



Land and Environment Court
New South Wales

Case Name: Askaro v Woollahra Municipal Council

Medium Neutral Citation: [2021] NSWLEC 1581

Hearing Date(s): 14 September 2021

Date of Orders: 5 October 2021

Decision Date: 5 October 2021

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development consent is granted to Development Application No DA448/2019/1 for the demolition of the existing dwelling house and the construction of a new 3 storey dwelling house at 4 Loch Maree Place, Vaucluse, subject to the conditions of consent contained at Annexure A.
(3) All exhibits are returned, except for Exhibits A, B, C, 2 and 5.

Catchwords: DEVELOPMENT APPLICATION – dwelling house development in R2 Low Density Residential zone – view loss – consideration of public submissions

Legislation Cited: Environmental Planning and Assessment Act 1979, s 8.7
Environmental Planning and Assessment Regulation 2000, cl 55
Land and Environment Court Act 1979, ss 34, 34AA
Woollahra Local Environmental Plan 2014, cll 4.3, 6.1, 6.2
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 55 –

Remediation of Land, c 7
Sydney Regional Environmental Plan (Sydney Harbour
Catchment) 2005, Part 2, cl 13

Cases Cited: Tenacity Consulting v Waringah (2004) 134 LGERA 23;
[2004] NSWLEC 140

Texts Cited: Woollahra Development Control Plan 2015
Photomontage Policy, published by the Land and
Environment Court

Category: Principal judgment

Parties: Patriza Askaro (First Applicant)
Banipal Askaro (Second Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
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Solicitors:
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Peter Rigg (Respondent)

File Number(s): 2021/163766

Publication Restriction: No

JUDGMENT

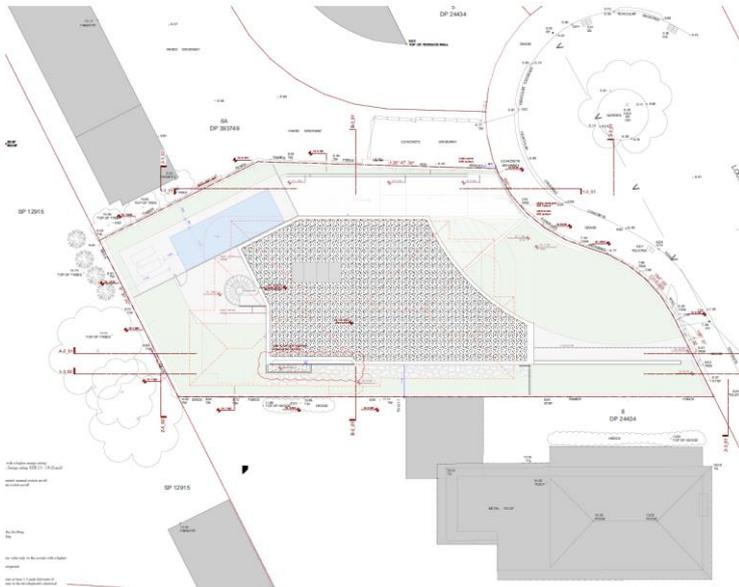
- 1 **COMMISSIONER:** This Class 1 Appeal is brought under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) following the refusal by the Woollahra Local Planning Panel on behalf of Woollahra Municipal Council (the Respondent) of Development Application No DA448/2019/1 for the demolition of the existing dwelling house and the construction of a new 3 storey dwelling house at 4 Loch Maree Place, Vaucluse (the site).
- 2 In accordance with its usual practice, the Court arranged a mandatory conciliation conference under s 34AA of the *Land and Environment Court Act 1979* ('LEC Act') on 13 September 2021, which commenced on MS Teams due to COVID-19-related restrictions. I presided at the conciliation conference.

- 3 Prior to the commencement of the conciliation conference, the Applicant prepared amended plans that the Court was advised were the subject of notification, later appended to Exhibit H (the 'Rev A plans').
- 4 As the notification period is scheduled to expire on 16 September 2021, the parties submit to the Court that the proceedings should be adjourned until after that time so as to consider public submissions.
- 5 For reasons that I will shortly set out, I determined that the matter should proceed at the time listed, and that public submissions, other than those granted leave to present orally, should be the subject of directions made at [48].
- 6 Accordingly, the owners of No 5 Loch Maree Place were granted leave for an oral submission to be made on their behalf by Mr Jonathan Evans, architect, and Mr Ian Cady, town planner, that was supported by a written submission ('written objection by No 5') later marked Exhibit 2.
- 7 During the conciliation conference, the Applicant advised that it would further amend the proposal. I granted an adjournment to permit the amendments that were supported by the Respondent.
- 8 However, as agreement was not reached, I terminated the conciliation conference in accordance with s 34AA(2)(b)(i) of the LEC Act and proceeded forthwith to hearing. The parties consent to relying upon discussions had, and documents produced, during the conciliation conference as evidence in the hearing, in accordance with s 34(12) of the LEC Act.
- 9 While the Court was assisted by town planning experts Mr Andrew Minto, for the Applicant, and Mr Matthew Kelly for the Respondent, as the parties consented to discussions had during the conciliation conference being used in evidence, oral evidence was not required of the experts.

