



Land and Environment Court

New South Wales

Case Name: Royal Prince Edward Yacht Club v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1363

Hearing Date(s): 15 June 2021

Date of Orders: 22 June 2021

Decision Date: 22 June 2021

Jurisdiction: Class 1

Before: O'Neill C

Decision: The orders of the Court are:
(1) The appeal is upheld.
(2) Development Application No. 563/2018 for alterations and additions to an existing ramp and pontoon, on land below the mean high water mark and adjacent to 160 Wolseley Road, Point Piper, is approved, subject to the conditions of consent at Annexure A.
(3) The exhibits, other than Exhibits 1, 3, A and F, are returned.

Catchwords: DEVELOPMENT APPLICATION – demolition of existing structures, retention of the existing jetty and construction of a new ramp and pontoon – consent orders – resident objectors

Legislation Cited: Disability Discrimination Act 1992
Environmental Planning and Assessment Act 1979, Div 4.8, ss 4.47, 8.7, 8.15
Fisheries Management Act 1994, s 205
Land and Environment Court Act 1979, s 34
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005, cll 2, 3, 5, 17, 18, 21, 22, 23, 24, 25, 26, 29, 63, Sch 2

Woollahra Local Environmental Plan 2014, Sch 5

Cases Cited: Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council [2017] NSWLEC 56

Texts Cited: Land and Environment Court, Practice Note, Class 1 Development Appeals
Sydney Harbour Foreshores and Waterways Area Development Control Plan

Category: Principal judgment

Parties: Royal Prince Edward Yacht Club (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
R O’Gorman-Hughes (Applicant)
J Hewitt (Solicitor) (Respondent)

Solicitors:
Holding Redlich (Applicant)
HWL Ebsworth (Respondent)

File Number(s): 2020/119022

Publication Restriction: Nil

JUDGMENT

1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No. 563/2018, on 17 October 2019, for alterations and additions to the existing jetty, ramp and pontoon (the proposal), on land below the mean high water mark and adjacent to 160 Wolseley Road, Point Piper (the site), by Woollahra Municipal Council (the Council).

Conduct of the proceedings

2 The appeal was subject to conciliation on 16 December 2020, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). As agreement was not reached, the conciliation conference was terminated, pursuant to s 34(4) of the LEC Act.

3 Leave was granted by the Court on 8 April 2021 for the applicant to amend the application to rely on amended plans (Ex A, Annexure B) and additional

documents, subject to an order that the applicant pay the Council's costs thrown away as a result of the amendments, pursuant to s 8.15(3) of the EPA Act.

- 4 After considering the amended plans and documents and after receiving advice from public authorities, the applicant and the Council reached agreement on a set of conditions upon which the development application could be determined by way of approval. The parties advised the Court via an online court communication sent on 2 June 2021 that the contentions raised in the Statement of Facts and Contentions filed on 18 August 2020 had been satisfactorily addressed by the amendments made to the proposal. Following the receipt of the online court communication on 2 June 2021, the Court listed the proceedings for a consent orders hearing to commence in court via MS Teams on 15 June 2021 and vacated the second day of the hearing.
- 5 On 3 June 2021, the Council's solicitor sent a letter (Ex 4) to all residents from whom the Council had received a submission regarding the proposal advising those residents that the Council's independent experts had formed the view that the application, as amended, could be granted development consent and that the Council would not oppose the application and would consent to the Court granting a development consent subject to conditions. In the letter, the Council advised the residents of the proposed consent orders and attached the proposed conditions of consent, consistent with the requirements of the Court's Practice Note – Class 1 Development Appeals at par 99.
- 6 The hearing was conducted via MS Teams.

The site and its context

- 7 The site is located on Lady Martins Beach, Point Piper, in Felix Bay, adjacent to 160 Wolseley Road, Point Piper (Lot 1 in DP 110298), the Prince Edward Yacht Club.
- 8 The existing access ramp and pontoon roughly bisects Lady Martins Beach. The beach is open to the public and used by swimmers. A Council owned right of way provides public access to the beach, adjacent to the western boundary of 160 Wolseley Road, Point Piper.

The proposal

- 9 The proposal is to retain the existing jetty and demolish the remaining structures, and to construct a 16m long hinged aluminium gangway ramp attached to the jetty with perforated decking and a 12m long x 5m wide pontoon. The proposal extends approximately 10.5m beyond the extent of the existing structure.
- 10 Owners consent is provided (Ex F).

