



Land and Environment Court
New South Wales

Case Name: Crooked River Land Holdings Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1429

Hearing Date(s): 10 May and 10 June 2021

Date of Orders: 28 July 2021

Decision Date: 28 July 2021

Jurisdiction: Class 1

Before: Shiels AC

Decision: The Orders of the Court are:
(1) The applicant is granted leave to rely upon the amended plans and documentation referred to in condition A3 of the conditions at annexure "A".
(2) The applicant is to pay the respondents costs thrown away as a result of the amendments pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 as agreed or assessed.
(3) The appeal is upheld.
(4) The clause 4.6 requests seeking to vary the height of buildings development standard (cl 4.3 of Woollahra Local Environmental Plan 2014) and floor space ratio development standard (cl 4.4 of Woollahra Local Environmental Plan 2014) prepared by Tony Moody and dated 15/6/21 and 22/6/21 respectively are well founded and are upheld.
(5) Development application DA 274/2020 for mixed residential/commercial amalgamation of 3 lots for strata-subdivision, alterations to 5 shops & shop top apartments, construction of new shop top housing development with basement car park & associated landscaping at 432-440 Oxford Street, Paddington is

approved subject to the conditions at annexure “A”.

Catchwords: DEVELOPMENT APPLICATION – construction of shop top housing – conservation area – breach of height and FSR development standards – conciliation conference – agreement reached – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 8.7, 8.15
Environmental Planning and Assessment Regulation 2000
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy No 55—Remediation of Land, cl 7
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development, cl 28,30
Woollahra Local Environmental Plan 2014, cl 4.3, 4.4, 4.6, 5.10, 6.1, 6.2, 6.3

Cases Cited: Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90
Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118
RebelMH Neutral Bay Pty Limited v North Sydney Council [2019] NSWCA 130
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

Texts Cited: Apartment Design Guide

Category: Principal judgment

Parties: Crooked River Land Holdings Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
C McEwen SC (Applicant)
S Puckeridge (Solicitor) (Respondent)

Solicitors:
Pikes and Verekers Lawyers (Applicant)
Lindsay Tayler Lawyers (Respondent)

File Number(s): 2020/331084

Publication Restriction: No

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.274/2020 (the proposal) at 432-440 Oxford Street, Paddington (the site) by Woollahra Municipal Council (the Council).
- 2 The Court arranged a conciliation on 10 May and 10 June 2021, in accordance with the provisions of s 34 of the *Land and Environment Court Act 1979* (LEC Act). An agreement was reached at the adjourned conciliation on 10 June 2021 pursuant to s 34(4) of the LEC Act.
- 3 Leave was granted by the Court on 10 June 2021 for the applicant to amend the application by relying on amended drawings. The parties agreed that the amended drawings were minor in the context of s 8.15(3) of the EPA Act.
- 4 As the presiding acting commissioner, I am satisfied that the decision to grant development consent to the amended application subject to conditions of consent is a decision that the court can make in the proper exercise of its function (this being the test applied by s 34(3) of the LEC Act.) I have formed this state of satisfaction as each of the judicial preconditions identified by the parties are met, for the reasons I have discussed in the following sections.

The site and its context

- 5 The site is known as 432-440 Oxford Street, Paddington and is legally described Lots 1 and 2 in DP 535418 and Lot B in DP 365605. The land to which the DA relates is situated predominantly within Zone B4 Mixed Use pursuant to the provisions of the Woollahra Local Environmental Plan 2014 (WLEP 2014), with the exception of the rear of the Site which is burdened by a right of way, and which is zoned R2 Low Density Residential.

Background and the proposal

- 6 On 6 August 2020, the Development Application (DA 274/2020) (DA) was lodged with the Council, and on 20 November 2020 the Applicant lodged an appeal in the court. The DA seeks development consent for the amalgamation

of three lots, being Lot 1 and Lot 2 in DP 535418 and lot B in DP 365605, alterations and additions to existing two storey commercial terraced buildings at 432-440 Oxford Street, construction of a three storey shop top housing building with basement car parking, and associated landscaping and strata subdivision.

Planning framework

- 7 Development consent is only sought for development in the B4 Zone.
Development for the purposes of shop top housing, which is permissible with consent in the B4 Zone in accordance with the Land Use Table in WLEP 2014.
- 8 The part of the Site which is zoned R2 is to be used for access only and no structure is to be erected. The use of the R2 zoned land will best meet the definition of “road” as provided in WLEP 2014 by reference to the *Roads Act 1993*.
- 9 The R2 zoned land access not only provides access to the subject development site, but also the properties benefited by the right of way, being 442-444 Oxford Street, 11 Elizabeth Place and 22 George Street. That right of way is to be expanded into the part of the Site zoned B4 as required by proposed condition G2.

