



Land and Environment Court
New South Wales

Case Name:	Thorpe v Woollahra Municipal Council
Medium Neutral Citation:	[2021] NSWLEC 1577
Hearing Date(s):	Conciliation conference on 15 and 16 September 2021
Date of Orders:	5 October 2021
Decision Date:	5 October 2021
Jurisdiction:	Class 1
Before:	Chilcott C
Decision:	Orders – see [17]
Catchwords:	DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.16, 8.7(1) and Sch 1, cl 7 Environmental Planning and Assessment Regulation 2000, cl 55(1), 77 and Sch 1 Woollahra Local Environmental Plan 2014, cl 2.3, 4.3, 4.4, 5.21, 6.1, 6.2 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
Texts Cited:	Woollahra Development Control Plan 2015 Land and Environment Court of New South Wales, COVID-19 Pandemic Arrangements Policy (April 2021)
Category:	Principal judgment
Parties:	Stacey Thorpe (Applicant) Woollahra Municipal Council (Respondent)

Representation:

Counsel:

D Briggs (Solicitor)(Applicant)

S Hill (Solicitor)(Respondent)

Solicitors:

DG Briggs and Associates (Applicant)

HWL Ebsworth Lawyers (Respondent)

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No

JUDGMENT

- 1 **COMMISSIONER:** Stacey Thorpe (the Applicant) has appealed the refusal by Woollahra Council (the Respondent) of her development application (DA 489/2020), made with owner's consent, seeking consent for alterations and additions to an existing dwelling (the Proposed Development) at 65 Beresford Road, Bellevue Hill (the Subject Site).
- 2 The Proposed Development includes:
 - (1) demolition works to the existing dwelling house and ancillary structures;
 - (2) a rear extension of the lower ground and ground floor levels;
 - (3) an attic addition and internal alterations;
 - (4) a new tandem double carport structure;
 - (5) an outbuilding (steam room/sauna) and a replacement pool; and
 - (6) landscaping and site works.
- 3 The Subject Site is zoned R2 Low Density Residential under cl 2.3 of Woollahra Local Environmental Plan 2014 (WLEP). The Proposed Development is permissible with consent on the Subject Site.
- 4 The appeal comes to the Court pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and falls within Class 1 of the Court's jurisdiction. The proceedings are determined pursuant to the provisions of s 4.16 of the EP&A Act.
- 5 The Court had arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the Parties, which was held on 15 and 16 September 2021, and I presided over the conciliation conference.

- 6 The conciliation conference was convened in a manner consistent with the Court's COVID-19 Pandemic Arrangements Policy (the Policy). A site view was not undertaken as part of the conciliation conference, and the Parties confirmed that no objectors had sought to make representations to the Court in relation to the proceedings.
- 7 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 consent to the Applicant's development application, subject to conditions.
- 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.
- 9 There are jurisdictional matters that must be satisfied before the Court can exercise its power to grant consent to the Proposed Development, and those requirements have been satisfied as follows:
 - (1) in relation to the provisions of cl 7 of State Environmental Planning Policy No 55—Remediation of Land (SEPP55), the Parties have confirmed, and I accept that:
 - (a) the application does not involve a change in use and there is no concern with respect to contamination. The Council's records are that the past and current use of the Site as a dwelling house, and
 - (b) the Applicant has provided a statutory declaration dated 16 July 2021 which confirms that the Site Notification Sign was erected on 14 December 2021 and maintained for the entirety of the notification period as required by Schedule 1, cl 7 of the EP&A Act.
 - (c) having considered whether the land is contaminated, and on the basis of the information provided above (at [9(a)] and [9(b)]) the provisions of cl 7 of SEPP55 are satisfied and no further investigation of the Subject Site is required.
 - (2) in relation to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX), the Applicant has provided BASIX Certificate number: A391745 dated 19 November 2021 in satisfaction of the provisions of SEPP BASIX;
 - (3) in relation to the provisions of WLEP, the Parties advise, and I accept that:
 - (a) in relation to cl 4.3 concerning the 'Height of Buildings':

