



Land and Environment Court
New South Wales

Case Name: SF Ultimate Investment Pty Ltd v Woollahra Municipal Council

Medium Neutral Citation: [2022] NSWLEC 1049

Hearing Date(s): Conciliation conference on 23 November 2021 and 28 January 2022

Date of Orders: 4 February 2022

Decision Date: 4 February 2022

Jurisdiction: Class 1

Before: Horton C

Decision: The Court orders that:
(1) The Court, exercising under s 39(2) of the Land and Environment Court Act 1979 the function of Woollahra Municipal Council as the relevant consent authority under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, agrees to the Applicant amending Development Application DA 452/2020 in accordance with the amended plans and other documents at Annexure A.
(2) The Applicant's amended written request under clause 4.6 of the Woollahra Local Environmental Plan 2014 ('WLEP'), prepared by GSA Planning dated November 2021 seeking a variation of the development standard for FSR under clause 4.4 of the WLEP, is upheld.
(3) The Applicant's amended written request under clause 4.6 of the WLEP, prepared by GSA Planning dated November 2021 seeking a variation of the development standard for height under clause 4.3 of the WLEP, is upheld.
(4) The appeal is upheld.
(5) Development Application No. DA452/2020 for

demolition of the existing structure and construction of a mixed use development at 10 Cross Street Double Bay is approved subject to the conditions at Annexure B.

Catchwords: DEVELOPMENT APPLICATION – residential flat building – shop top housing development – conciliation conference – agreement between parties – orders

Legislation Cited: Architects Act 2003
Environmental Planning and Assessment Act 1979, s 8.7
Environmental Planning and Assessment Regulation 2000, cl 50, 55
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Infrastructure) 2007, cl 102
State Environmental Planning Policy No 55 – Remediation of land, cl 7
State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development, cl 28, 30
Woollahra Local Environmental Plan 2014, ss 4.3, 4.4, 4.6, 5.10, 5.21, 6.1, 6.2

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal Council (2018) 236 LGERA 256; [2018] NSWLEC 118

Texts Cited: Woollahra Development Control Plan 2015
NSW Department of Planning and Environment, Apartment Design Guide, (July 2015)

Category: Principal judgment

Parties: SF Ultimate Investment Pty Ltd (Applicant)
Woollahra Municipal Council (Respondent)

Representation: Counsel:
I Hemmings SC (Applicant)
K Mortimer (Solicitor) (Respondent)

Solicitors:
Mills Oakley (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2021/157078

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This Class 1 appeal 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 the Woollahra Municipal Council (the Respondent) of Development Application DA 452/2020 seeking development consent for the partial demolition of an existing single and two storey building and construction of a new six storey shop top housing development at 10 Cross Street, Double Bay (the site).
- 2 The matter was initially listed before me for hearing on 23 November 2021. However, prior to the hearing, the parties advised the Court that the Applicant had prepared amended plans, and on that basis the parties had reached in-principle agreement as to the terms of an agreement that would be acceptable to the parties.
- 3 Accordingly, the matter was re-allocated to me under s 34 of the *Land and Environment Court Act 1979* (LEC Act), and the conciliation conference was held on 23 November 2021, at which I presided.
- 4 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. A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 23 November 2021.
- 5 The Court subsequently identified certain matters for which it required evidence in order to be satisfied that the parties' decision is a decision that the Court could have made in the proper exercise of its functions, and the conciliation was adjourned for this purpose.
- 6 The further evidence sought by the Court was provided by the parties on 28 January 2022, and a further signed agreement was filed with the Court on 31 January 2022.

- 7 The parties ask me to approve their decision as set out in the s34 agreement before the Court. In general terms, the agreement approves the development subject to amended plans that were prepared by the Applicant, and noting that the final detail of the works and plans are specified in the agreed conditions of development consent annexed to the s34 agreement.
- 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. The parties explained to me during the conference as to how the requirements of the relevant environmental planning instruments have been satisfied in order to allow the Court to make the agreed orders at [37].
- 9 The site is located within the B2 Local Centre zone according to the Woollahra Local Environmental Plan 2014 (WLEP), in which shop top housing development is permitted with consent, where the proposed development is consistent with the following objectives for development in the zone:
- 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.

The proposed development exceeds development standards

- 10 The proposed development is at a maximum height of 20.6m, which exceeds the height of building development standard applicable to the site under cl 4.3 of the WLEP by 5.9m. The Applicant relies upon a written request prepared by GSA Planning in accordance with cl 4.6 of the WLEP and dated November 2021 (the height request).
- 11 The objectives of cl 4.3 of the WLEP are as follows:

- (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.