Contentions

- 10 The Council’s contentions as summarised and resolved by the parties, in the Section 34 Agreement in the agreed Jurisdictional Matters document, prepared by the parties, have been included in the amended documentation prepared by the Applicant and the agreement between the parties and state, inter alia:
 - i. The parties are satisfied that the proposal as amended will be consistent with the design quality principles of SEPP 65 (see DA60-DA72);
 - ii. The parties are satisfied that the proposal as amended will be consistent with the objectives of the Apartment Design Guide (see DA60-DA72);
 - iii. The parties are satisfied that the proposal as amended will be consistent with the aims of the LEP;
 - iv. The parties are satisfied that the proposal as amended will be consistent with the objectives of the relevant zones (see cl 4.6 Requests);
 - v. The parties are satisfied that the non-compliance with the FSR development standard can be justified (see cl 4.6 Requests);

- vi. The parties are satisfied that the amended cl 4.6 request is well founded (see cl 4.6 Requests);
- vii. The parties are satisfied that the heritage impacts of the proposal are acceptable;
- viii. The parties are satisfied that the traffic and parking impacts of the proposal are acceptable (see report from Varga Traffic Planning dated 3/6/21);
- ix. The parties are of the view that the proposal is in the public interest (see cl 4.6 Requests);
- x. Additional information has been provided to address storage, solar access and Council's pipeline;
- xi. Additional traffic information has been provided;
- xii. Additional parking information has been provided;
- xiii. A new Construction Traffic Management Plan has been provided;
- xiv. The parties are of the view that a Road Safety Audit is not required following the provision of the additional traffic information;
- xv. The suggested deferred commencement conditions have been addressed by the provision of amended plans and documentation.

11 I am satisfied that the contentions have been suitably addressed by the parties.

Heritage

- 12 The proposed development is within the Paddington Heritage Conservation Area (HCA) (item C8 Schedule 5 to WLEP 2014). Pursuant to cl 5.10(4) the Court must consider the effect of the proposed development on the heritage significance of the Paddington HCA.
- 13 A Heritage Impact Statement was prepared by Urbis dated 3 April 2020. The report concludes that the proposal complies with the heritage-related planning objectives and controls which are applicable to the site, the Paddington HCA in which the site is located, and to the proposal itself (see p47, Tab 16 to Class 1).
- 14 The Respondent's heritage expert, Mr Brian McDonald, is satisfied that the amendments to the DA causing Block B to have a simple gable roof with a lowered ceiling pitch, improved articulation of the north elevation, and changes to the roof form, cause the proposed development to be sympathetic to and appropriate for the HCA. I am satisfied that heritage has been addressed.

Acid Sulfate Soils

- 15 The Site is mapped as Class 5 pursuant to cl 6.1 of WLEP 2014.

- 16 Clause 6.1(2) of WLEP 2014 does not apply to the DA, as the subject works are not likely to lower the water table below 1.0m AHD on any land within 500m of a Class 1, 2, 3 or 4 land classifications. The subject site is not located within 500m of a Class 1, 2, 3 or 4 land classifications.

Earthworks

- 17 The Court must be satisfied in relation to the relevant considerations pursuant to cl 6.2(3) of WLEP 2014. These considerations are addressed by the Geotechnical Report prepared by JK Geotechnics dated 28 October 2019 (Tab 15 to Class 1), various conditions of consent (e.g. C14 & E12), and were assessed in Council's Assessment Report dated 18 February 2021. I am satisfied that these matters have been addressed.

Flooding

- 18 The Site is mapped as a "flood planning area" on the map referred to in cl 6.3 of WLEP 2014. Pursuant to cl 6.3 the Court must be satisfied in relation to the matters specified in cl 6.3(3).
- 19 These matters are addressed in the Flood Assessment prepared by Catchment Simulation dated March 2020 (see Tab 14 of Class 1), and were assessed in Council's Assessment Report dated 18 February 2021. Various conditions of consent have also been imposed (e.g. C19 & E19).

SEPP 55

- 20 Consideration has been given to whether the Site is contaminated as required by cl 7(1) of State Environmental Planning Policy No 55 – Remediation of Land.
- 21 The proposed works do not include any change to the use of land that would result in concern with respect to contamination as the Site has a long history of residential use. Condition E4 has been imposed in any event.

SEPP BASIX

- 22 An updated BASIX Certificate dated 9 June 2021 has been provided to satisfy the requirement in Schedule 1 of the Environmental Planning and Assessment Regulation 2000.

SEPP 65

- 23 An updated Design Verification Statement has been provided to satisfy cl 28(2) of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65) (see DA 60-DA72).
- 24 Pursuant to cl 30(2), the parties have, and the Court has had regard to the design quality principles in SEPP 65 and the objectives specified in the Apartment Design Guide.

Public submissions

- 25 A number of residents addressed the Court at the s 34 on site hearing. The concerns identified were considered by the parties and the Court and further studies were undertaken the plans were amended.

Expert evidence

- 26 The court heard expert evidence from the traffic engineers. There was a dispute over the number of car parking spaces on-site and the traffic volumes in the locality. The traffic engineers were asked to inspect the site and agree on the car spaces in traffic volumes. While the number of on-site car parking spaces was agreed, traffic counts needed to be undertaken to verify traffic volumes in the locality.