Planning framework

- 11 The majority of the site is zoned W1—Maritime Waters and the site is partly zoned W8—Scenic Waters: Passive Use, pursuant to the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SHREP 2005) (cl 3(1) of SHREP 2005).
- 12 The consent authority for the proposal is the Council (cl 5(1) of SHREP 2005).
- 13 The aims of the SHREP 2005 with respect to the Sydney Harbour Catchment are as follows (cl 2(1) of SHREP 2005):
 - (a) to ensure that the catchment, foreshores, waterways and islands of Sydney Harbour are recognised, protected, enhanced and maintained—
 - (i) as an outstanding natural asset, and
 - (ii) as a public asset of national and heritage significance,for existing and future generations,
 - (b) to ensure a healthy, sustainable environment on land and water,
 - (c) to achieve a high quality and ecologically sustainable urban environment,
 - (d) to ensure a prosperous working harbour and an effective transport corridor,
 - (e) to encourage a culturally rich and vibrant place for people,
 - (f) to ensure accessibility to and along Sydney Harbour and its foreshores,
 - (g) to ensure the protection, maintenance and rehabilitation of watercourses, wetlands, riparian lands, remnant vegetation and ecological connectivity,
 - (h) to provide a consolidated, simplified and updated legislative framework for future planning.
- 14 For the purpose of enabling those aims to be achieved in relation to the Foreshores and Waterways Area, SHREP 2005 adopts the following principles (cl 2(2) of SHREP 2005):

- (a) Sydney Harbour is to be recognised as a public resource, owned by the public, to be protected for the public good,
- (b) the public good has precedence over the private good whenever and whatever change is proposed for Sydney Harbour or its foreshores,
- (c) protection of the natural assets of Sydney Harbour has precedence over all other interests.

15 The objectives of the W1 zone are (cl 17 of SHREP 2005):

- (a) to give preference to and protect waters required for the effective and efficient movement of commercial shipping, public water transport and maritime industrial operations generally,
- (b) to allow development only where it is demonstrated that it is compatible with, and will not adversely affect the effective and efficient movement of, commercial shipping, public water transport and maritime industry operations,
- (c) to promote equitable use of the waterway, including use by passive recreation craft.

16 The objectives of the W8 zone are (cl 17 of SHREP 2005):

- (a) to give preference to unimpeded public access along the intertidal zone, to the visual continuity and significance of the landform and to the ecological value of waters and foreshores,
- (b) to allow low-lying private water-dependent development close to shore only where it can be demonstrated that the preferences referred to in paragraph (a) are not damaged or impaired in any way, that any proposed structure conforms closely to the shore, that development maximises open and unobstructed waterways and maintains and enhances views to and from waters in this zone,
- (c) to restrict development for permanent boat storage and private landing facilities in unsuitable locations,
- (d) to allow water-dependent development only where it can be demonstrated that it meets a demonstrated demand and harmonises with the planned character of the locality,
- (e) to ensure that the scale and size of development are appropriate to the locality and protect and improve the natural assets and natural and cultural scenic quality of the surrounding area, particularly when viewed from waters in this zone or areas of public access.

17 Development for the purpose of Recreation or club facilities is permissible with consent (cl 18(1)(b) of SHREP 2005). "Recreation or club facilities" is defined in the dictionary of SHREP 2005 as, "recreational or club facility means a building or place used exclusively for sporting or leisure activities, whether operated for the purpose of gain or not".

18 The matters for consideration under SHREP 2005, before granting consent under Pt 4 of the EPA Act, are biodiversity, ecology and environmental

protection, at cl 21; public access to, and use of, foreshores and waterways at cl 22; maintenance of a working harbour, at cl 23; interrelationship of waterway and foreshore uses, at cl 24; foreshore and waterways scenic quality, at cl 25; maintenance, protection and enhancement of views, at cl 26; and the environmental effects of the development, at cl 63.

- 19 Clause 29 of SHREP 2005 requires the consent authority, for development in the Foreshores and Waterways listed in Sch 2, to refer the application to the Advisory Committee and to take into consideration any submission received from the committee within 30 days of the proposal being forwarded to the committee. The Council submitted that the proposal was twice referred to the committee and the Council has not received a response.
- 20 The Sydney Harbour Foreshores and Waterways Area Development Control Plan 2005 (DCP 2005) is to be taken into consideration by consent authorities when assessing development applications within the area covered by the Foreshores and Waters Area of SHREP 2005. The Ecological Communities and Landscape Characters Map of DCP 2005 identifies Felix Bay as Landscape Character Type 8.
- 21 Any development within the Landscape Character Type 8 of DCP 2005 is to satisfy the following criteria:
 - vegetation is integrated with land-based development to minimise the contrast between natural and built elements;
 - design and mitigation measures are provided to minimise noise and amenity impacts between incompatible land uses;
 - the maritime uses on the Harbour are preserved. Pressure for these uses to relocate is minimised. New developments adjoining maritime uses are designed and sited to maintain compatibility with existing maritime uses; and
 - remaining natural features that are significant along the foreshore are preserved and views of these features are maintained.”
- 22 Lady Martins Beach is a local heritage item (Item 279, Sch 5 to the Woollahra Local Environmental Plan 2014).
- 23 The proposal is integrated development, pursuant to Div 4.8 of the EPA Act and the Council notified the Department of Primary Industries and Transport for NSW of the proposal. The Department of Primary Industries provided general terms of approval to the Council regarding the proposal (as amended) on 3

May 2021 (Ex 6, tab 21) and those conditions are incorporated in the conditions of consent at Annexure A, pursuant to s 4.47(3) of the EPA Act. Transport for NSW advised the Council on 3 May 2021 in relation to the proposal (as amended) that the “considerable reduction in size” of the proposal “reduces the impact to navigation for the area”. Transport for NSW also advised the Council that there may be a requirement to relinquish or relocate a commercial mooring licence following further assessment if the proposal proceeds (Ex 6, tab 24).