- 12 The proposed development also exceeds the floor space ratio (FSR) permitted on the site under cl 4.4 of the WLEP and the Applicant relies upon a written request prepared by GSA Planning, dated November 2021, in accordance with cl 4.6 of the WLEP.
- 13 Clause 4.4(2) of the WLEP permits a FSR of 2.5:1, and the proposed FSR is expressed as 3.07:1.
- 14 As the objectives of the FSR control are virtually identical to those in respect of height, the grounds on which the FSR request are founded are also similar and so it is appropriate to consider the written requests together.
- 15 The relevant objectives of cl 4.4 of the WLEP are:
 - ...
 - (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.
- 16 The height request seeks to justify the contravention of the height control on the grounds that compliance with the control is unreasonable or unnecessary because the objectives of the standard above are achieved notwithstanding the non-compliance for the following reasons:
 - (1) The height, bulk and scale are consistent with the desired future character of the neighbourhood when the provisions of the WLEP that define the desired future character are considered.
 - (2) Three properties within the immediate vicinity, subject to the same controls, have been approved with heights ranging from 20.7m-21.21m, and recent approval of a six-storey building opposite the site has a similar variation in height. The FSR of the same developments are expressed as 3.29:1 to 3.54:1. This demonstrates approval by the consent authority of development in the neighbourhood that varies from the controls yet forms the desired future character.

- (3) The proposal is also consistent with the relevant objectives at Part D5.4.7 of the Woollahra Development Control Plan 2015 that seeks to retain street level connections to Knox Lane; permit four storeys on 50% of the Knox Lane frontage; encourage outdoor eating and gathering, and with Part D5.4.9 of the WDCP to retain and enhance the spatial definition of Knox Lane, and to retain and enhance connections between Cross Street and Knox Lane.
 - (4) The exceedance in height and FSR result in additional shadow over parts of the building to the south of the site, at No 3 Knox Street that will nevertheless still receive 4.5 hours of sunlight. Likewise, additional shadow cast onto Goldman Lane by the exceedance is negligible when the area of shadow cast by the complying portions of the proposed development are considered.
 - (5) Privacy and visual privacy are managed by locating new private open space to Cross Street and Knox Lane, and by setting back terraces to minimise overlooking.
- 17 The height request also sets out reasons why the underlying objective would be defeated if compliance was required, and because the height and FSR controls have been virtually abandoned. However, as shown by Preston CJ in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118, at [22], an Applicant does not need to establish all of the ways that compliance may be unreasonable or unnecessary and it may be sufficient to establish only one way. For the reasons set out in the height and FSR requests, I accept the objectives of the controls are achieved.
- 18 Next the height and FSR requests set out the following environmental planning grounds it asserts are sufficient to justify the contravening of the relevant control:
- (1) Firstly, for the reasons advanced at [10], supported by statements in the Urban Design Report prepared by AE Design Partnership dated 28 October 2020, the proposal is consistent with the desired future character of the area.
 - (2) Secondly, a complying development of 14.7m height would result in a development of a scale and form that is discordant with the desired future character of the area.
 - (3) Thirdly, the built form that exceeds the height and FSR controls maintains the solar access and privacy of adjoining and surrounding properties.
 - (4) Fourthly, the proposed development facilitates orderly and economic use of an undeveloped site with a development of a scale that is

compatible with surrounding development, in accordance with the objects of the EPA Act.

- 19 I accept the grounds summarised above are sufficient environmental planning grounds to justify the contravention, and I am therefore satisfied that the height and FSR requests adequately address the matters required to be demonstrated by cl 4.6(3) of the WLEP.
- 20 Likewise, I am satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the height and FSR controls, as stated at [11], and because it is consistent with the objectives for development in the B2 zone for the reasons that follow:
- (1) The proposed development includes five retail tenancies on the ground floor to serve the needs of people who live in, work in, and visit the local area and to provide an active ground floor frontage.
 - (2) The site is in a highly accessible location, and encourages employment in accessible locations by virtue of the at-grade access to ground floor tenancies.
 - (3) By demonstrating compatibility with the height and scale of developments approved at No's 16-34 Cross Street, the proposal is consistent with the desired future character of the neighbourhood.
- 21 In considering whether the height and FSR requests should be upheld, I have considered the matters to which the Secretary would have regard in granting their concurrence at cl 4.6(5) of the WLEP and find no grounds on which concurrence would be withheld.
- 22 While the site is not identified as an item of heritage significance, and is not located within a Heritage Conservation Area, the site is located in the vicinity of the Transvaal Avenue Heritage Conservation Area. I accept the conclusions on the Heritage Impact Statement prepared by Damian O'Toole dated December 2021 that the site is too far removed from the relevant Heritage Conservation Area to have a meaningful impact and for this reason I consider the proposed development acceptable under cl 5.10(4) of the WLEP.
- 23 The site is identified as flood affected. On the basis of the Stormwater and Flood Risk Management Report prepared by Stronghold Engineers dated 27 November 2020, the Supplementary Flood Risk Management Plan prepared by Martens Consulting Engineers dated 12 November 2021, and agreement of the

parties' experts that the requirements of cl 5.21 of the WLEP are satisfied by Condition C.14 of the agreed conditions of consent, I am also satisfied as to those matters at cl 5.21(2).