Contravention of the height and FSR development standards

- 27 The applicant provided two amended written requests seeking to justify the contravention to the development standards for height (15 June 2021) and FSR (22 June 2021).
- 28 The Height of Buildings Map referred to in cl 4.3 of WLEP 2014, the maximum permissible height on the site is 9.5m. The proposal has a maximum height of 10.85m to the ridgeline, being an exceedance of 1350mm.
- 29 The Floor Space Ratio Map referred to in cl 4.4 of WLEP 2014, the maximum permissible FSR on the site is 1:1. The proposed FSR is 1.2:1.
- 30 Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority or the Court exercising the functions of a consent authority can exercise the power to grant development consent (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at

[13] “*Initial Action*”). The consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a). As these preconditions are expressed in terms of the opinion or satisfaction of a decision-maker, they are a “jurisdictional fact of a special kind”, because the formation of the opinion of satisfaction enlivens the power of the consent authority to grant development consent (*Initial Action* [14]). The consent authority, or the Court on appeal, must be satisfied that the applicant’s written request has adequately addressed the matters required to be addressed by cl 4.6(3) and that the proposal development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4), as follows:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and

(b) the concurrence of the Secretary has been obtained.

- 31 On appeal, the Court has the power under cl 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(6) of the LEC Act, but should still consider the matters in cl 4.6(5) of WLEP 2014 (*Initial Action* at [29]).

The applicant’s two written requests to contravene the height and FSR development standard

- 32 The first opinion of satisfaction required by cl 4.6(4)(a)(i) is that the applicant’s written requests seeking to justify the contravention of the development standards have adequately addressed the matters required to be demonstrated by cl 4.6(3) (see *Initial Action* at [15]), as follows:

(a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and

(b) that there are sufficient environmental planning grounds to justify contravening the development standard

- 33 The applicant bears the onus to demonstrate that the matters in cl 4.6(3) have been adequately addressed by the written request in order to enable the Court, exercising the functions of the consent authority, to form the requisite opinion of satisfaction (*Initial Action* at [25]). The consent authority has to be satisfied that the applicant's written request has in fact demonstrated those matters required to be demonstrated by cl 4.6(3) and not simply that the applicant has addressed those matters (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [4]).
- 34 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42]-[51] ("*Wehbe*") and repeated in *Initial Action* [17]-[21]:
- (1) the objectives of the development standards are achieved notwithstanding non-compliance with the standards;
 - (2) the underlying objective or purpose of the development standards are not relevant to the development, so that compliance is unnecessary;
 - (3) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
 - (4) the development standard has been abandoned by the council;
 - (5) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).
- 35 The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).
- 36 The applicant's written request justifies the contravention of the height and FSR development standards on the bases that compliance is unreasonable or unnecessary because the proposal satisfies the objectives of the standards and the zone objectives.
- 37 The grounds relied on by the applicant in the written requests under cl 4.6 must be "environmental planning grounds" by their nature, and environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield*

Council [2015] NSWLEC 90 at [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* at [23]). The environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (*Initial Action* at [24]). Therefore the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

- 38 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant's two written requests have adequately addressed the matters required to be demonstrated by cl 4.6(3). The applicant's written requests defend the exceedance of the height and FSR development standards as a justified response to objectives of the standards. I am satisfied that justifying those aspects of the development that contravenes the development standards of height and FSR can be properly described as environmental planning grounds within the meaning identified by his Honour in *Initial Action* at [23].

Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone

- 39 The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest (*Initial Action* at [27]). The consent authority must be directly satisfied about the matters in cl 4.6(4)(a)(ii) (*Initial Action* at [26]).

Consideration

- 40 I am satisfied that all of the contentions identified by Council have been addressed and agreed to by the parties as now having been resolved. I am also satisfied that the two 4.6 written requests to vary the development standards for height and FSR have addressed the matters in cl 4.6(4)(a)(ii) (*Initial Action* at [26]).

Conclusion

- 41 Accordingly, 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.
- 42 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

- 43 The Orders of the Court are:
- (1) The applicant is granted leave to rely upon the amended plans and documentation referred to in condition A3 of the conditions at annexure "A".
 - (2) The applicant is to pay the respondents costs thrown away as a result of the amendments pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* as agreed or assessed.
 - (3) The appeal is upheld.
 - (4) The clause 4.6 requests seeking to vary the height of buildings development standard (cl 4.3 of Woollahra Local Environmental Plan 2014) and floor space ratio development standard (cl 4.4 of Woollahra Local Environmental Plan 2014) prepared by Tony Moody and dated 15/6/21 and 22/6/21 respectively are well founded and are upheld.
 - (5) Development application DA 274/2020 for mixed residential/commercial amalgamation of 3 lots for strata-subdivision, alterations to 5 shops & shop top apartments, construction of new shop top housing development with basement car park & associated landscaping at 432-440 Oxford Street, Paddington is approved subject to the conditions at annexure "A".

Gary A Shiels

Acting Commissioner of the Court

Annexure A (1167166, pdf)

Amendments

28 July 2021 - Amended typographical error in case name.

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