



Land and Environment Court
New South Wales

Case Name:	Pallas Development Management Pty Limited trading as Fortis Development Group v Woollahra Municipal Council
Medium Neutral Citation:	[2021] NSWLEC 1585
Hearing Date(s):	Conciliation conference on 13 September 2021
Date of Orders:	6 October 2021
Decision Date:	6 October 2021
Jurisdiction:	Class 1
Before:	O'Neill C
Decision:	<p>The orders of the Court are:</p> <p>(1) The applicant is to pay the respondent's costs thrown away as a result of the amendment of the application, in the amount of \$7,500.00, pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979.</p> <p>(2) The appeal is upheld.</p> <p>(3) Development Application No. 14/2021/1 for the demolition of existing buildings and the construction of a five storey commercial building over three levels of basement parking, at 21-27 Bay Street, Double Bay, is approved, subject to the conditions of consent at Annexure A.</p>
Catchwords:	DEVELOPMENT APPLICATION – mixed use commercial building – conciliation conference – agreement between the parties
Legislation Cited:	<p>Environmental Planning and Assessment Act 1979 ss 4.16, 4.46, 4.47, 8.7</p> <p>Environmental Planning and Assessment Regulation 2000 cl 55</p> <p>Land and Environment Court Act 1979 s 34</p>

State Environmental Planning Policy No 55—
Remediation of Land cl 7
Sydney Regional Environmental Plan (Sydney Harbour
Catchment) 2005 cl 3, 20
Water Management Act 2000 s 90
Woollahra Local Environmental Plan 2014 cl 4.3, 4.4,
5.21, 6.1, 6.2

Cases Cited: Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC
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Initial Action Pty Ltd v Woollahra Municipal Council
(2018) 236 LGERA 256; [2018] NSWLEC 118
RebelMH Neutral Bay Pty Limited v North Sydney
Council [2019] NSWCA 130
Thing Net Pty Limited v Woollahra Municipal Council
[2020] NSWLEC 1063
Wehbe v Pittwater Council (2007) 156 LGERA 446;
[2007] NSWLEC 827
Woollahra Municipal Council v SJD DB2 Pty Limited
[2020] NSWLEC 115

Category: Principal judgment

Parties: Pallas Development Management Pty Limited trading
as Fortis Development Group (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
A Boskovitz (Solicitor) (Applicant)
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File Number(s): 2021/127725

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JUDGMENT

1 **COMMISSIONER:** This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application No. 14/2021/1 for the demolition of the existing buildings and the construction of a five-storey commercial

development over basement parking, including the provision of a through-site pedestrian link (the proposal), at 21-27 Bay Street, Double Bay (the site) by Woollahra Municipal Council (the Council).

- 2 The Council agreed to the applicant amending the application. The amended application was lodged on the NSW planning portal on 20 September 2021 and the applicant filed the amended application on 24 September 2021.
- 3 The proposal, as amended, includes two retail premises on the ground floor, over three levels of basement parking accessed from Gumtree Lane, and a through-site pedestrian link between Bay Street and Gumtree Lane. The proposal includes four levels of commercial floor space, and a lightwell on the northern side, adjacent to the adjoining property. The uppermost level is setback from the façades below on the eastern, western and northern sides.
- 4 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 13 September 2021. I presided over the conciliation conference.
- 5 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.
- 6 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.
- 7 There are preconditions to the exercise of power to grant development consent for the proposal pursuant to cl 4.6(2) of the Woollahra Local Environmental Plan 2014 (LEP 2014).

Consideration

- 8 The site area is 820m².
- 9 The Site is the subject of a development consent for a mixed use retail and residential housing development (*Thing Net Pty Limited v Woollahra Municipal Council* [2020] NSWLEC 1063).

10 The site is zoned B2 Local Centre pursuant to LEP 2014 (Land Zoning Map – Sheet LZN_002 of LEP 2014). The proposal is permissible with consent. The objectives of the B2 zone are:

- To provide a range of retail, business, entertainment and community uses that serve the needs of people who live in, work in and visit the local area.
- To encourage employment opportunities in accessible locations.
- To maximise public transport patronage and encourage walking and cycling.
- To attract new business and commercial opportunities.
- To provide active ground floor uses to create vibrant centres.
- To provide for development of a scale and type that is compatible with the amenity of the surrounding residential area.
- To ensure that development is of a height and scale that achieves the desired future character of the neighbourhood.

11 The site is located within an area identified as being in the Flood Planning Area, cl 5.21 of LEP 2014. Sub-clauses 5.21(2) and (3) are in the following terms:

(2) Development consent must not be granted to development on land the consent authority considers to be within the flood planning area unless the consent authority is satisfied the development—

(a) is compatible with the flood function and behaviour on the land, and

(b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and

(c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and

(d) incorporates appropriate measures to manage risk to life in the event of a flood, and

(e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.

(3) In deciding whether to grant development consent on land to which this clause applies, the consent authority must consider the following matters—

(a) the impact of the development on projected changes to flood behaviour as a result of climate change,

(b) the intended design and scale of buildings resulting from the development,

(c) whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood,

(d) the potential to modify, relocate or remove buildings resulting from development if the surrounding area is impacted by flooding or coastal erosion.

