



Land and Environment Court  
New South Wales

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Case Name: STM123 No. 16 Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1466

Hearing Date(s): Conciliation conference held on 21 June 2021

Date of Orders: 13 August 2021

Decision Date: 13 August 2021

Jurisdiction: Class 1

Before: Dickson C

Decision: Orders at [9]

Catchwords: DEVELOPMENT APPLICATION – alterations and additions to an approved residential flat building – amended plans – agreement between the parties – orders made

Legislation Cited: Architects Act 2003  
Environmental Planning and Assessment Act 1979  
Environmental Planning and Assessment Regulation 2000  
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004  
State Environmental Planning Policy No 55—Remediation of Land  
State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development  
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005  
Woollahra Local Environmental Plan 2014

Texts Cited: Apartment Design Guide  
Land and Environment Court, COVID-19 Pandemic Arrangements Policy, (April 2021)

## Woollahra Community Participation Plan

Category: Principal judgment

Parties: STM123 No. 16 Pty Ltd (Applicant)  
Woollahra Municipal Council (Respondent)

Representation: Counsel:  
V Conomos (Solicitor) (Applicant)  
A Kleiss (Solicitor) (Respondent)

Solicitors:  
Conomos Legal (Applicant)  
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2021/38192

Publication Restriction: No

### JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act) by STM123 No. 16 Pty Ltd (the Applicant) against the Respondent's refusal of development application DA536/2020. The development application seeks consent for alterations and additions a residential flat building approved under DA2018/484 and DA2017/369 (the existing consents) to provide an additional residential level, a new mezzanine level in the basement and internal basement reconfiguration. The development is proposed at 23 Wolseley Road (AKA 2 Wentworth Street) Point Piper (Lot 1 DP 773310).
- 2 In exercising the functions of the consent authority on the appeal, the Court has the power to determine the development application pursuant to s 4.16 of the EPA Act.
- 3 The appeal was listed for conciliation on 21 June 2021, in accordance with the provisions of s 34 of the Land and Environment Court Act 1979 (LEC Act). Consistent with the Court's COVID-19 Pandemic Arrangements Policy, published on 6 April 2021, the matter was conducted by Microsoft Teams. As part of the conciliation conference the Court heard evidence from members of the public in relation to the proposed development. In determining the

development application, I have given consideration to these oral submissions, along with the written submissions received during the assessment of the application.

- 4 Following the conciliation conference, an agreement, under s 34(3) of the LEC Act, was reached between the parties as to the terms of a decision in the proceedings that was acceptable to the parties, namely leave to be granted to amended plans and the grant of consent to the development application subject to conditions. A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 26 July 2021.
- 5 As required by cl 55 of the Environmental Planning and Assessment Regulation 2000 (the Regulation) the Applicant has lodged the amended plans arising from the conciliation process on the NSW planning portal. Further, the Respondent has given their agreement to the amendment of the development application. Further, the Court has allowed the applicant to file an amended application for development consent pursuant to s 8.15(3) of the EPA Act. My assessment and determination are of the development application as amended.
- 6 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I have formed this state of satisfaction for the following reasons:
  - (1) In accordance with the requirements of cl 49(1) of the Regulation, consent has been provided by the owners of the land the subject of the Development Application;
  - (2) A BASIX Certificate has been provided to satisfy the requirements of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004;
  - (3) As the application relates to residential apartment development, cl 50(1A) of the Regulation requires that the application must be accompanied by a statement by a qualified designer, defined at cl 3 as a person registered as an architect in accordance with the Architects Act 2003. The statement must conform to the provisions of cl 50(1AB), which include attestations in relation to sub-cl 28(2)(b) and (c) of State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65). I rely on the statement completed by the architect Emmanuil Chatzinikolaou to this effect;

