



## Land and Environment Court New South Wales

**Medium Neutral Citation:**

**Doonside Holdings Pty Ltd v Woollahra Municipal Council [2021] NSWLEC 1736**

**Hearing dates:**

Conciliation conference 26 November 2021

**Date of orders:**

6 December 2021

**Decision date:**

06 December 2021

**Jurisdiction:**

Class 1

**Before:**

Dickson C

**Decision:**

The Court orders that:

- 1) The appeal is upheld
- 2) Development Application DA/40/2021/1 seeking approval for the substantial demolition of the existing commercial building and construction of new upper levels resulting in a five storey commercial building on 55 Bay Street, Double Bay (Lot 1 DP796750) is approved subject to the conditions set out in Annexure A.
- 3) The Applicant is to pay the Respondent's costs thrown away pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 in the agreed amount of \$12,250.00 to be paid within 28 days of these orders.

**Catchwords:**

DEVELOPMENT APPLICATION: partial demolition of an existing commercial building – construction of new upper floors – amended plans – agreement between the parties – orders.

**Legislation Cited:**

Environmental Planning and Assessment Act 1979, ss 4.15, 4.46, 8.7, 8.15

Environmental Planning and Assessment Regulation 2000, cl 55

Land and Environment Court Act 1979, s 34

State Environmental Planning Policy No 55—Remediation of Land, cl 7

Water Management Act 2000

Woollahra Local Environmental Plan 2014, cl 2.7, 4.3, 4.4, 4.6, 5.21, 6.1, 6.2

**Texts Cited:** Waverly Community Participation Plan 2019

**Category:** Principal judgment

**Parties:** Doonside Holdings Pty Ltd (Applicant)  
Woollahra Municipal Council (Respondent)

**Representation:** Counsel:  
A Boskovitz (Applicant)  
S Symington (Respondent)

Solicitors:  
Boskovitz Lawyers (Applicant)  
Lindsay Taylor Lawyers (Respondent)

**File Number(s):** 2021/120468

**Publication restriction:** No

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## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7 of the Environmental Planning and Assessment Act 1979 (EPA Act) by Doonside Holdings Pty Ltd (Applicant) against actual refusal of Development Application No. DA/40/2021/1 by Woollahra Municipal Council (the Respondent) on 17 June 2021. The development application seeks consent for substantial demolition of the existing commercial building, and construction of new upper levels for a new commercial building. The development is proposed at 55 Bay Street, Double Bay (Lot 1 DP 796750).
- 2 The Court arranged a conciliation conference under s 34(1) of the Land and Environment Court Act 1979 (the LEC Act) between the parties, which was held on 2 September 2021. The parties failed to reach agreement and on 23 September 2021, the conciliation was terminated, and the matter was listed for hearing.
- 3 By request of the parties the matter was listed for a further s 34 conciliation conference on 26 November 2021. I presided over this conciliation conference. The decision agreed upon by the parties is that the appeal is upheld, and the development application is approved, subject to the conditions of consent annexed to this judgment.
- 4 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I have formed this state of satisfaction for the following reasons:
  - (1) By reference to the development application form filed with the Class 1 Application, Owner's consent has been given to the Applicant for lodgement of the Development Application.

- (2) The Woollahra Local Environmental Plan 2014 (LEP 2014) applies to the site. Pursuant to LEP 2014 the site is zoned B2 Local Centre. The proposed development is for the purpose of commercial premises which is a permitted use in the zone. Demolition is permissible pursuant to cl 2.7 of LEP 2014. In determining the development application, I have had regard to the objectives of the zone.
- (3) Pursuant to cl 4.3 of LEP 2014 the maximum height standard applicable to the site is 18.1m. The amended plans seek a variation to the maximum height standard, limited to the extent of the lift overrun which has a maximum height of 18.7m. On the following basis I am satisfied that consent should be granted notwithstanding the contravention of the height development standard.
- (a) I am satisfied that the written request dated November 2021, lodged pursuant to cl 4.6 of the LEP 2014, adequately establishes sufficient environmental planning grounds that justify the breach in the height development standard, by demonstrating that the breach allows for a lift to be provided to give equitable access to the occupants, the additional height is compatible with the desired future character of the locality, the facilitation of the retention and reuse of the building and the urban design benefits arising from the articulated façade.
  - (b) I am also satisfied that the written request demonstrates that compliance with the standard is unreasonable and unnecessary given that the proposal is consistent with the objectives of the standard notwithstanding the non-compliance. I note the submissions of the objectors in relation to view impacts arising from the proposed development, but on the basis of the development application information I am able to be satisfied that the proposed development is consistent with the objectives of the standard, including objective (d) namely, 'to minimise the impacts of new development on adjoining or nearby properties from disruption of views, loss of privacy, overshadowing or visual intrusion', for the reasons provided in the written request.
  - (c) Further, I am satisfied, based on the content of the written request, that the proposal is in the public interest because it is consistent with the objectives of the zone and of the standard.
  - (d) The states of satisfaction required by cl 4.6 of LEP 2014 have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the height control.
- (4) Pursuant to cl 4.4 of LEP 2014 the maximum floor space ratio (FSR) applicable to the site is 3:1. The amended plans seek a variation to the FSR standard of 0.5:1. On the following basis, I am satisfied that consent should be granted notwithstanding the contravention of the FSR development standard.