The site and its context

- 10 The site is on the western side of Loch Maree Place, which is a cul-de-sac ending in a circular turning head serving only a few properties.
- 11 The geometry of the site is partly formed by the frontage to the circular turning head, resulting in a sweeping curved boundary to the east, and an irregular

shaped block. It is helpful at this stage to re-produce an excerpt of the roof plan at Drawing 1_04 (Exhibit B):



- 12 A two-storey residential dwelling with a generous set back to Loch Maree Place currently stands on the site that is legally described in the Statement of Environmental Effects (Exhibit 1, Tab 11) as Lot 7A in DP393749.
- 13 The site is within the Vaucluse West Precinct as identified by Section B1 of the Woollahra Development Control Plan 2015 (WDCP).
- 14 The site is also located within the R2 Low Density Residential zone as identified in the Woollahra Local Environmental Plan 2014 (WLEP), in which dwelling house development is permitted with consent, where it is consistent with the following objectives for development in the R2 zone:
 - To provide for the housing needs of the community within a low density residential environment.
 - To enable other land uses that provide facilities or services to meet the day to day needs of residents.
 - To provide for development that is compatible with the character and amenity of the surrounding neighbourhood.
 - To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

The issues are considered

- 15 At the outset of the hearing, the Applicant sought to further amend the application before the Court to incorporate the amendments referred to at [7].

The proposed amended application comprises the following amended plans and documents:

- Architectural plans (Exhibit B)
- BASIX Certificate 1035957S_04 dated 13 September 2021 (Exhibit C)
- Shadow diagrams Dwg No 0_02 (Exhibit D)
- View Analysis (Exhibit E)
- Landscape Plans (Exhibit F)
- Stormwater Plans (Exhibit G).

16 I record here that the Respondent, as the relevant consent authority, agreed, under cl 55(1) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation), to the Applicant further amending the development application No.448/2019/1 on the basis of the amended plans and documents at [15], and parties were directed by the Court to effect lodgement on the NSW Planning Portal.

17 The primary question for the Court is whether the departure from the building envelope and floorplate controls set out in the WDCP results in unreasonable view loss on the neighbouring property at No 5 Loch Maree Place.

18 The building envelope controls are set out in Section B3.2 of the WDCP. Section B3.2.1 explains the control in the following terms:

“Development in the R2 Low Density Residential Zone

The building envelope (as shown in Figure 1) is established by applying the following controls:

front, side and rear setbacks;

maximum wall height of 7.2m;

inclined plane of 45° taken from the maximum wall height; and

maximum building height set by Woollahra LEP 2014.

The building is to be contained within the building envelope, but is to occupy only a percentage of the building envelope (as determined by the floorplate controls in Section B3.3 Floorplate). There is an allowance for eaves outside the building envelope as long as the protrusion is below the inclined plane (where one applies).”

19 The calculation of the applicable side setback, which is an aspect or element of the building envelope, is the subject of dispute between the town planning experts.

- 20 The origin of the dispute lies in the effect of the sweeping curved frontage to Loch Maree Place on the lot frontage when calculated in accordance with Section B3.2.3 of the WDCP, Control C1 (which refers to the table at Figure 5A).
- 21 In simple terms, the frontage may be calculated parallel to the curving geometry formed by Loch Maree Place, which is preferred by Mr Kelly, resulting in a dimension in the order of 23m, or perpendicular to the side boundaries, as preferred by Mr Minto, resulting in a dimension in the order of 19m.
- 22 According to Figure 5A, a frontage measuring 23m or more requires a side setback of 3.4m, and a frontage measuring 19m requires a side setback of 2.7m.
- 23 While the town planning experts differ on the applicable setback to the southwestern boundary, they agree the outcome is acceptable notwithstanding the difference in their opinion.
- 24 The experts also agree that further amendment to increase the side setback to the south western elevation from 2.7m to 3.15m for a 7m portion of this elevation provides relief and articulation, reduces the unbroken wall length from 22m to 15m, and assists in avoiding a sense of enclosure.
- 25 Floorplate controls are set out in Section B3.3 of the WDCP, which relevantly provides:

“The floorplate control only applies to:
development on land in the R2 Low Density Residential Zone; and

...