Public submissions

24 Eight resident objectors of the proposal and one local supporter (who is not a member of the Prince Edward Yacht Club) gave evidence at the commencement of the hearing via MS Teams. The concerns of the resident objectors can be summarised as:

- the proposal represents the substantial appropriation of public space by the Prince Edward Yacht Club;
- Felix Bay is used by swimmers, including children, and watercraft, and larger boats coming into the bay will risk the safety of those users;
- Camp Cove at Watsons Bay has an exclusion zone for vessels to protect swimmers and Felix Bay should have a similar exclusion zone;
- the proposal is not suitable for sailors with disabilities and access for sailors with disabilities is not a significant benefit of the proposal as claimed by the applicant;
- the hearing should have commenced with a site inspection;
- the public good should take precedence over the proposal;
- the applicant has not established a demand for the proposal;
- the gradient of the ramp is too steep;
- the proposal is at the expense of physical and visual access to the harbour;
- vessels will have an unacceptable impact on the marine environment; and
- the Council recommended approval of the original proposal and the Woollahra Local Planning Panel (WLPP) refused the application, so the WLPP should defend the decision to refuse the application and not the Council.

Expert evidence

- 25 The applicant relied on the expert planning evidence of John McFadden and the Council relied on the expert planning evidence of Stuart Harding. The experts prepared a joint report (Ex 2).

Consideration

- 26 I accept the applicant's submission that the use carried out on the land and waterway, including the alterations and additions proposed to the jetty, ramp and pontoon, is for the purpose of a recreational boating club and that the proposal is properly characterised as Recreation or club facilities as defined by the SHREP 2005 (*Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* [2017] NSWLEC 56 at [27]-[29]). I accept the applicant's submission that the proposal is not for a private landing facility as defined by SHREP 2005, because the end being served by all of the facilities and activities of the Prince Edward Yacht Club is the purpose of Recreation or club facilities (*Royal Motor Yacht Club (Broken Bay) Pty Ltd v Northern Beaches Council* [2017] NSWLEC 56 at [27]-[29]).
- 27 I accept the Council's submission that the proposal does not have any effect on the identified heritage significance of Lady Martins Beach because the existing jetty is being retained and the proposed alterations and additions to the ramp and pontoon do not detract from or obscure the special natural elements that contribute to the heritage significance of the beach.
- 28 The recommendations of the Marine Habitat Survey (Ex E) are imposed on the development by condition A.3 and I am satisfied that the proposal (as amended) has taken into account the conservation significance of the ecology of Felix Bay and is appropriately consistent with the Landscape Character Type 8 performance criteria of DCP 2005. The recommendations of the Marine Habitat Survey require a silk curtain to be deployed between the piling works and the seagrass patches, to ensure that the short-term increase in turbidity created by the piling works are localised and protect the adjacent seagrass habitat. Condition I.6 imposes a requirement on the consent that the nearby seagrass not be removed, cut or damaged during the construction and

maintenance of the development, without a permit obtained under s 205 the *Fisheries Management Act 1994*.

29 I accept the agreement of the planning experts, as follows:

- The proposal (as amended) has an acceptable visual impact in the context of surrounding development as a result of the lower profile of the pontoon and the reduced length and changed location of the ramp and pontoon. The proposal is not visually dominant when viewed from surrounding locations. The pontoon sits in a backdrop of a number of boats moored within the bay.
- There is an existing jetty and pontoon. The components of the structure closer to the beach remain unchanged by the proposal and therefore the proposal does not further impede swimmers. The increased projection of the ramp and pontoon causes only a minor inconvenience to those using watercraft and those watercraft are already impeded by boats moored on swing moorings.
- The Royal Prince Alfred Yacht Club is an existing use and has been operating since the 1920s. The relocation of the new pontoon to deeper water does not prioritise a private use over a public asset.
- The total length of the proposal (as amended) is restricted to the minimum required for the function and to achieve improved stability of the pontoon and the proposal meets the objectives of DCP 2005.
- The conditions of consent limit the use of the facility by restricting vessels moored to the structure to users of the Prince Edward Yacht Club and limits the time period those vessels can be moored to a maximum of 3 hours.
- Upgraded disabled access is a requirement under the *Disability Discrimination Act 1992* and it is not a requirement for an application to demonstrate that there is a need for access for people with a disability.

Conclusion

30 On the basis of all of the evidence before me, I am satisfied that the proposal (as amended) is consistent with the zone objectives and that it is lawful and appropriate to grant development consent.

Orders

31 The orders of the Court are:

- (1) The appeal is upheld.
 - (2) Development Application No. 563/2018 for alterations and additions to an existing ramp and pontoon, on land below the mean high water mark and adjacent to 160 Wolseley Road, Point Piper, is approved, subject to the conditions of consent at Annexure A.
 - (3) The exhibits, other than Exhibits 1, 3, A and F, are returned.
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Susan O'Neill

Commissioner of the Court

[Annexure A \(314317, pdf\)](#)

[Architectural Plans \(1055970, pdf\)](#)

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