



Land and Environment Court
New South Wales

Case Name: 117 O'Sullivan Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1426

Hearing Date(s): Conciliation conference on 14 and 28 May and 15 June 2021, final agreement filed 30 June 2021

Date of Orders: 27 July 2021

Decision Date: 27 July 2021

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The orders of the Court are:

- (1) Leave is granted to the Applicant to rely upon the amended plans and documents referenced in Condition A.3 at Annexure 'A'.
- (2) The Applicant's written request under clause 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP), prepared by GSA Planning, seeking a variation of the development standard for height of buildings set out in clause 40(4)(a) of the State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (Seniors SEPP) is upheld.
- (3) The Applicant's written request under clause 4.6 of the WLEP, prepared by GSA Planning, seeking a variation of the development standard for building storeys set out in clause 40(4)(b) of the Seniors SEPP is upheld.
- (4) Pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979, the Applicant is to pay the costs of the Respondent thrown away as a result of amending the development application as agreed or assessed.
- (5) The appeal is upheld.
- (6) Consent is granted to Development Application DA

416/2020, for the demolition of the existing dwelling house at 117 O'Sullivan Road, Bellevue Hill and construction of a seniors housing development comprising of 10 self-contained dwellings over part two, part three and part four storeys (inclusive of roof level) and basement and lower ground parking levels for 21 on-site car spaces, subject to the conditions set out at Annexure 'A'.

Catchwords: DEVELOPMENT APPLICATION – seniors housing development – clause 4.6 written request – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7, 8.15
Land and Environment Court Act 1979, s 34
Woollahra Local Environmental Plan 2014, cl 4.3, 4.6, 5.10, 6.1, 6.2, 6.3, Sch 5
State Environmental Planning Policy No 55—Remediation of Land, cl 7
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development
State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004, cl 4, 17, 25, 26, 28, 29, 30, 32, 40
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

Texts Cited: Land and Environment Court of New South Wales, COVID-19 Pandemic Arrangements Policy (April 2021)
Woollahra Development Control Plan 2015
New South Wales Department of Planning and Environment, Apartment Design Guide (July 2015)

Category: Principal judgment

Parties: 117 O'Sullivan Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Boskovitz (Solicitor) (Applicant)
J Hewitt (Solicitor) (Respondent)

Solicitors:

Boskovitz Lawyers (Applicant)
HWL Ebsworth Lawyers (Respondent)

File Number(s): 2021/5114

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application DA416/2020 (DA) by Woollahra Municipal Council (the Respondent). The DA sought consent for the demolition of the existing dwelling house at 117 O'Sullivan Road, Bellevue Hill and construction of a seniors housing development comprising of 10 self-contained dwellings over part two, part three and part four storeys (inclusive of roof level) and basement and lower ground parking levels for 21 on-site car spaces at 117 O'Sullivan Road, Bellevue Hill (the site).
- 2 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 14 and 28 May and 15 June 2021. I presided over the conciliation conference.
- 3 Consistent with the Court's *COVID-19 Pandemic Arrangements Policy*, published on 6 April 2021, the matter commenced with a site view, limited in the number of participants, and thereafter was conducted by Microsoft Teams.
- 4 Prior to the conciliation conference, the Applicant had prepared a set of amended plans, on a without prejudice basis, in an attempt to resolve the contentions raised by the Respondent. These amended plans formed the subject of the conciliation conference.
- 5 During the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. The agreement involves the Court upholding the appeal and granting development consent to a final amended proposal, subject to conditions.
- 6 Whilst the amended proposal remains largely consistent with the original development application, the final amendments cumulatively work to resolve the contentions raised by the Respondent, which related primarily to building

height, bulk and scale, view loss, desired future character, and visual and acoustic privacy, amongst other contentions.

