



Land and Environment Court

New South Wales

Case Name: Roseville Returned Servicemen's Memorial Club Ltd v Ku-ring-gai Council

Medium Neutral Citation: [2021] NSWLEC 1198

Hearing Date(s): Conciliation conference on 9 April 2021

Date of Orders: 27 April 2021

Decision Date: 27 April 2021

Jurisdiction: Class 1

Before: Chilcott C

Decision: The Court orders that:

- (1) The applicant is granted leave to amend the development application and rely on the following drawings:
 - a. DA100, Basement 3 Plan, revision J prepared by PBD Architects dated 11 February 2021;
 - b. DA101, Basement 2 Plan, revision J prepared by PBD Architects dated 11 February 2021; and
 - c. DA102, Basement 1 Plan, revision J prepared by PBD Architects dated 11 February 2021.
- (2) The Applicant's written request under clause 4.6 of the Ku-ring-gai Local Environmental Plan (Local Centres) 2012 (KLEP) dated May 2020 seeking a variation of the development control for floor space ratio set out in clause 4.4 of the KLEP is upheld.
- (3) The Applicant's written request under clause 4.6 of KLEP dated May 2020 seeking a variation of the development control for height of buildings set out in clause 4.3 of KLEP is upheld.
- (4) The appeal is upheld.
- (5) Development Application DA0134/18 for the demolition of the existing club and construction of shop top housing consisting of ground floor club and

residential dwellings above, with basement parking is approved subject to the conditions set out in Annexure “A”.

Catchwords:	DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979, ss 4.16 and 8.7(1) Environmental Planning and Assessment Regulation 2000, s 77 Land and Environment Court Act 1979, s 34(3) Ku-ring-gai Local Environmental Plan (Local Centres) 2012, cl 2.3, 4.3, 4.4, 4.6, 6.2, 6.3 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, cl 3 State Environmental Planning Policy No 55— Remediation of Land, cl 7(1)
Texts Cited:	Land and Environment Court of New South Wales COVID-19 Pandemic Arrangements Policy (July 2020) Ku-ring-gai Local Centres Development Control Plan 2017
Category:	Principal judgment
Parties:	Roseville Returned Servicemen’s Memorial Club Ltd (Applicant) Ku-ring-gai Council (Respondent)
Representation:	Counsel: A Gadiel (Solicitor) (Applicant) J Smith (Respondent) Solicitors: Mills Oakley (Applicant) Sparke Helmore Lawyers (Respondent)
File Number(s):	2019/368599
Publication Restriction:	No

JUDGMENT

- 1 **COMMISSIONER:** Roseville Returned Servicemen’s Memorial Club Ltd (the Applicant) has appealed the deemed refusal (later approved) by Ku-ring-gai

Council (the Respondent) of its development application (DA0134/18) seeking consent for demolition of the existing club and construction of a mixed use development including a ground floor RSL Club, shop-top housing with 33 residential dwellings, basement car parking, with associated works and subdivision of land (the Proposed Development) at 62-66 Pacific Highway, Roseville (the Subject Site).

- 2 The Subject Site is zoned part B2 Local Centre and part RE1 Public Recreation under the provisions of cl 2.3 of Ku-ring-gai Local Environmental Plan (Local Centres) 2012 (KLEP).
- 3 The proposed new mixed use building that forms part of the Proposed Development is proposed to be situated on land zoned B2 Local Centre and is permissible within that land.
- 4 The lot at 62 Pacific Highway includes land zoned both RE1 and B2. The portion of the lot zoned RE1 is the site of the Roseville Memorial Park. The Proposed Development includes the proposed subdivision of the lot at 62 Pacific Highway to separate the RE1 zoned land from the land on the lot that is zoned B2, in order to situate the Roseville Memorial Park on its own lot all of which would be zoned RE1.
- 5 The Applicant's development application DA0134/18 is made with owners' consent.
- 6 The appeal comes to the Court pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EP&A Act) and falls within Class 1 of the Court's jurisdiction. The proceedings are determined pursuant to the provisions of s 4.16 of the EP&A Act.
- 7 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 9 April 2021, and I presided over the conciliation conference.
- 8 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 at the commencement of the conciliation conference.

- 9 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.
- 10 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.
- 11 The Parties have advised that there are jurisdictional matters that must be satisfied in order for the Court to have power to grant consent to the Proposed Development, and that these requirements have been satisfied as follows:
 - (1) In relation to the provisions of State Environmental Planning Policy No 55 - Remediation of Land (SEPP55), the Parties have confirmed that, on the basis of its previous use and information available to them, the Subject Site is not subject to any contamination, and would be suitable for its intended as a mixed use development. I am satisfied that, as required under the provisions of cl 7(1) of SEPP55, the Subject Site will be suitable for its proposed future residential use and use as a continuing club facility.
 - (2) In relation to the provisions of KLEP, the Parties have confirmed, and I accept, that the Applicant's development application (as amended) satisfies all applicable provisions of KLEP, and where required, this satisfaction is supported through the imposition of conditions of consent within Annexure "A" to this judgment. In particular, the Parties have confirmed, and I accept, that the following specific provisions of KLEP have been addressed by the Applicant's Proposed Development (as amended):
 - (a) clause 2.3(2) of KLEP requires that the consent authority, or the Court on appeal, should have regard to the objectives of the B2 Local Centre and RE1 Recreation zoning of the Subject Site in relation to the Proposed Development. Development for the purposes of a mixed use development is permissible in B2 Local Centre zone, and the memorial garden is a permissible on-going use of the land zoned RE1 Public Recreation. I am satisfied that regard has been had to the objectives of the B2 and RE1 zones by the Parties in relation to the Proposed Development;
 - (b) clause 4.6 of KLEP provides for exceptions to development standards, and in relation to this:
 - (i) the Applicant relies on a written request prepared pursuant to cl 4.6 of KLEP to vary the development standard for the height of buildings (HoB), as would otherwise apply under cl 4.3(2) of KLEP. This request is

entitled 'Clause 4.3 Variation Request, Ku-ring-gai Local Environmental Plan (Local Centres) 2012 Height of Buildings Development standard' and is dated May 2020.

