



Land and Environment Court
New South Wales

Case Name: Vaucluse Early Learning Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1350

Hearing Date(s): Conciliation conference on 15 April, 6, and 18 May and 1 June 2021

Date of Orders: 15 June 2021

Decision Date: 15 June 2021

Jurisdiction: Class 1

Before: Espinosa C

Decision: See orders at [24]

Catchwords: DEVELOPMENT APPEAL – child care centre – conciliation conference – agreement between the parties – orders

Legislation Cited: Children (Education and Care Services) National Law 2010
Education and Care Services National Regulations
Environmental Planning and Assessment Act 1979, ss 4.16, 8.7, 8.15
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017
State Environmental Planning Policy No 55 – Remediation of Land, cl 7
State Environmental Planning Policy No 64 – Advertising and Signage
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005
Woollahra Local Environmental Plan 2014, cl 6.1, 6.2

Texts Cited: Child Care Planning Guideline, NSW Department of Planning and Environment
Woollahra Community Participation Plan 2019, Woollahra Municipal Council

Category: Principal judgment

Parties: Vaucluse Early Learning Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
M Staunton (Applicant)
S Patterson (Solicitor) (Respondent)

Solicitors:
Jaku Legal Pty Ltd (Applicant)
Wilshire Webb Staunton Beattie (Respondent)

File Number(s): 2020/267216

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** *The nature of proceedings:* This is a Class 1 - Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) being an Appeal against the deemed refusal of a development application No DA2020/233/1 seeking approval for the demolition of existing dwelling and construction of a new child care centre providing 86 places (the Proposed Development) on land known as 56 Village High Road, Vaucluse, legal described as Lot 129 in Deposited Plan 10293 (the Site).
- 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 15 April, 6, and 18 May and 1 June 2021. I have presided over the conciliation conference.
- 3 After the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. This decision involved the Court granting leave to the Applicant to amend the Proposed Development, upholding the appeal and granting development consent to the development application subject to conditions.

- 4 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.
- 5 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be the following:
- (1) State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017, Child Care Planning Guideline, Children (Education and Care Services) National Law (2010) and Education and Care Services National Regulations (Child Care controls);
 - (2) State Environmental Planning Policy No 64 – Advertising and Signage (SEPP 64);
 - (3) State Environmental Planning Policy No 55 – Remediation of Land, cl 7 (SEPP 55);
 - (4) Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP);
 - (5) Woollahra Local Environmental Plan 2014 (WLEP); and
 - (6) Public Notification.
- 6 The parties explained how the jurisdictional prerequisites have been satisfied in a document titled "Agreed statement of jurisdictional requirements and reasons for agreement." I set out the parties' explanation below.

Child Care controls

- 7 The Amended Development has been assessed against the relevant provisions of State Environmental Planning Policy (Educational Establishments and Child Care Facilities) 2017 ("**Education SEPP**"), the Child Care Planning Guideline ("**Guideline**"), the Children (Education and Care Services) National Law 2010 (NSW) (Education and Care Services National Law Act 2010) ("**National Law**") and the Education and Care Services National Regulations ("**National Regulations**"). The Amended Development is considered to be acceptable with regards to the relevant provisions contained within the Education SEPP, Guideline, National Law and National Regulations.

Advertising and Signage

- 8 The Amended Development has been assessed against the provisions of SEPP 64. The signage proposed by the Amended Development is consistent with the provisions, objectives and assessment criteria contained in SEPP 64. The proposed signage is compatible with the desired amenity and visual character of the area and is of high quality design and finish. Accordingly, the Amended Development is considered acceptable with respect to SEPP 64.

Contaminated Land – SEPP 55

- 9 Clause 7(1) of SEPP 55 provides as follows:

A consent authority must not consent to the carrying out of any development on land unless:

- (a) it has considered whether the land is contaminated, and
- (b) if the land is contaminated, it is satisfied that the land is suitable in its contaminated state (or will be suitable, after remediation) for the purpose for which the development is proposed to be carried out, and
- (c) if the land requires remediation to be made suitable for the purpose for which the development is proposed to be carried out, it is satisfied that the land will be remediated before the land is used for that purpose.