- (i) the maximum building height development standard for the Subject Site is 9.5m;
 - (ii) the existing building has a maximum height of approximately 8.85m;
 - (iii) the plans referred to in the Parties' agreed conditions of consent demonstrate that the proposed alterations and additions will have a maximum height of 9.27m, being below the permitted 9.5m height of buildings development standard.
- (b) in relation to cl 4.4 concerning 'Floor Space Ratio' does not prescribe a maximum FSR standard for development on the Subject Site;
- (c) in relation to cl 5.21 concerning 'Flood Planning' the Subject Site is within the Council's flood planning area and:
 - (i) the Proposed Development must satisfy the requirements of cl 5.21(2);
 - (ii) on the basis of the implementation of the works to the driveway level described in agreed conditions C.6(1) and C.9, and as recommended in the applicant's Flood Report referred to in agreed condition A.3, the requirements of cl 5.21(2) have been satisfied.
 - (iii) flood risk is further mitigated through the imposition of agreed condition C.9 requiring preparation of a permanent Flood Risk Management plan.
- (d) in relation to cl 6.1 concerning 'Acid Sulfate Soils', the Subject Site is mapped as containing Class 5 Acid Sulfate Soils. However, no works are proposed of a kind described in cl 6.1(2) and there are jurisdictional matters that would limit the Court's power to grant consent to the Applicant's development application.
- (e) in relation to cl 6.2 concerning 'Earthworks', the consent authority, or Court on appeal, must consider the matters in cl 6.2(3) in relation to the Proposed Development, and:
 - (i) the Applicant has provided a geotechnical report that has responded to the matters in cl 6.2(3), and the Respondent has advised that the matters requiring consideration have been so considered;
 - (ii) a subsidiary issue identified by the Respondent regarding the extent of excavation required facilitate stormwater works and potential impacts on existing structures was resolved through the provisions of further information from the Applicant in relation to the form of structural certification of works to be provided;

- (4) the Applicant's development application was notified between 16 December and 15 January 2021, consistent with the provisions of cl 77 and Schedule 1 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation) and of Woollahra Development Control Plan 2015. The Respondent advised that matters identified in submissions received in response to notification have been considered by the Parties' in resolving contentions in the appeal.
- 10 There are no other jurisdictional prerequisites that must be satisfied before the Court can exercise the power to determine the appeal under s 4.16 of the EP&A Act.
- 11 Having considered the advice of the Parties, provided above at [9], I agree that the jurisdictional prerequisites on which I must be satisfied before I can exercise the power under s 4.16 of the EP&A Act have been so satisfied.
- 12 I am further 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.
- 13 As the Parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required to dispose of the proceedings in accordance with the Parties' decision.
- 14 In making the orders to give effect to the agreement between the Parties, I was not required to make, and have not made, any merit assessment of the issues that were originally in dispute between the Parties.
- 15 I have previously directed that:
- (1) the Respondent, Woollahra Municipal Council, as the relevant consent authority, is to lodge the amendment of the application for modification of the development consent on the NSW planning portal within 7 days of the date of this order and notify the applicant and the Court after it has been lodged.
 - (2) the Applicant is to file a copy of the amended application for modification of the development consent within 7 days after the respondent has notified the applicant that the amendment has been lodged on the NSW planning portal.
- 16 The Parties have now complied with Court's directions above (at [15]) and so I can make final orders to dispose of this appeal.

Orders

17 The Court orders:

- (1) Each party to pay its own costs of the proceedings.
- (2) The appeal is upheld.
- (3) Development Application No. DA 489/2020 lodged on 25 November 2020, as amended, for alterations and additions to an existing dwelling house with construction of a new pool and carport, along with associated landscaping works at 65 Beresford Road Bellevue Hill is approved subject to the conditions in Annexure "A" to this Agreement.

18 The Respondent is directed to upload the development consent to the Planning Portal within 7 days of this judgment.

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M Chilcott

Commissioner of the Court

[Annexure A \(756765, pdf\)](#)

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