- 12 The application included a Flood Study and Flood Risk Management Plan prepared by AKY Civil Engineering and dated December 2020, which addresses the relevant matters listed in sub-cl 5.21(2) and (3). I accept the Council's submission that the required matters have been considered and the Council is satisfied that the proposal meets the objectives of cl 5.21(1) of LEP 2014.
- 13 The site is mapped as being Class 2 Acid Sulphate Soils (cl 6.1 and Acid Sulfate Soils Map Sheet ASS_003 of LEP 2014). Development consent is required for works below the natural ground surface or works by which the watertable is likely to be lowered. The application included an Acid Sulfate Soils Management Plan prepared by JK Environmental dated 10 September 2021, pursuant to sub-cl 6.1(3) of LEP 2014.
- 14 Development consent is required for earthworks, pursuant to sub-cl 6.2(2) of LEP 2014, because the proposal does not meet the exceptions under sub-cl 6.2(2). The application included a Geotechnical Report prepared by JK Geotechnics and dated 20 November 2020. I accept the Council's submission that the matters pursuant to sub-cl 6.2(3) have been considered and the Council is satisfied that the proposal meets the objective of sub-cl 6.2(1), to ensure that earthworks for which development consent is required will not have a detrimental impact on environmental functions and processes, neighbouring uses, cultural or heritage items or features of the surrounding land.
- 15 I accept the Council's submission that the land is suitable for the purpose for which the development is proposed, pursuant to cl 7(1) of State Environmental Planning Policy No 55—Remediation of Land, as demonstrated by the Preliminary Site Investigation prepared by JK Environments dated 4 December 2020 and the Remediation Action Plan prepared by JK Environments dated 8 September 2021 and conditions of consent.
- 16 The proposal is integrated development within the meaning of s 4.46 of the EPA Act because the proposal requires a water management work approval under s 90 of the *Water Management Act 2000* (WM Act). The proposal

requires a water supply work approval for the dewatering of the site. A water supply work approval authorises its holder to construct and use a specified water supply work at a specified location, pursuant to s 90(2) of the WM Act. Water NSW provided general terms of approval in relation to the proposal, pursuant to s 4.47(2) of the EPA Act, and those conditions are included in the conditions of consent at A.7.

- 17 The Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 applies to the site at cl 3(1). The matters referred to in Part 3, Div 2, are to be taken into consideration by consent authorities before granting consent to development under Pt 4 of the EPA Act, at cl 20(a). I accept the Council's submission that the proposal will not be visible from Sydney Harbour, or its islands, foreshores or tributaries.
- 18 No signage is proposed as part of the application.
- 19 I accept the Council's detailed submission that the proposal was notified in accordance with Council's requirements and the submissions have been considered and the amended proposal appropriately responded to the concerns of objectors.

Contravention of the height of buildings development standard

- 20 The height of buildings development standard for the site is 14.7m (cl 4.3 and Height of Buildings Map HOB_002 of LEP 2014). The objectives of the height of buildings development standard, cl 4.3(1) of LEP 2014, are:
 - (a) to establish building heights that are consistent with the desired future character of the neighbourhood,
 - (b) to establish a transition in scale between zones to protect local amenity,
 - (c) to minimise the loss of solar access to existing buildings and open space,
 - (d) to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion,
 - (e) to protect the amenity of the public domain by providing public views of the harbour and surrounding areas.
- 21 The proposal has a maximum height of 17.715m to the top of the central roof plant screen and a height of 17.09m to the top of the upper-level parapet. The applicant provided a written request seeking to justify the contravention of the

height of buildings development standard prepared by GSA Planning and dated September 2021.

- 22 Clause 4.6(4) establishes preconditions that must be satisfied before a consent authority or the Court exercising the functions of a consent authority can exercise the power to grant development consent (*Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118 at [13] “*Initial Action*”). The consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a). As these preconditions are expressed in terms of the opinion or satisfaction of a decision-maker, they are a “jurisdictional fact of a special kind”, because the formation of the opinion of satisfaction enlivens the power of the consent authority to grant development consent (*Initial Action* at [14]). The consent authority, or the Court on appeal, must be satisfied that the applicant’s written request has adequately addressed the matters required to be addressed by cl 4.6(3) and that the proposal development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4), as follows:

(4) Development consent must not be granted for development that contravenes a development standard unless:

(a) the consent authority is satisfied that:

(i) the applicant’s written request has adequately addressed the matters required to be demonstrated by subclause (3), and

(ii) the proposed development will 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, and

(b) the concurrence of the Secretary has been obtained.

- 23 On appeal, the Court has the power under cl 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(6) of the LEC Act, but should still consider the matters in cl 4.6(5) (*Initial Action* at [29]).