- (ii) the Applicant also relies on a written request prepared pursuant to cl 4.6 of KLEP to vary the development standard for floor space ratio (FSR), as would otherwise apply under cl 4.4(2) of KLEP. This request is entitled 'Clause 4.4 Variation Request, Ku-ring-gai Local Environmental Plan (Local Centres) 2012 Floor Space Ratio' and is dated May 2020;
 - (iii) both written requests satisfy the requirements of cl 4.6(3) of KLEP in that they demonstrate, to my satisfaction, that compliance with each of the HoB and FSR development standards in KLEP is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening those development standards;
 - (iv) both written requests have also demonstrated, to my satisfaction, that the Proposed Development is consistent with the objectives for development within the zone in which the development is proposed to be carried and so the provisions of cl 4.6(4)(a) of KLEP are satisfied;
 - (v) the provisions of clause 4.6(4)(b) of KLEP are satisfied as the concurrence of the Secretary of the Department of Planning, Industry and Environment is to be assumed pursuant to the provisions of cl 64 of the Environmental Planning and Assessment Regulation 2000 (EP&A Regulation);
 - (vi) as a consequence of my findings above (at [(iii)], [(iv)], and [(v)]) the Applicant's written requests have satisfied the relevant provisions of cl 4.6 of KLEP such that its requests to vary the HoB and FRS development standards applicable to development on the Subject Site under cl 4.3 and 4.4 of KLEP are justified, and their written requests should be upheld.
 - (vii) I also note that, pursuant to the provisions of cl 4.6(5) of KLEP, it is the Parties' assessment that the contravention of the development standard does not raise any matter of significance for State or regional environmental planning and there is no public benefit of maintaining the development standard in the present circumstances.
- (3) Clause 6.2(2) of KLEP concerns stormwater and water sensitive urban design, and in relation to this the Parties advise, and I am satisfied, that:
- (a) civil engineering drawings have been prepared by Jones Nicholson Consulting Engineers dated 10 September 2019, and

water sensitive urban design principles have been incorporated into the design of the Proposed Development;

- (b) riparian, stormwater and flooding mitigation measures have been integrated within the Proposed Development;
 - (c) the Applicant's proposed stormwater management system includes all reasonable management actions to avoid any adverse impacts on the land on which the Proposed Development is to be carried out, as well as in relation to adjoining properties, native bushland, waterways and groundwater systems;
 - (d) the Proposed Development minimises and mitigates the potential adverse impacts of stormwater runoff on adjoining properties, native bushland, waterways and groundwater systems
- (4) Clause 6.6(3) of KLEP concerns ground floor development in business zones, and in relation to this the Parties advise, and I am satisfied, that:
- (a) a Statement of Environmental Effects has been prepared by City Plan dated 11 April 2018 (the SEE), and as confirmed on page 26 of the SEE the ground floor of the Proposed Development:
 - (i) will not be used for the purpose of residential accommodation or a car park to provide ancillary car parking spaces; and
 - (ii) will provide uses and building design elements that encourage interaction between the inside of the building and the external public areas adjoining the building.
- (5) Consistent with the provisions of cl 3 of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, and the EP&A Regulation, a BASIX Certificate (Certificate number: 908539M_05 issued on 29 May 2020) has been submitted in relation to the development application, as amended. The Certificate identifies that the development complies with applicable water, thermal comfort and energy targets;
- (6) The Proposed Development has been notified consistent with the provisions of Ku-ring-gai Local Centres Development Control Plan 2017 (KDCP) and s 77 of the EP&A Regulation, and submissions received in response to that notification have been considered by the Parties in reaching agreement in this appeal.

12 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.

13 Having considered the advice of the Parties, provided above at [11], 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.

- 14 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.
- 15 As the Parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the Parties' decision.
- 16 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.
- 17 The Court orders that:
- (1) The Applicant is granted leave to amend the development application and rely on the following drawings:
 - (a) DA100, Basement 3 Plan, revision J prepared by PBD Architects dated 11 February 2021;
 - (b) DA101, Basement 2 Plan, revision J prepared by PBD Architects dated 11 February 2021; and
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 - (3) The Applicant's written request under clause 4.6 of KLEP dated May 2020 seeking a variation of the development control for height of buildings set out in clause 4.3 of KLEP is upheld.
 - (4) The appeal is upheld.
 - (5) Development Application DA0134/18 for the demolition of the existing club and construction of shop top housing consisting of ground floor club and residential dwellings above, with basement parking is approved subject to the conditions set out in Annexure "A".

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M Chilcott

Commissioner of the Court

Annexure A (451946, pdf)

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