- 10 A Demolition Report prepared by Ruth Daniell dated June 2020 (Demolition Report) has been submitted in support of the proposed development (See Tab 21 of Class 1 Application filed with the Court on 14 September 2020 (stamped on 15 September 2020)). The Demolition Report provides that the Site comprised part of land that was the subject of a large subdivision on 16 October 1920. Pages 10 to 12 of the Demolition Report refer to an application for a house and garage in 1937 and provides evidence of building applications relating to the Site since that time, which indicate historical use of the Site for residential purposes.
- 11 A Phase I Preliminary Site Investigation carried out by ADE Consulting Group dated 2 July 2020 (PSI) concludes that there is a low to moderate potential for contamination to have occurred on-Site as a result of past and present land uses (See Tab 16 of Class 1 Application filed with the Court on 14 September 2020 (stamped on 15 September 2020)).
- 12 As such, ADE Consulting Group has recommended that a Phase II Detailed Site Assessment (“DSI”) be undertaken but that based on the current layout of

the Site, access to the soil will only be possible following the demolition of existing buildings within the Site.

- 13 By letter dated 17 March 2021, (contained in Tab 14 in the Applicant's bundle of without prejudice material for the Conciliation Conference) ADE Consulting Group has confirmed its conclusion in the PSI that the Site can and will be made suitable for the intended land use as a childcare centre, following the results of the DSI and remedial activities (if any are required). If required, a remediation action plan ("RAP") may be recommended.
- 14 As is typical in cases where demolition of existing structures is required in order to undertake a DSI, proposed condition D.13 requires a DSI to be carried out, and if necessary, a RAP and validation report to be prepared, following demolition works and clearing of the site and before construction/development works commence.
- 15 In addition, proposed condition E.4 requires any new information that comes to light during remediation, demolition or construction works, which has the potential to alter previous conclusions about site contamination or other relevant matters must be immediately notified.
- 16 Accordingly, the Court can be satisfied that cl 7(1) of SEPP 55 has been complied with because:
 - (1) whether the Site is contaminated has been considered;
 - (2) the Site is suitable in its current state or will be suitable, after any necessary remediation, for the purpose of a child care centre; and
 - (3) if the Site requires remediation to be made suitable for use as a child care centre, the Site will be remediated before the Site is used for that purpose.

Sydney Harbour catchment

- 17 The Amended Development has been assessed against the provisions of SREP. The Amended Development is considered to be acceptable with respect to SREP.

WLEP

- 18 The Site is zoned R2 Low Density Residential under the WLEP. The Amended Development is permissible with consent in the R2 Low Density Residential zone.
- 19 The Amended Development has been assessed against the relevant provisions of WLEP. The Amended Development achieves the aims and objectives of WLEP, including the objectives of the R2 Low Density Residential zoning of the Site.
- 20 The Amended Development also complies with all relevant development standards contained within WLEP and is considered acceptable with respect to provisions relating to acid sulfate soils (cl 6.1) and earthworks (cl 6.2).

Public notification

- 21 Although this is not strictly a jurisdictional prerequisite to the Court's powers to make the orders as required under s 34(3) of the LEC Act, I note the following information provided by the parties regarding public notification:
 - (1) The Development Application was notified and advertised from 29 July 2020 to 12 August 2020 pursuant to Chapter 6 of Woollahra Community Participation Plan 2019. The Respondent received 128 submissions objecting to the proposed development and 79 submissions in support of the proposed development.
 - (2) Oral submissions were made by two objectors from 63 Village High Road, Vacluse, at the commencement of the Conciliation Conference.
 - (3) The Amended Development was notified and advertised from 19 April 2021 to 13 May 2021. The Respondent received 99 submissions opposing the Amended Development and 64 submissions supporting the Amended Development.
- 22 I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act. I accept and adopt the comprehensive reasons provided by the parties.
- 23 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.

