



Land and Environment Court
New South Wales

Case Name: Crowe v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1569

Hearing Date(s): Conciliation conference on 20 September 2021

Date of Orders: 28 September 2021

Decision Date: 28 September 2021

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development Consent is granted to development application DA 123/2021 for alterations and additions to the existing dwelling house at 33 Edward Street Woollahra, subject to the conditions annexed hereto and marked "Annexure A".

Catchwords: DEVELOPMENT APPEAL – residential – alterations and additions – cl 4.6 written request to justify contravention of height of buildings development standard – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, s 1.3, 4.16, 8.7
Environmental Planning and Assessment Regulation 2000
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 55 – Remediation of Land, cl 7
Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

Woollahra Local Environmental Plan 2014, cl 4.3, 4.6,
5.10, 6.1, 6.2

Texts Cited: Woollahra Development Control Plan 2015

Category: Principal judgment

Parties: Stephen Desmond Crowe (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
P Holt (Solicitor) (Applicant)
D Le Breton (Solicitor) (Respondent)

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

File Number(s): 2021/153690

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is a class 1 Residential 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 - residential DA 123/2021 seeking development consent for alterations and additions to a residential dwelling (the Proposed Development) at 33 Edward Street Woollahra legally described as Lot 33 DP 1053956 (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 has been held on 20 September 2021. I have presided over the conciliation conference.
- 3 At 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 upholding the appeal and granting development consent to the development application subject to conditions. The Proposed Development has been amended following a Notice of Motion in August 2021 (the Amended Application) and the Amended Application substantially resolved

the contentions raised by the Respondent with the balance of the contentions being resolved by the imposition of agreed conditions of consent.

- 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. 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 cl 4.6 of the Woollahra Local Environmental Plan 2014 (WLEP) to justify the contravention of a development standard, cl 5.10 of the WLEP regarding heritage conservation, cl 6.1 as to acid sulfate soils and cl 6.2 of the WLEP regarding excavation.
- 5 The parties have identified the jurisdictional pre-requisites, key issues of relevance and the reasons for entering into an agreement in these proceedings, a copy of which is entitled "Parties Joint Note on Jurisdictional Issues" dated 16 September 2021. The parties are in agreement that the jurisdictional pre-requisites to the Court exercising its functions under section 34(3)(a) of the LEC Act have been satisfied. The parties explained how the jurisdictional prerequisites have been satisfied as follows:
 - (1) The development application has been made by the Applicant as the owner of the land in accordance with cl 49(1) of the Environmental Planning and Assessment Regulation 2000.
 - (2) The original application was notified, and the two submissions subsequently received have been considered.
 - (3) The Amended Application has not been notified, consistent with the Woollahra Community Participation Plan, as the Respondent has formed the opinion that the Amended Application will have no greater impacts than the previously advertised application.
 - (4) The Respondent has considered the effect of the works proposed by the Proposed Development on the heritage significance of the Woollahra Heritage Conservation Area and is satisfied that the development is satisfactory with respect to cl 5.10 of the WLEP. I have considered the Amended Application and the Statement of Heritage Impact dated March 2021 filed with the Class 1 Application filed 31 May 2021. I note that the introduction of timer batons to the exterior of the lift well resolves the heritage and character concerns raised by the Respondent

and I am satisfied that the effect of the Proposed Development on the Woollahra Heritage Conservation Area has been adequately and appropriately considered as required by cl 5.10 of the WLEP.

- (5) The Site is located within a Class 5 area on the Acid Sulfate Soils Map however as the proposed works are not likely to lower the water table below 1m AHD a preliminary assessment is not required pursuant to cl 6.1 of the WLEP.
- (6) The parties agree that the Proposed Development does not proposed any excavation of the Site and that cl 6.2 of the WLEP has been satisfactorily addressed.
- (7) The Applicant has submitted a written request under cl 4.6 of the WLEP to vary the development standard at cl 4.3 of the WLEP relating to height of buildings. The parties agree that the request is made in accordance with cl 4.6 of the WLEP, and that the Commissioner can be satisfied that:
 - (a) The written request demonstrates that compliance with the development standard is unreasonable or unnecessary in the circumstances of the development (cl 4.6(3)(a) of the WLEP).
 - (b) The written request adequately establishes that there are sufficient environmental planning grounds to justify contravening the development standard (cl 4.6(3)(b) of the WLEP). This is established through demonstrating that the development is able to satisfy the other applicable controls (in particular, the Woollahra Development Control Plan 2015), notwithstanding the variation, and is consistent with the zone and development standard objectives, in alignment with s 1.3 of the EPA Act.
 - (c) On the basis of the above, the Proposed Development is in the public interest because it is consistent with the zone and development standard objectives (cl 4.6(4)(a)(ii) of the WLEP).
 - (d) The states of satisfaction required by cl 4.6 of the WLEP have been reached and there is therefore power to grant development consent to the Proposed Development notwithstanding the breach of the development standard.
- (8) Having regard to the State Environmental Planning Policy No 55 – Remediation of Land and in particular cl 7(1), the Respondent has considered whether the land is contaminated and is satisfied that the land is unlikely to be contaminated and does not require any further consideration under cl 7.
- (9) The parties agree that the Court can be satisfied that the BASIX certificate dated A432063 is satisfactory pursuant to State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- (10) The parties agree that the Site falls with land marked on the maps associated with the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 but that it outside the Foreshores and

Waterways Area and therefore there are no specific matters for consideration.

- 6 I have read the cl 4.6 written request prepared by SJB Planning dated 19 March 2021 and filed with the Class 1 Application on 31 May 2021. The Court is satisfied that the applicant's written request seeking to justify the contravention of the development standard in the WLEP has adequately addressed the matters required to be demonstrated by cl 4.6(3) of the WLEP and that the proposed development would 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.
- 7 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 and I adopt the reasons provided by the parties and set out above.
- 8 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.
- 9 The Court notes:
 - (1) That Woollahra Municipal Council as the relevant consent authority has agreed, under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the applicant amending development application DA 123/2021.
 - (2) That Woollahra Municipal Council has uploaded the Amended Application on the NSW planning portal on 20 September 2021.
 - (3) That the applicant has subsequently filed the Amended Application with the Court on 20 September 2021.
- 10 The Court orders that:
 - (1) The appeal is upheld.
 - (2) Development Consent is granted to development application DA 123/2021 for alterations and additions to the existing dwelling house at 33 Edward Street Woollahra, subject to the conditions annexed hereto and marked "Annexure A".

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E Espinosa

Commissioner of the Court

Annexure A (567698, pdf)

Plan (898003, pdf)

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