- 7 In summary, the final amended proposal reduces the proposed building height to mitigate against potential view loss impacts, and further sets back upper levels of the proposal to improve the built form relationship to the street, enhancing its relationship with the immediate context, and improving residential amenity for the benefit of both the subject site and its immediate neighbours.
- 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 DA.
- 9 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 10 In that regard the parties agree, and I am satisfied, the Woollahra Local Environmental Plan 2014 (WLEP) is the relevant environmental planning instrument. The site is zoned R2 Low Density Residential, and the final amended proposal, characterised as seniors housing development, is made permissible with consent by virtue of cl 17 of State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004 (SEPP Seniors).
- 11 The parties agree, and I am satisfied, the relevant development standards that apply to the site are set out within the WLEP, or within the SEPP Seniors to the extent that it applies.
- 12 The relevant height of building development standard set out in the WLEP (of 9 metres) is set aside by cl 40(4)(a) of the SEPP Seniors, which determines a maximum height of building of 8 metres. The final amended proposal relies on a written cl 4.6 WLEP request to vary this development standard, which is considered from [30] of this judgment.
- 13 There is no floor space ratio development standard set by the WLEP within the R2 zone.

- 14 I am satisfied the subject site is not a heritage item, nor located within any heritage conservation area identified within cl 5.10 and Schedule 5 of the WLEP.
- 15 Clause 6.1 of the WLEP - Acid sulfate soils - sets out a series of considerations regarding development with a potential to disturb acid sulfate soils. The final amended proposal is situated on land identified as Class 5 and (in small part) Class 4 on the Acid Sulfate Soils Map for the purposes of cl 6.1 of the WLEP. However, a Preliminary Site Investigation (PSI) has been prepared by the Applicant and an assessment of acid sulfate soils undertaken. The parties agree, and I am satisfied, that the PSI concludes acid sulfate soils are not expected to be encountered or disturbed during construction.
- 16 Clause 6.2 of the WLEP - Earthworks - sets out matters to be considered prior to any grant of consent. The Applicant has prepared a geotechnical report, which the parties agree, and I am satisfied, has appropriately considered the matters set out at cl 6.2(3)(a) to (h). Appropriate conditions of consent have been imposed to mitigate against excavation risks.
- 17 Clause 6.3 of the WLEP - Flood planning - sets out matters to be considered prior to any grant of consent. The parties agree, and I am satisfied the final amended proposal is not situated on land identified on the Flood Planning Map for the purposes of cl 6.3(2).
- 18 I am satisfied State Environmental Planning Policy 55 – Remediation of Land (SEPP 55) is an additional relevant environmental planning instrument. The parties agree the site and its immediate vicinity have historically been used for residential purposes not typically associated with activities that might result in contamination of the land. As such, I am satisfied cl 7 of SEPP 55 has been appropriately addressed.
- 19 The parties agree, and I am satisfied, a BASIX Certificate has been submitted in support of the amended proposal, fulfilling the necessary requirements of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. Conditions of consent have been imposed to ensure compliance with the BASIX Certificate.

- 20 I am satisfied State Environmental Planning Policy 65–Design Quality of Residential Apartment Development (SEPP 65) is an additional relevant environmental planning instrument. The final amended proposal is accompanied by a Design Verification Statement prepared by the Applicant’s architect, Roselli Architects, consistent with SEPP 65. I am satisfied the Design Verification Statement outlines how the final amended proposal meets the nine design quality principles set out in SEPP 65. I am also satisfied the final amended proposal has appropriately responded to the various targets set out in the NSW Apartment Design Guide and thereby achieves an acceptable level of design quality.
- 21 I am satisfied SEPP Seniors is an additional relevant environmental planning instrument. There are several related jurisdictional prerequisites that must be considered prior to any grant of consent. These are addressed in the successive paragraphs.
- 22 I am satisfied the final amended proposal is situated on land identified primarily for urban purposes and thereby satisfies cl 4(1) of the SEPP Seniors.
- 23 Similarly, the parties agree, and I am satisfied, that future residents of the final amended proposal will have access to facilities set out in cl 26(1) of the SEPP Seniors. A public transport service will be available to future residents meeting the requirements of cl 26(2)(b).
- 24 The parties agree, and I am satisfied, that the final amended proposal meets the requirements of cl 28 of the SEPP Seniors since it will be connected to a reticulated water system and have adequate facilities for the removal or disposal of sewage.
- 25 Clause 29 of the SEPP Seniors requires the consent authority to consider criteria referred to in cl 25(5)(b)(i), (iii) and (v), which relate to the compatibility of the proposal with the natural and built environment, and associated services and infrastructure. The parties agree, and I am satisfied, the final amended proposal is compatible with its immediate context.
- 26 I am satisfied a site analysis, meeting the requirements of cl 30 of the SEPP Seniors, has been prepared by the Applicant.