- 24 On the basis of the Preliminary Geotechnical and Hydrogeological Investigation Report, prepared by Alliance Geotechnical dated 14 December 2020, the Acid Sulfate Soil Management Plan prepared by Martens Consulting Engineers dated November 2021, and Condition E.19 of the agreed conditions of consent, I accept that the provisions of cl 6.1 of WLEP are satisfied.
- 25 I have considered the recommendations contained in Section 5 of the amended Geotechnical and Hydrogeological Investigation Report prepared by Alliance Geotechnical dated 14 October 2021, and the terms of Condition C.12 of the agreed conditions of consent which I find addresses the matters for consideration in respect of earthworks at cl 6.2(3) of the WLEP.

State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65)

- 26 As the proposal is for shop top housing comprising residential apartment development, the provisions of SEPP 65 apply.
- 27 Clause 28 of SEPP 65 requires a consent authority to take into consideration, in addition to any other matters that are required to be, or may be, taken into consideration, the following:
- (a) the advice (if any) obtained from the design review panel, and
 - (b) the design quality of the development when evaluated in accordance with the design quality principles, and
 - (c) the Apartment Design Guide.
- 28 The Respondent has, for whatever reason, not constituted a design review panel within the meaning of SEPP 65 by whose advice the Court can be assisted.
- 29 However, where an application relates to residential apartment development, cl 50(1A) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation) requires a development application to be accompanied by a statement by a qualified designer, defined at cl 3 of the EPA Regulation as a person registered as an architect in accordance with the *Architects Act 2003*.

- 30 The statement must conform to the provisions of cl 50(1AB) of the EPA Regulation, which include attestations in relation to cl 28(2)(b) and (c) of SEPP 65. I am satisfied that the statement provided by Mr Yiou Tan (Reg No.9334) is in a complying form and adequately demonstrates that the development is consistent with the design quality principles, objectives and design criteria of the Apartment Design Guide.
- 31 On the basis of the design statement prepared by Mr Tan, I am also of the opinion that the proposal is consistent with those standards at cl 30 that cannot be used as grounds to refuse development consent, and I consider that adequate regard has been had to the design quality principles and to the objectives specified in the Apartment Design Guide, in accordance with cl 30(2) of SEPP 65.

State Environmental Planning Policy (Infrastructure) 2007 (Infrastructure SEPP)

- 32 As the proposed development is for residential accommodation located close to South Head Road, cl 102 of the Infrastructure SEPP requires measures to be taken to ensure that certain acoustic levels are not exceeded.
- 33 On the basis of Condition C.16 of the agreed conditions of consent at Annexure A, I am satisfied that appropriate measures will be taken to ensure that the acoustic levels in any bedroom, and in other areas of the proposed development, other than a garage, kitchen, bathroom or hallway, will comply with the levels set out at cl 102(3)(a) and (b) of the Infrastructure SEPP.

State Environmental Planning Policy No 55 – Remediation of land

- 34 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 Preliminary Site Investigation dated December 2021, prepared by Martens and the conclusions reached in the Remedial Action Plan of the same author dated January 2022, I am satisfied that the site can be made suitable for the proposed development, subject to implementing a Remedial Action Plan, that is the subject of the agreed conditions of consent.

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

35 I am satisfied that the application is accompanied by a BASIX certificate (Cert No. 1141999M_02), prepared by Gradwell Consulting dated 19 November 2021 in accordance with State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 and the EPA Regulation.

Orders

36 The Court notes that:

- (1) The Applicant has filed the amended application with the Court.
- (2) The Applicant lodged the amended application on the NSW planning portal on 23 November 2021 and 28 January 2022.

37 The Court orders that:

- (1) The Court, exercising under s 39(2) of the Land and Environment Court Act 1979 the function of Woollahra Municipal Council as the relevant consent authority under cl 55(1) of the Environmental Planning and Assessment Regulation 2000, agrees to the Applicant amending Development Application DA 452/2020 in accordance with the amended plans and other documents at Annexure A.
- (2) The Applicant's amended written request under clause 4.6 of the Woollahra Local Environmental Plan 2014 ('WLEP'), prepared by GSA Planning dated November 2021 seeking a variation of the development standard for FSR under clause 4.4 of the WLEP, is upheld.
- (3) The Applicant's amended written request under clause 4.6 of the WLEP, prepared by GSA Planning dated November 2021 seeking a variation of the development standard for height under clause 4.3 of the WLEP, is upheld.
- (4) The appeal is upheld.
- (5) Development Application No. DA452/2020 for demolition of the existing structure and construction of a mixed use development at 10 Cross Street Double Bay is approved subject to the conditions at Annexure B.

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T Horton

Commissioner of the Court

[Annexure A \(132313, pdf\)](#)

[Annexure B \(828126, pdf\)](#)

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