Floorplate determines amount of development

The development potential for a site is determined by the total floorplate. This is calculated as a percentage of the buildable area.

The buildable area is the area of the site that is identified once the front, rear and side setbacks have been established (refer to Figure 10).

The maximum amount of development permitted on the site is determined by multiplying the buildable area by a factor of 1.65 (165%). This is the maximum permitted total floorplate.

For example if the buildable area is 150m² the maximum floorplate yield is:
150m² x 1.65 = 247.5m²

The floorplate is measured at each level. A level is defined as the space between a floor and a level above. If any part of a level is above 1m above exist ground level that area of the level is counted as floorplate (refer to Figures 11 and 12).

The total floorplate may be distributed over multiple levels, but must be wholly contained within the building envelope.”

- 26 As the floorplate controls are derived, in part, from a calculation of the side setbacks, the agreement of the experts that the built form is acceptable notwithstanding the disputed side setback, is also mirrored in their agreement that any departure from the floorplate controls is likewise acceptable.
- 27 Given the exaggerated geometry of the circular turning head, and the orientation of the irregular site in relation to the circular turning head, I accept Mr Minto’s preferred method of determining the applicable side setback.
- 28 The view analysis prepared by the Applicant at Exhibit E, shows the superimposition of the proposal over the existing dwelling from viewing points within the dwelling at No 5 Loch Maree Place.
- 29 In the written objection by No 5, the accuracy of the view analysis prepared by the Applicant is disputed given anomalies in existing features that do not appear to align with known locations.
- 30 Furthermore, the written objection by No 5 contends that the non-conformity with the side setback and floorplate controls contributes to ‘severe’ view loss, and proposes the design be amended to produce a more skilful design.
- 31 The views enjoyed by No 5 Loch Maree Place are described by Mr Evans in 3 categories. Firstly, distant views of the harbour that encompass Middle Head and Manly. Secondly, middle distance views are to the navigation channel of the harbour. Thirdly, close views are enjoyed of boats and swimmers in Vaucluse Bay.
- 32 As a result of the amendments made to the proposal at [3], Mr Evans accepts that distant views are retained, but considers the middle and close views to be obscured by the overall height of the building, particularly to the eastern portion over which existing view corridors would be retained by proposed further amendments.

- 33 The Applicant submits that the images relied upon in the written objection by No 5 are founded on a presumption that all viewpoints from all rooms of No 5 Loch Maree should be afforded views to all three categories of harbour views identified by Mr Evans, and does not show the continued views of boats and swimmers in Vaucluse Bay enjoyed from the eastern portion of the first floor balcony of No 5 Loch Maree Place otherwise depicted on Drawing SK7_16B of Exhibit E.
- 34 Furthermore, consideration should be given to the degree to which the proposed development has not pursued the maximum height of buildings standard, pursuant to cl 4.3(2), permitting development of 9.5m in height.
- 35 In the Addendum to the Statement of Environmental Effects (Exhibit J), the height of the building is recorded as 7.89m.
- 36 The written objection by No 5 invokes the planning principle set out in *Tenacity Consulting v Waringah* (2004) 134 LGERA 23; [2004] NSWLEC 140 (Tenacity), at [26]-[29], to the effect that significant water views are severely affected from positions standing on the first floor of the property.
- 37 As the proposal complies with the height standard, Mr Evans also advances a view that a more skilful design would permit the Applicant the same development potential and amenity but reduce the impact on the views of neighbours by:
- (1) Reducing ceiling heights on all levels in order to achieve a 950mm reduction in overall height.
 - (2) Increasing the eastern setback of the upper level, including entry portico.
 - (3) Increasing the southern, or south western, setback to the common boundary.
- 38 The standards expected by the Court of photomontages relied on in evidence are set out in the Court's Photomontage Policy, and the view analysis is not entirely consistent with this Policy. A 2D plan showing the location of the camera and target point that corresponds to the same location the existing photograph was taken is not provided, survey data is not supplied, and the camera type and field of view of the lens used for the purpose of the photograph from which the photomontage has been derived are lacking.