- 27 The parties agree, and I am satisfied, that the final amended proposal is consistent with cl 32 of the SEPP Seniors since it has been designed with regard to the principles set out in Part 3, Division 2 of SEPP Seniors.
- 28 Clause 40 of the SEPP Seniors sets out development standards that apply to the final amended proposal. The development standard set out at cl 40(2) for minimum site area has been met since the site area is greater than 1,000 square metres. Similarly, the development standard set out at cl 40(3) for minimum site width has been met since the site frontage to O'Sullivan Road is greater than 20 metres.
- 29 Since the site is located within the R2 low density residential zone, where residential flat buildings are prohibited, cl 40(4) of the SEPP Seniors applies and serves to establish development standards for height of building and for number of storeys.
- 30 The final amended proposal exceeds the SEPP Seniors development standard for height of building of 8 metres and hence a written request has been prepared by the Applicant seeking to vary this development standard.
- 31 Similarly, the final amended proposal exceeds the SEPP Seniors development standard for building height adjacent to a site boundary of not more than 2 storeys and hence a written request has been prepared by the Applicant seeking to vary this development standard.
- 32 In both cases, cl 4.6(3) of the WLEP requires consideration of a written request from the Applicant demonstrating compliance with a development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.
- 33 Clause 4.6(4) of the WLEP requires the consent authority to be satisfied the Applicant's written request has adequately addressed the matters required by cl 4.6(3), and the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.

- 34 Additionally, cl 4.6(4)(b) of the WLEP requires the concurrence of the Planning Secretary be obtained, while cl 4.6(5) requires the Planning Secretary to consider whether, in granting this concurrence, the proposed contravention of the development standard raises any matters of significance for State environmental planning, the public benefits of maintaining the standard, and any other matters required to be considered by the Planning Secretary.
- 35 On the question of the height of building development standard, the parties agree the final amended proposal exceeds the development standard of 8 metres as established by SEPP Seniors.
- 36 Of some relevance is that the WLEP establishes a maximum height of building for the site of 9.5 metres, but importantly this would apply in the context of a permissible use in the R2 Low Density Residential zone.
- 37 The final amended proposal has a maximum height of approximately 9.13 metres when measured from the existing ground level adjacent to the point of maximum exceedance. This represents an exceedance of the development standard of approximately 14%.
- 38 The parties and their planning experts are agreed that the Applicant's cl 4.6 written request is well founded because the final amended proposal reduces the ridge height by approximately 400 millimetres, and thereby ameliorates issues of view loss raised in public submissions.
- 39 On the question of the number of storeys development standard established by SEPP Seniors, the parties and their town planning experts agree that the final amended proposal will exceed 2 storeys along each of the two side boundaries. The site is characterised by steep topography rising from the street frontage to the rear. The final amended proposal includes portions which exceed 2 storeys (but not 3 storeys) when measured from various extrapolated points used to determine the existing ground level adjacent to the points of maximum exceedance.
- 40 I am satisfied the two separate cl 4.6 written requests, prepared by GSA Planning and dated May and June 2021, demonstrate that objectives set out in cl 4.3(1) of the WLEP have been met despite the numeric non-compliance.