- (4) Clause 30(2) of SEPP 65 requires the consent authority, or the Court on appeal, to be satisfied that the proposed development demonstrates that adequate regard has been given to the design quality principles, and the objectives specified in the Apartment Design Guide (ADG) for the relevant design criteria. On the basis of the architect's statement demonstrating how the objectives of Parts 3 and 4 of the ADG have been achieved, I am satisfied that adequate regard has been given to the ADG;
- (5) Pursuant to cl 7(1) of State Environmental Planning Policy No 55—Remediation of Land (SEPP 55), the consent authority must not grant consent to development unless it has considered whether the subject land is contaminated and, subject to its status of contamination, is satisfied that the land is or will be made to be suitable for the development. The Respondent, as consent authority to the DA, has considered whether the Site is contaminated and is satisfied that the Site is suitable for the Proposal, on account of it involving works to a residential property with a long history of residential use. The Court, as consent authority can be similarly satisfied. Further, I note that no change in use is proposed in this application;
- (6) The land is within the Sydney Harbour Catchment as defined by Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 but is outside the demarcated foreshore or waterways areas. There are no specific matters required to be considered;
- (7) The Woollahra Local Environmental Plan 2014 (LEP 2014) applies to the site. Pursuant to LEP 2014 the site is zoned R3 Medium Density Development. Development for the purposes of a residential flat building is permitted with consent in the zone. In determining the development application, I have had regard to the objectives of the zone;
- (8) The proposed development seeks a variation to the applicable height standard of 13.5m: cl 4.3 of LEP 2014. The approved development, under the existing consents, has a maximum building height of 19.39m. The development application seeks to increase this maximum building height by a further 3.83m to facilitate an additional residential level on the site. The development as amended will have a maximum height of RL 61.130 (lift overrun). The Applicant has filed a written request pursuant to cl 4.6 of LEP 2014 prepared by ASquare Planning dated 9 July 2021. This request accords with the amended plans and seeks a variation to the height development standard. I reviewed the request and in accordance with cl 4.6 of LEP 2014, I am satisfied that:
  - (a) The written request demonstrates that compliance with the height development standard is unreasonable and unnecessary as the objectives of the height development standard are met notwithstanding the noncompliance (subcl 4.6(3)(a) of LEP 2014);
  - (b) The written request adequately establishes sufficient environmental planning grounds that justify the breach of the height standard (subcl 4.6(3)(b) of LEP 2014);

- (c) On the preceding basis I am satisfied that the requirements of subcl 4.6(4)(a)(i) of LEP 2014 are met;
  - (d) For the reasons outlined in the written request I am satisfied that the development is in the public interest as it is consistent with the objectives of the R3 Medium Density Residential zone and the height development standard. On this basis I am satisfied that the requirements of subcl 4.6(4)(a)(ii) of LEP 2014 are met;
  - (e) The states of satisfaction required by cl 4.6 of the LEP 2014 have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the height control.
- (9) The proposed development also seeks a variation to the floor space ratio (FSR) control. The parties agree that the FSR applicable to the site is 1.3:1, resulting in a permissible gross floor area (GFA) of 865.67m<sup>2</sup>: cl 4.4 of LEP 2014. The approved development, under the existing consents, has a GFA of 1,223m<sup>2</sup>. The proposed development seeks consent for an FSR of 2.08:1 or 1,386.6m<sup>2</sup> of GFA. The Applicant has filed a written request pursuant to cl 4.6 of LEP 2014 prepared by ASquare Planning dated 9 July 2021. This request accords with the amended plans and seeks a variation to the FSR development standard. I reviewed the request and in accordance with cl 4.6 of LEP 2014, I am satisfied that:
- (a) The written request demonstrates that compliance with the FSR development standard is unreasonable and unnecessary as the objectives of the FSR development standard are met notwithstanding the noncompliance (subcl 4.6(3)(a) of LEP 2014);
  - (b) The written request adequately establishes sufficient environmental planning grounds that justify the breach of the FSR standard (subcl 4.6(3)(b) of LEP 2014);
  - (c) On the preceding basis I am satisfied that the requirements of subcl 4.6(4)(a)(i) of LEP 2014 are met;
  - (d) For the reasons outlined in the written request I am satisfied that the development is in the public interest as it is consistent with the objectives of the R3 Medium Density Residential zone and the FSR development standard. On this basis I am satisfied that the requirements of subcl 4.6(4)(a)(ii) of LEP 2014 are met;
  - (e) The states of satisfaction required by cl 4.6 of the LEP 2014 have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the FSR standard.
- (10) Finally, the proposed development also seeks a variation to the Minimum Lot size standard at cl 4.1A of LEP 2014. The parties agree that the minimum lot size applicable to the site is 700m<sup>2</sup>. The subject site has an area of 665.9m<sup>2</sup>, which is 34.1m<sup>2</sup> less than the minimum lot

size required. The Applicant has filed a written request pursuant to cl 4.6 of LEP 2014 prepared by ASquare Planning dated 24 May 2021. This request accords with the amended plans and seeks a variation to the Minimum Lot size standard. I reviewed the request and in accordance with cl 4.6 of LEP 2014, I am satisfied that:

- (a) The written request demonstrates that compliance with the Minimum Lot size development standard is unreasonable and unnecessary as the objectives of the Minimum Lot size development standard are met notwithstanding the noncompliance (sub-cl 4.6(3)(a) of LEP 2014);
  - (b) The written request adequately establishes sufficient environmental planning grounds that justify the breach of the Minimum Lot size standard (subcl 4.6(3)(b) of LEP 2014);
  - (c) On the preceding basis I am satisfied that the requirements of subcl 4.6(4)(a)(i) of LEP 2014 are met;
  - (d) For the reasons outlined in the written request I am satisfied that the development is in the public interest as it is consistent with the objectives of the R3 Medium Density Residential zone and the Minimum Lot size standard. On this basis I am satisfied that the requirements of subcl 4.6(4)(a)(ii) of LEP 2014 are met;
  - (e) The states of satisfaction required by cl 4.6 of the LEP 2014 have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the Minimum Lot size standard.
- (11) Pursuant to subcl 4.6(5) I am satisfied the proposal is not considered to raise any matter of significance for state or regional development;
  - (12) By reference to the LEP 2014 maps, cl 6.3: Flood Planning does not apply to the subject site;
  - (13) In relation to the provisions of cl 6.1 of LEP 2014 concerning acid sulfate soils I am satisfied that: firstly, the Subject Site is identified as being located within land mapped as Class 5 acid sulfate soils land; secondly the works are not likely to lower the water table below 1.0m AHD on any land within 500m of a Class 1, 2 and 3 classification as the basement is proposed at RL 31.300. I am satisfied that an acid sulfate soils report is not required;
  - (14) As the extent of excavation was approved under the existing consents I am satisfied that cl 6.2: Earthworks in LEP 2014 does not apply;
  - (15) The application was notified in accordance with the Woollahra Community Participation Plan and I am satisfied that the submissions have been considered. I accept the agreement of the parties that the amended plans do not require readvertising as the amendments do not result in new or greater impacts.

7 As the parties' decision, to uphold the appeal and grant conditional consent to the development application, 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.

8 In making the orders to give effect to the agreement between the parties, the parties have not raised, and I am not aware of any jurisdictional impediment to the making of these orders. Further, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

9 The Court orders that:

(1) The Court notes that the Applicant has amended their development application as relies on the following amended plans and materials:

Reference	Description	Author/Drawn	Date(s)
<b>Dwg. No.</b>	<b>Architectural Plans</b>		
A.00.01 – D	Site Plan		
A.01.01 – D	Basement		
A.01.02 – D	Garage Level		
A.01.03 – D	Plan		
A.01.04 – D	Basement		
A.01.05 – D	Mezzanine		
A.01.06 – F	Plan	All prepared by	All dated
A.01.07 – F	Lower Ground	BKH Architects	09.07.2021
A.01.08 – C	Floor Plan		
A.02.01 – D	Ground Floor		
A.02.02 – D	Plan		
A.02.03 – D	Level 1 / 2 / 3		
A.02.04 – D	Plan		
	Level 4 Plan		
	(Noted as 'Lvl		

A.04.01 – D	6')		
A.04.02 – D	Level 5 Plan Roof Plan Elevation 1: South Elevation 2: North Elevation 3: East Elevation 4: West on Wolseley Section AA Section BB		
3416 - DA	Finishes Schedule	BKH Architects	09.07.2021
828307M_10	BASIX Certificate	NSW Department of Planning, Industry and Environment	11 July 2021
Cert. No. 0005522930	Nationwide House Energy Rating Scheme Certificate	NSW Department of Planning, Industry and Environment	11 July 2021
Ref: 19583	Queuing	Varga Traffic	12 June



	Analysis - Letter	Planning	2021
Ref: 19583	Response to Contention 5 & 6(E) - Letter	Varga Traffic Planning	24 May 2021
	Clause 4.6 request to vary clause 4.1A of the <i>Woollahra Local Environmental Plan 2014</i>	aSquare Planning	24 May 2021
	Clause 4.6 request to vary clause 4.3 of the <i>Woollahra Local Environmental Plan 2014</i>	aSquare Planning	9 July 2021
	Clause 4.6 request to vary clause 4.4 of the <i>Woollahra Local Environmental Plan 2014</i>	aSquare Planning	9 July 2021
	SEPP 65 Design Principles	Burley Katon Haliday	14 July 2021

	Report		
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- (2) Pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is to pay the Respondent's costs thrown away as a result of the amendments in the agreed amount of \$7,500.00 within 28 days of the date of these orders.
- (3) The appeal is upheld.
- (4) Development consent is granted to development application DA 536/2020 for alterations and additions to the residential flat building approved under DA/2017/369 and DA/2018/484 at 23 Wolseley Road, Point Piper, being Lot 1 in deposited plan 773310, subject to the conditions set out in Annexure A.

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**D M Dickson**

**Commissioner of the Court**

[Annexure A \(269352, pdf\)](#)

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