- 39 That said, the photomontage overlays the proposal in a translucent 3 dimensional form on the existing condition of buildings, landscape and view in a manner I consider sufficient to assess the likely impact of the proposed form on the three view categories posited by Mr Evans.
- 40 In considering the recommendations contained in the written objection by No 5, I note that the reduction in the height of the proposal relies upon a reduction in the basement ceiling height to 2100mm, that would require the deletion of habitable rooms shown on that level.
- 41 While it may be that Mr Evan's recommendations would result in an alternative design with a greater area of water views retained from No 5 Loch Maree Place, it would come at the expense of the development potential and amenity of the proposal before the Court which, in my view, is sufficiently balanced in the Rev B plans.
- 42 A view of the water will continue to be available from a standing height on the first floor level of No 5 Loch Maree Place, despite that view being enjoyed across a side boundary. I also consider the view from the eastern portion of the first floor level to enjoy views in all three categories identified by Mr Evans.
- 43 The impact is a result of a building that is well below the maximum height permitted by the WLEP and as stated at [23], the outcome is agreed by the experts to be acceptable in its setback and siting.

WLEP matters for consideration

- 44 The site is identified on the Acid Sulfate Soils Map in cl 6.1(2) as containing Class 5 acid sulfate soil, and is within 500m of soils identified as Class 2. A report prepared by JK Environments dated 14 September is appended to Exhibit J and sets out reasons the site is not likely to require de-watering that would lower the watertable by 1 metre Australian Height Datum on the Class 2 land. That said, the report also contains an Acid Sulfate Soils Management Plan that is the subject of Condition E.28 in the agreed conditions of consent. On this basis I am satisfied that the provisions of cl 6.1 are addressed.
- 45 Clause 6.2 of the WLEP requires consideration be given to the manner in which earthworks are proposed to be undertaken, and the likely impacts arising

on the subject site, and adjoining properties. On the basis of the Stormwater Plans at Exhibit G, and the agreed conditions of consent in respect of Geotechnical and Hydrogeological Design, Certification and Monitoring, I consider those matters at cl 6.2(3) to be adequately addressed.

Public submissions

- 46 According to the statement of facts contentions prepared by the Respondent in this matter, the development application was notified by the Respondent between 4-18 December 2019, resulting in 32 submissions.
- 47 As stated at [5], the parties, prior to the proceedings commencing, agreed to re-notify the amended proposal. Re-notification was still underway during the proceedings. A copy of the letter of re-notification dated 1 September is appended to Exhibit 3.
- 48 At the conclusion of the hearing, the Respondent was directed to file and serve all public submissions received by the close of the notification period, no later than 4pm 17 September 2021, and the parties were granted liberty to apply with 2 days' notice, up to 7 days after receipt of the submissions in the event submissions raised matters of concern to the proposal, or in respect of the proposed agreed conditions of consent at Exhibit 7.
- 49 On 17 September 2021, the parties provided to the Court 23 written submissions in accordance with the direction above that are added to Exhibit 3. I have read the submissions, and I consider the issues raised within those submissions to be addressed by the judgment above.

Other considerations

State Environmental Planning Policy No 55 – Remediation of land

- 50 Clause 7 of the State Environmental Planning Policy No 55—Remediation of Land requires a consent authority to consider whether the land is contaminated and requires remediation. On the basis of the historical research evident in the Demolition Report prepared by Ms Ruth Daniel dated November 2019 (Exhibit 1, Tab 13), I am satisfied that the site is not contaminated.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004

51 I am satisfied that the application is accompanied by a BASIX certificate (Cert No. 1035957S_04), prepared by Sustainability-z Pty Ltd dated 13 September 2021 in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the EPA Regulation.

Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005

52 I have considered the relevant provisions of Part 2 of the Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP), and I conclude that nothing proposed in the application before the Court would result in failure to achieve the relevant principles set out in cl 13 of the SREP. In particular, I note the stormwater management proposed by the stormwater drainage plans at Exhibit G, and the terms of Condition E.28 of the agreed conditions of consent requiring compliance with the Acid Sulfate Soils Management Plan.

Orders

53 The Court notes that:

- (1) That the Applicant has amended the application with the consent of the Woollahra Municipal Council pursuant to cl 55(1) of the Environmental Planning and Assessment Regulation 1979.
- (2) That the Applicant has uploaded the amended application on the NSW planning portal on 21 September 2021.
- (3) That the Applicant has subsequently filed the amended application with the Court on 23 September 2021.

54 The Court orders that:

- (1) The appeal is upheld.
- (2) Development consent is granted to Development Application No DA448/2019/1 for the demolition of the existing dwelling house and the construction of a new 3 storey dwelling house at 4 Loch Maree Place, Vaucluse, subject to the conditions of consent contained at Annexure A.
- (3) All exhibits are returned, except for Exhibits A, B, C, 2 and 5.

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T Horton

Commissioner of the Court

Annexure A (664274, pdf)

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