



Land and Environment Court

New South Wales

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Case Name:	Loftex Commercial Pty Ltd v Woollahra Municipal Council
Medium Neutral Citation:	[2021] NSWLEC 1697
Hearing Date(s):	Conciliation conference on 11, 14 and 25 October 2021
Date of Orders:	17 November 2021
Decision Date:	17 November 2021
Jurisdiction:	Class 1
Before:	Chilcott C
Decision:	Orders – see [15]
Catchwords:	DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.16, 8.7 Environmental Planning and Assessment Regulation 2000, cl 55(1) and 77 Land and Environment Court Act 1979, s 34 State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Infrastructure) 2007 State Environmental Planning Policy No 55 - Remediation of Land Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 Water Management Act 2000 Woollahra Local Environmental Plan 2015

Texts Cited: Land and Environment Court of New South Wales,  
COVID-19 Pandemic Arrangements Policy, (April 2021)  
Woollahra Community Participation Plan 2019

Category: Principal judgment

Parties: Loftex Commercial Pty Ltd (Applicant)  
Woollahra Municipal Council (Respondent)

Representation: Counsel:  
A Hemmings (Applicant)  
S Puckeridge (Solicitor) (Respondent)

Solicitors:  
Corrs Chambers Westgarth (Applicant)  
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2021/168854

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** Loftex Commercial Pty Ltd (the Applicant) has appealed the refusal by Woollahra Municipal Council (the Respondent) of its development application seeking approval for demolition of the existing buildings and construction of a mixed-use development comprising residential and commercial uses (the Proposed Development) at 2 and 4-10 Bay Street and 294-296 and 298 New South Head Road, Double Bay, and contained in Lots 24 and 25 in DP4606, Lot 100 in DP712017, and Lots B and C in DP955406 (the Subject Site).
- 2 The Applicant's appeal is made pursuant to the provisions of s 8.7 of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and falls within Class 1 of the Court's jurisdiction. It is determined pursuant to the provisions of s 4.16 of the EP&A Act.
- 3 The Subject Site is zoned B2 under the provisions of Woollahra Local Environmental Plan 2014 (WLEP).

- 4 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 11, 14 and 25 October 2021, and I presided over the conciliation conference.
- 5 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.
- 6 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.
- 7 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.
- 8 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) the Application was submitted with the consent, in writing, of the owners of the Subject Site;
  - (2) in relation to the requirements for notification of the Proposed Development under cl 77 of the Environmental Assessment and Planning Regulation 2000 (EP&A Reg):
    - (a) the Applicant's development application was notified and advertised from 17 March 2021 to 16 April 2021 in accordance with the provisions of Woollahra Community Participation Plan 2019 (WCPP);
    - (b) in accordance with the WCPP, the Respondent is satisfied that the Application as amended does not need to be re-notified as the amendments do not result in new or greater impacts;
  - (3) in relation to Concurrences and General Terms of Approval (GTAs)
    - (a) the Applicant's Proposed Development is integrated development as defined under the provisions of s 4.46 of the EPA Act, as it requires a water supply work approval under s 90 of the *Water Management Act 2000* for the dewatering of the Subject Site;

- (b) Water NSW issued GTAs for the development application on 31 May 2021. Those terms are incorporated into the agreed conditions of consent;
  - (c) The Application requires the concurrence of Transport for NSW (TfNSW) under cl 100 and consultation under cll 101 and 104 of the State Environmental Planning Policy (Infrastructure) 2007;
  - (d) TfNSW provided conditions on 29 March 2021 which have been incorporated into the agreed conditions of consent;
- (4) in relation to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX) the Applicant's development application was accompanied by a BASIX certificate no. 1165353M in satisfaction of the provisions of SEPP BASIX;
- (5) 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 following information has been provided by the Applicant in satisfaction of the provisions of cl 7(1) of SEPP55:
    - (i) a Preliminary Site Investigation Report prepared by Douglas Partners dated February 2021;
    - (ii) a Conceptual Remediation Action Plan prepared by Douglas Partners dated October 2021;
  - (b) while the Proposed Development involves a change of use from '*commercial use*' to a mixed-use development including a residential component, none of the circumstances in cl 7(4) apply, and therefore the provisions of cl 7(2) do not apply;
  - (c) the Respondent's environmental health officer has confirmed, supported by a letter from Douglas Partners dated 18 August 2021 and signed by Mr Paul Gorman and Mr Tim Wright that if contamination is detected following demolition of the existing buildings, the land will be suitable (following remediation) for its proposed use as a mixed use development;
- (6) in relation to the provisions of State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development (SEPP65)
  - (a) as concerns the provisions of cl 28(1) of SEPP65, the Woollahra Municipal Council does not have a design review panel;
  - (b) as concerns the provisions of cl 28(2) of SEPP65, the Applicant's development application is supported by the following information regarding consistency with the design principles:
    - (i) a Design Verification Statement prepared by Tzannes, contained on pages 40-64 of the Design Report dated December 2020;

