA2 302 Revision 2 dated 20 April 2021 and revised BASIX Certificate (certificate number 1163063S).
- (2) The appeal is upheld.
- (3) Development Application DA 357/2020 for the excavation of basement level and modified vehicle and pedestrian access at 4 Queens Avenue, Vaucluse (the site) is approved, subject to the conditions of consent at "Annexure A".

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**J Bindon**

**Acting Commissioner of the Court**

[Annexure A \(539446, pdf\)](#)

[Level 1 Plan \(154041, pdf\)](#)

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