Orders

- 24 The Court orders that:

- (1) Leave is granted to the Applicant to rely on the following amended plans and documents set out in Condition A.3 of Annexure A:
- (a) Architectural Plans prepared by SJB Architects:
1. DA-0101, Rev D, Site Plan, dated 27 November 2020;
 2. DA-0201, Rev D, Floor Plan–Basement, dated 27 November 2020;
 3. DA-0202, Rev E, Floor Plan–Ground, dated 11 December 2020;
 4. DA-0203, Rev D, Floor Plan–Level 1, dated 27 November 2020;
 5. DA-0204, Rev D, Floor Plan–Level 2, dated 27 November 2020;
 6. DA-0205, Rev D, Floor Plan–Roof, dated 27 November 2020;
 7. DA-0501, Rev E, Elevations–North & East, dated 11 December 2020;
 8. DA-0502, Rev E, Elevations–South & West, dated 11 December 2020;
 9. DA-0601, Rev D, Sections–A & B, dated 27 November 2020;
 10. DA-0602, Rev D, Detail Section–Boundary Fence Condition, dated 27 November 2020; and
 11. DA-0603, Rev D, Detail Section–Southern Wall Height, dated 27 November 2020.
- (b) Landscape Plans prepared by Conzept Landscape Architects:
1. LPS3421–01 Page 1, Revision F, Hardscape Plan, dated 26 November 2020;
 2. LPS3421–01 Page 2, Revision F, Landscape Plan, dated 26 November 2020;
 3. LPS3421–01 Page 3, Revision F, Landscape Plan, dated 26 November 2020;
 4. LPS3421–01 Page 4, Revision F, Specification & Detail, dated 26 November 2020; and
 5. LPS3421–01 Page 5, Revision F, Detail, dated 26 November 2020.
- (c) Civil Engineering Plans prepared by Engineering Studio Civil & Structural:
1. C00.01, Revision C, General Notes, dated 26 November 2020;
 2. C01.01, Revision C, Sediment & Erosion Control Plan, dated 26 November 2020;
 3. C02.01, Revision C, Roof Drainage Plan, dated 26 November 2020;
 4. C02.02, Revision C, Basement Drainage Plan, dated 26 November 2020;
 5. C02.03, Revision C, Drainage Detail Sheet 1, dated 26 November 2020; and

6. C02.04, Revision C, Drainage Detail Sheet 2, dated 26 November 2020.

- (d) Arboricultural Impact Assessment prepared by Tree Wise Men, dated 27 November 2020.
 - (e) Addendum Letter to Arboricultural Impact Assessment by Tree Wise Men, dated 21 December 2020.
 - (f) Acoustical Assessment prepared by The Acoustic Group dated 27 November 2020.
 - (g) Operational Management Plan for Vaucluse Early Learning dated December 2020.
- (2) The Applicant is to pay the Respondent its costs thrown away as a result of the amendment referred to in (1) above pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW) in the sum of \$3,337 payable within 21 days of these orders.
 - (3) Leave is granted to the Applicant to amend the Class 1 Application filed with the Court on 14 September 2020 to correct the Applicant's Australian Company Number (ACN) from "639 995 467" to "638 125 738".
 - (4) The Appeal is upheld.
 - (5) Development consent is granted to Development Application No. DA 233/2020 for the demolition of an existing dwelling and construction of a new child care centre providing 86 places, at 65 Village High Road, Vaucluse (Lot 129 in DP10293), subject to the conditions of consent in Annexure A.

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E Espinosa

Commissioner of the Court

[Annexure A \(931986, pdf\)](#)

[Architectural Plans \(5272635, pdf\)](#)

[Landscape Plans \(8014673, pdf\)](#)

[Civil Engineering Plans \(1616182, pdf\)](#)

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