- (ii) the Respondent's urban design expert has evaluated the design quality of the Proposed Development in accordance with the design quality principles and is satisfied on that basis that the design quality of the Proposed Development is acceptable;
- (7) in relation to the provisions of Sydney Regional Environmental Plan (Sydney Harbour Catchment) 2005 (SREP SHC), the Subject Site is located within the Sydney Harbour catchment but is outside the Foreshores and Waterways Area and therefore there are no specific matters for consideration in relation to SREP SHC;
- (8) in relation to the provisions of State Environmental Planning Policy (Infrastructure) 2007 (SEPP-I):
  - (a) as concerns the provisions of cl 101,
    - (i) the Subject Site has a frontage to a classified road, being New South Head Road, and vehicular access is not proposed on New South Head Road;
    - (ii) the Applicant has provided a Traffic Impact Assessment prepared by PDC Consultants dated 17 February 2021 in satisfaction of the requirements of subcll 101(2)(b) and 101(2)(c); and
    - (iii) the Respondent's traffic engineer has formed the view, and I agree, that the provisions of subcll 101(2)(b) and 101(2)(c) are satisfied by the Proposed Development;
  - (b) as concerns the provisions of cl 102:
    - (i) the Applicant proposes residential accommodation in close proximity to a classified road and it has provided a Noise Impact Assessment prepared by White Noise Acoustics (Rev 3) and dated 7 October 2021, in satisfaction of the matters in cl 102(3) of SEPP-I: and
    - (ii) the Respondent's traffic engineer has formed the view, and I agree, that the requirements of cl 102(3) are met by the Proposed Development;
  - (c) as concerns the provisions of cl 104:
    - (i) the Applicant's development application was referred to TfNSW and the comments received in response dated 29 March 2021 have been considered in accordance with the provisions of cl 104(3);
    - (ii) the Applicant has provided a Traffic Impact Assessment prepared by PDC Consultants and dated 17 February 2021 to satisfy the matters identified in subcll 104(3)(b)(ii) and (iii) of SEPP-I:

- (iii) TfNSW has been consulted and does not have any objections to the Proposed Development subject to the imposition of conditions it has proposed; and
  - (iv) the Respondent's traffic engineer has formed the view, and I agree, that the requirements of cl 104(3) of SEPP-I are satisfied by the Proposed Development;
- (9) in relation to the provisions of WLEP, the Parties advise, and I accept that:
  - (a) in relation to permissibility, the Applicant seeks consent for a shop top housing development, and development for the purposes of shop top housing is permissible with consent in the B2 Local Centre Zone which is the zoning of the Subject Site;
  - (b) in relation to the provisions of cl 4.3 concerning the height of buildings (HoB):
    - (i) the Proposed Development does not comply with the HoB development standard in cl 4.3 of WLEP;
  - (c) the Applicant relies on a written request to vary the HoB development standard in cl 4.3 of WLEP and this has been prepared pursuant to the provisions of cl 4.6 of WLEP. The Respondent has advised, and I accept, that for reasons provided within the Applicant's written request, which I adopt, the request should be upheld because:
    - (i) compliance with the HoB development standard in cl 4.3 of WLEP is unreasonable or unnecessary in the circumstances of the case because the objectives of the development standard are achieved; and
    - (ii) there are sufficient environmental planning grounds to justify the HoB non-compliance; and
    - (iii) the Proposed Development will be in the public interest because it is consistent with the zone objectives and the objectives of the development standard; and
    - (iv) the Respondent's planning and urban design expert has formed the view, and I agree, that the requirements of cl 4.6 of WLEP are satisfied in relation to the Applicant's request to vary the HoB development standard in cl 4.3 of WLEP;
  - (d) in relation to the provisions of cl 4.4 concerning the floor space ratio development standard applicable to the Subject Site, the Proposed Development complies with the development standard;
  - (e) in relation to the provisions of cl 5.10 of WLEP concerning heritage:
    - (i) the Subject Site does not contain a heritage item nor is it located within a heritage conservation area. However, the