Whilst these objectives relate to development anticipated in the R2 zone, I accept they apply equally in this instance to the final amended seniors housing proposal made permissible by the SEPP Seniors, and noting no equivalent objectives for the building height development standard are established by the SEPP itself.

- 41 The zone objectives set out in cl 4.3(1) of the WLEP include establishing building heights consistent with the desired future character of the neighbourhood, minimising loss of solar access to existing buildings and open space, minimising impacts of development upon nearby properties from disruption of views, loss of privacy or overshadowing.
- 42 I am satisfied the final amended proposal has been reduced in scale sufficient to mitigate against public and private view loss within the immediate vicinity, and does not create unreasonable additional adverse amenity impacts on adjoining properties as a result of the proposed bulk and scale. For these reasons, I accept the objectives of the development standards are met despite the numeric contravention.
- 43 Similarly, and consistent with cl 4.6(4) of the WLEP, I am satisfied the two separate cl 4.6 written requests adequately address the objectives of the R2 – Low Density Residential zone, providing for the housing needs of the community within a low density residential environment. The final amended proposal provides for seniors housing in a form that is compatible with the prevailing character and amenity evident within the surrounding neighbourhood.
- 44 The site is located within the Sydney Harbour Catchment as defined by Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP). However, the Site is not located within the Foreshores and Waterways Area and is not identified as a strategic foreshore site or a heritage item listed under the SREP. The parties agree, and I am satisfied, the final amended proposal is consistent with the objectives of the SREP.
- 45 I am satisfied that the original DA was made with the consent in writing of the owner of the site, which was provided with the Class 1 Application to this appeal.

- 46 I am satisfied that the original DA was publicly notified between 13 and 28 January 2021. A total of 21 submissions were received by the Respondent, and the Court heard oral submissions from three concerned neighbours during the site viewing on 14 May 2021.
- 47 The Respondent re-notified the final amended proposal to the three concerned neighbours who attended the site viewing. A single joint submission in response to this re-notification was received. The Respondent is satisfied no new issues were raised in this joint submission and that the concerns raised are satisfactorily resolved by the final amended proposal.
- 48 In accordance with s 4.15 of the EPA Act, I am satisfied that in considering and responding to submissions, the final amended proposal is in the public interest. The final amended proposal and agreed conditions of consent cumulatively serve to address and appropriately resolve a range of contentions.
- 49 Finally, in accordance with s 4.16(1) of the EPA Act, the parties agree, and I am satisfied, the final amended proposal may be granted consent.
- 50 Having considered each of the preceding jurisdictional requirements, and having formed the necessary view required by s 34(3) of the LEC Act, I find it is appropriate to make the orders agreed to by the parties and now dispose of the matter.

Orders

- 51 The orders of the Court are:
- (1) Leave is granted to the Applicant to rely upon the amended plans and documents referenced in Condition A.3 at Annexure 'A'.
 - (2) The Applicant's written request under clause 4.6 of the *Woollahra Local Environmental Plan 2014* (WLEP), prepared by GSA Planning, seeking a variation of the development standard for height of buildings set out in clause 40(4)(a) of the *State Environmental Planning Policy (Housing for Seniors or People with a Disability) 2004* (Seniors SEPP) is upheld.
 - (3) The Applicant's written request under clause 4.6 of the WLEP, prepared by GSA Planning, seeking a variation of the development standard for building storeys set out in clause 40(4)(b) of the Seniors SEPP is upheld.
 - (4) Pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is to pay the costs of the

Respondent thrown away as a result of amending the development application as agreed or assessed.

- (5) The appeal is upheld.
- (6) Consent is granted to Development Application DA 416/2020, for the demolition of the existing dwelling house at 117 O'Sullivan Road, Bellevue Hill and construction of a seniors housing development comprising of 10 self-contained dwellings over part two, part three and part four storeys (inclusive of roof level) and basement and lower ground parking levels for 21 on-site car spaces, subject to the conditions set out at Annexure 'A'.

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M Pullinger

Acting Commissioner of the Court

Annexure A (839412, pdf)

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