- (a) I am satisfied that the written request dated November 2021, lodged pursuant to cl 4.6 of the LEP 2014, adequately establishes sufficient environmental planning grounds that justify the breach in the FSR development standard by demonstrating that the grounds advanced in the request are sufficient and they focus in the aspect of the development that contravenes the standard. .
  - (b) I am also satisfied that the written request demonstrates that compliance with the standard is unreasonable and unnecessary given that: firstly, the proposal is consistent with the objectives of the standard notwithstanding the non-compliance; and secondly, the underlying purpose would be thwarted if compliance was required. I am satisfied, for the reasons given in the written request, that the state of satisfaction required by cl 4.6(3)(a) is met.
  - (c) Further, I am satisfied, based on the content of the written request, that the proposal is in the public interest because it is consistent with the objectives of the zone and of the standard.
  - (d) The states of satisfaction required by cl 4.6 of LEP 2014 have been reached and there is therefore power to grant development consent to the proposed development notwithstanding the breach of the FSR control.
- (5) Clause 5.21 of the LEP 2014, concerning flood planning, applies to the site, and development consent must not be granted unless the Court, exercising the functions of the consent authority, is satisfied of the matters in cl 5.21(2). The development application was accompanied by a Flood Study and Flood Risk Management Plan, prepared by Martens Consulting Engineering dated 29 January 2021. Based on the contents of those documents, I have considered the matters in cl 5.21(3) of the LEP 2014 and I am satisfied of the matters in cl 5.21(2).
- (6) The site is mapped as being affected by Class 1 acid sulfate soils on the Acid Sulfate Soils Map referred to in cl 6.1(2) of LEP 2014. The development application (as amended) is accompanied by a Geotechnical Report prepared by Geotechnique Pty Ltd, dated 20 January 2021. The report concludes that excavation works may proceed without the need for an Acid Sulfate Soils Management Plan. The development application satisfies cl 6.1 of LEP 2014
- (7) Clause 6.2 'Earthworks' of LEP 2014 applies to the site. After reviewing the documents supporting the development application, I am satisfied that the proposed development meets the requirements of cl 6.2(3) of LEP 2014.
- (8) Consideration has been given as to whether the subject site is contaminated as required by cl 7(1) of State Environmental Planning Policy No 55—Remediation of Land. Based on the historical use of the site as commercial office premises, it is considered unlikely that the site will require remediation works. However, the

Council has identified that the existing building may contain hazardous building materials that may have been used in the construction of the building, and recommended that a hazardous building materials survey be undertaken to ensure that the premises is safe with respect to hazardous materials during demolition and building works, and prior to occupation. Appropriate conditions of consent have been agreed to by the parties, and I accept that the site will be suitable for the proposed development.

- (9) The proposed development is integrated development pursuant to s 4.46 of the EPA Act as a Water Supply Work Approval is required under the *Water Management Act 2000*. The development application was referred to Water NSW who provided General Terms of Approval on 12 May 2021. These conditions are included in the annexed conditions of consent.
- (10) The application was notified in accordance with the relevant development control plan, and I am satisfied that the submissions have been considered in the determination of the development application: s 4.15(1)(d) of the EPA Act. I note that the amended development application was not notified by the Council as they determined, consistent with the Waverley Community Participation Plan, that the nature, scale and likely impact of the development did not warrant renotification. In particular, the Respondent notes that the Council formed the opinion that the change(s) resulted in lesser impact.

5 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).

6 In making the orders to give effect to the agreement between the parties, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.

7 The Court notes that:

- (1) 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 before the Court (Development Application DA40/2021/1).
- (2) The Respondent uploaded the amended application to the NSW Planning Portal on 23 November 2021 (Ref PEH-881).
- (3) The Applicant has filed the amended application with the Court.

8 The Court orders that:

- (1) The appeal is upheld.
- (2)

Development Application DA/40/2021/1 seeking approval for the substantial demolition of the existing commercial building and construction of new upper levels resulting in a five storey commercial building on 55 Bay Street, Double Bay (Lot 1 in DP 796750) is approved subject to the conditions set out in Annexure A.

- (3) The Applicant is to pay the Respondent's costs thrown away pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* in the agreed amount of \$12,250.00 to be paid within 28 days of these orders.

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**D M Dickson**

**Commissioner of the Court**

([Annexure A](#))([823923.pdf](#))

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Decision last updated: 06 December 2021