The applicant’s written request to contravene the height of buildings development standard

- 24 The first opinion of satisfaction required by cl 4.6(4)(a)(i) is that the applicant’s written request seeking to justify the contravention of a development standard

has adequately addressed the matters required to be demonstrated by cl 4.6(3) (see *Initial Action* at [15]), as follows:

- (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
- (b) that there are sufficient environmental planning grounds to justify contravening the development standard

- 25 The applicant bears the onus to demonstrate that the matters in cl 4.6(3) have been adequately addressed by the written request in order to enable the Court, exercising the functions of the consent authority, to form the requisite opinion of satisfaction (*Initial Action* at [25]). The consent authority has to be satisfied that the applicant's written request has in fact demonstrated those matters required to be demonstrated by cl 4.6(3) and not simply that the applicant has addressed those matters (*RebelMH Neutral Bay Pty Limited v North Sydney Council* [2019] NSWCA 130 at [4]).
- 26 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by Preston CJ in *Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 [42]-[51] ("*Wehbe*") and repeated in *Initial Action* at [17]-[21]:
- (1) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;
 - (2) the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;
 - (3) the underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;
 - (4) the development standard has been abandoned by the council;
 - (5) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).
- 27 The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* at [22]).
- 28 The applicant's written request justifies the contravention of the height of buildings development standard on the basis that compliance is unreasonable

or unnecessary because the objectives of the development standard are achieved notwithstanding non-compliance with the numerical standard. The applicant's written request justifies the contravention of the height of buildings development standard as follows:

- The proposal is consistent with the built form in Double Bay, including approved development that contravenes the height of buildings development standard (*Woollahra Municipal Council v SJD DB2 Pty Limited* [2020] NSWLEC 115 at [63]).
- The uppermost level is setback from the façade when viewed from Bay Street and is not visible when viewed from the footpath on the opposite side of Bay Street.
- The proposal maintains at least 3 hours of solar access on the winter solstice to surrounding development.
- The façades are articulated and include soft landscaping in large planter boxes. The articulation of the façade and use of materials reduces the perceived scale of the development.
- The building envelope of the proposal is similar to a current approval for the site.

29 The grounds relied on by the applicant in the written request under cl 4.6 must be “environmental planning grounds” by their nature, and environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 at [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* at [23]). The environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (*Initial Action* at [24]). Therefore, the environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* at [24]).

30 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). The applicant's written request defends the exceedance of the development standard as a justified response to the existing and approved built context of the site. I am satisfied that justifying the aspect of the development that

contravenes the development standard in this way can be properly described as an environmental planning ground within the meaning identified by his Honour in *Initial Action* at [23].

Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone

- 31 The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest (*Initial Action* at [27]). The consent authority must be directly satisfied about the matters in cl 4.6(4)(a)(ii) (*Initial Action* at [26]).
- 32 I am satisfied that the proposal will be in the public interest because it is consistent with the objectives of the development standard and the zone, for the reasons given by the applicant in the written request.

Contravention of the floor space ratio (FSR) development standard

- 33 The FSR development standard for the site is 2.5:1 (cl 4.4 and Floor Space Ratio Map FSR_002 of LEP 2014). The objective of the FSR development standard, cl 4.4(1)(b) of LEP 2014, is:
- (b) for buildings in Zone B1 Neighbourhood Centre, Zone B2 Local Centre, and Zone B4 Mixed Use—to ensure that buildings are compatible with the desired future character of the area in terms of bulk and scale.
- 34 The proposal has a FSR of 3.25:1.
- 35 The applicant provided a written request seeking to justify the contravention of the height of buildings development standard prepared by GSA Planning and dated September 2021.

The applicant's written request to contravene the height of buildings development standard

- 36 The applicant's written request justifies the contravention of the FSR development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the development standard are achieved

notwithstanding non-compliance with the numerical standard. The applicant's written request justifies the contravention of the FSR development standard for the same reasons as the contravention of the height of buildings development standard. Those reasons are set out above at [28].

- 37 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). The applicant's written request defends the exceedance of the FSR development standard as a justified response to the existing and approved built context of the site. I am satisfied that justifying the aspect of the development that contravenes the development standard in this way can be properly described as an environmental planning ground within the meaning identified by his Honour in *Initial Action* at [23].

Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone

- 38 I am satisfied that the proposal will be in the public interest because it is compatible with the desired future character of the area in terms of bulk and scale, for the reasons given by the applicant in the written request.

Orders

- 39 The Court notes:

- (1) That Woollahra Municipal Council as the relevant consent authority agreed, under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, to the applicant amending Development Application No. 14/2021/1.
- (2) That Woollahra Municipal Council lodged the amended development application on the NSW planning portal on 20 September 2021.
- (3) The applicant filed the amended development application with the Court on 24 September 2021.

- 40 The orders of the Court are:

- (1) The applicant is to pay the respondent's costs thrown away as a result of the amendment of the application, in the amount of \$7,500.00, pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*.
- (2) The appeal is upheld.
- (3) Development Application No. 14/2021/1 for the demolition of existing buildings and the construction of a five storey commercial building over

three levels of basement parking, at 21-27 Bay Street, Double Bay, is approved, subject to the conditions of consent at Annexure A.

Susan O'Neill

Commissioner of the Court

Annexure A (1092002, pdf)

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