Subject Site is located in the vicinity of a number of heritage items listed under the WLEP;

- (ii) the Applicant has provided a Heritage Impact Statement (HIS) prepared by Urbis and dated 15 January 2021 which confirms that the potential impacts of the Proposed Development on the heritage significance of nearby heritage items has been considered, and the Respondent's heritage officer has formed the view, and I accept, that the impact of the proposed development would be neutral with respect to those items;
- (f) in relation to the provisions of cl 5.21 concerning flooding:
  - (i) the Subject Site is located on land identified as a Flood Planning Area on the Flood Planning Map within WLEP;
  - (ii) the Applicant has provided a Flood Study prepared by AKY Civil Engineering and dated February 2021, in satisfaction of the matters listed in cl 5.21(2) and matters requiring consideration in cl 5.21(3); and
  - (iii) the Respondent's flood planning officer has formed the view, and I accept, that the requirements of cl 5.21 have been satisfied subject to the Applicant being required to implement the measures outlined in the Flood Study prepared by AKY Civil Engineering along with the imposition of condition C.16 that requires a Flood Risk Management Plan to be provided with the documents included in the application for a construction certificate;
- (g) in relation to the provisions of cl 6.1 concerning Acid Sulfate Soils:
  - (i) the Subject Site is partly located within Class 5 and partly within Class 2 land as identified in the Acid Sulfate Soils Map within WLEP;
  - (ii) the Applicant does not propose any works below natural ground surface on that part of the Subject Site located within Class 2 lands, and therefore the provisions of cl 6.1(3) of WLEP do not apply;
  - (iii) further, the Applicant has provided a Preliminary Site Investigation prepared by Douglas Partners and dated February 2021 which concludes that an Acid Sulfate Soils Management Plan is not required in relation to the Proposed Development;
- (h) in relation to the provisions of cl 6.2 concerning earthworks:
  - (i) the Proposed Development includes excavation works below existing basement levels;
  - (ii) the Applicant has provided a Geotechnical Report prepared by Douglas Partners Report and dated 13

October 2021 in relation to the matters identified in cl 6.2(3), and which confirms to my satisfaction that those matters have been considered.

- 9 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.
- 10 Having considered the advice of the Parties, provided above at [8], 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.
- 11 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.
- 12 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.
- 13 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.
- 14 The Court notes that:
  - (1) the Respondent, Woollahra Municipal Council, as the relevant consent authority, has agreed, under cl 55 of the Environmental Planning and Assessment Regulation 2000, to the Applicant amending the application for development consent (DA69/2021);
  - (2) the Applicant has uploaded the amended application on the NSW planning portal on 29 October 2021; and
  - (3) the Applicant filed the amended application with the Court on 1 November 2021.

## **Orders**

- 15 The Court orders:
  - (1) the Applicant is to pay the Respondent's costs thrown away pursuant to s 8.15(3) of the EP&A Act as a result of the amendment to the development application, as agreed or assessed;



- (2) the Applicant's written request under cl 4.6 of the Woollahra Local Environmental Plan 2014 (LEP) to vary the height of buildings development standard under cl 4.3 of the LEP is upheld;
- (3) the appeal is upheld.
- (4) development application DA69/2021 seeking approval for demolition of the existing buildings and construction of a mixed-use development comprising residential and commercial uses at 2 and 4-10 Bay Street and 294-296 and 298 New South Head Road, Double Bay and contained in Lots 24 and 25 in DP4606, Lot 100 in DP712017, and Lots B and C in DP955406 is approved subject to the conditions set out in Annexure A.

16 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 \(951076, pdf\)](#)

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