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| Case Name: | Coles Group Property Developments Ltd v Ku-ring-gai Council |
| Medium Neutral Citation: | [2019] NSWLEC 1400 |
| Hearing Date(s): | Conciliation conference on 22 May 2019 |
| Date of Orders: | 29 August 2019 |
| Decision Date: | 29 August 2019 |
| Jurisdiction: | Class 1 |
| Before: | Walsh C |
| Decision: | The Court orders: (1)   Leave is granted to the Applicant to rely upon the amended plans listed in Condition 1 at Annexure ‘A’. (2)   Pursuant to section 8.15(3) of the Environmental Planning and Assessment Act 1979 (“EP&A Act”), the Applicant is to pay those costs of the Respondent that were thrown away as a result of amending the development application in a sum as agreed or assessed. (3)   The Applicant’s written request pursuant to clause 4.6 of the Ku-ring-gai Local Environmental Plan (Local Centres) 2012 (“KLEP 2012”) seeking to justify the breach of the height of buildings development standard pursuant to clause 4.3 of KLEP 2012 dated February 2019 has been considered and I have formed the necessary opinion of satisfaction under clause 4.6(4) of KLEP 2012. Consequently, the Applicant’s written request is well founded and is upheld. (4)   The appeal in respect of the property known as 376-390 Pacific Highway, 1 Balfour Street and Balfour Lane, Lindfield, is upheld. (5)   Development Application DA0197/18 for lot consolidation, demolition of the existing supermarket, partial demolition of heritage item, relocation of Balfour Lane and construction of a 6 storey mixed use building comprising shop top housing including 70 apartments, supermarket, liquor store, coffee shop, offices (first floor of heritage item), car parking and associated works at 376-390 Pacific Highway, 1 Balfour Street and Balfour Lane, Lindfield, is approved subject to the conditions at Annexure “A”. |
| Catchwords: | DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders |
| Legislation Cited: | Environmental Planning and Assessment Act 1979 Environmental Planning and Assessment Regulation 2000 Ku-ring-gai Local Environmental Plan (Local Centres) 2012 Land and Environment Court Act 1979 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy No 55 – Remediation of Land State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development |
| Cases Cited: | Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 |
| Category: | Principal judgment |
| Parties: | Coles Group Property Developments Ltd (Applicant) Ku-ring-gai Council (Respondent) |
| Representation: | Counsel: N Brunton (Solicitor) (Applicant) J Ede (Solicitor) (Respondent)   Solicitors: Norton Rose Fulbright (Applicant) Wilshire Webb Staunton Beattie Lawyers (Respondent) |
| File Number(s): | 2018/391613 |
| Publication Restriction: | No |

Judgment

1. **COMMISSIONER**:These proceedings are an appeal brought under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (“EP&A Act”) against Ku-ring-gai Council's refusal of Development Application No. DA 0197/18 for lot consolidation, demolition of the existing supermarket, partial demolition of heritage item, relocation of Balfour Lane and construction of a 6 storey mixed use building comprising shop-top housing including 70 apartments, supermarket, liquor store, coffee shop, offices, car parking and associated works at 376-390 Pacific Highway, 1 Balfour Street and Balfour Lane, Lindfield.
2. The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* (“LEC Act”), which was held on 22 May 2019, and at which I presided. After the conciliation conference, the parties came to an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties.
3. This decision involved the Court upholding the appeal and granting development consent to the development application subject to conditions.
4. 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.

Jurisdiction

1. The parties’ decision involves the Court exercising the function under s 4.16 of the EP&A Act to grant consent to the development application. The parties outlined jurisdictional matters of relevance in these proceedings. In regard to jurisdiction, I note the following:
2. In relation to the applicable Ku-ring-gai Local Environmental Plan (Local Centres) 2012 (“KLEP”):
3. the site falls within the B2 Local Centre zone and shop-top housing, as proposed, is permissible development within the zone;
4. the development contravenes the height of buildings standard at cl 4.3 of the KLEP, with the respondent indicating, by way of the agreement, it is satisfied with this contravention in the circumstances (I need to be directly satisfied in regard to this matter and this is considered below);
5. the development complies with the floor space ratio standard at cl 4.4 of the KLEP;
6. appropriate consideration has been given to earthworks (under cl 6.1 of the KLEP), and stormwater and water sensitive urban design (cl 6.2 of the KLEP);
7. the proposal meets the requirements in regard to ground floor development in business zones under cl 6.6 of the KLEP, and I am directly satisfied in that regard; and
8. the development complies with the requirements of the minimum street frontages for lots in business zones provision at cl 6.7 of the KLEP.
9. The development is required to comply with the provisions of State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (“SEPP 65”). The requirements of cl 30(2) of SEPP 65 are met in that the Applicants’ architect has prepared a Design Verification Statement in satisfaction of cl 50(1AB) of the Environmental Planning and Assessment Regulation 2000 (“EPA Regulation”). It is noted that under cll 143A and 154A of the EPA Regulation, compliance with SEPP 65 is required.
10. Pursuant to State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004, a BASIX certificate has been submitted by the Applicant. In combination with the conditions of consent, this satisfies the requirements of that instrument.
11. The development is required to comply with the provisions of State Environmental Planning Policy No 55 – Remediation of Land (“SEPP 55”), and in particular cl 7(1) requiring consideration of any contamination and associated required remediation. The Applicant has provided a Phase 1 Environmental Site Assessment Report prepared by Geo-Logix Pty Ltd dated 14 May 2018 in respect of the suitability of the site for the proposed use. In order to satisfy the requirements of SEPP 55, this report recommends that further investigatory works should be completed as a pre-construction certificate consent condition. The parties have agreed to a suitable condition (condition 24) ensuring the further assessment is completed prior to substantive building work being carried out on the site. I am satisfied in regard to cl 7(1) of SEPP 55.

Height of building contravention

1. Clause 4.3 of the KLEP provides a maximum height of buildings of 20.5m for the site. The Applicant seeks a variation to this development standard and has lodged a written request pursuant to cl 4.6 of the KLEP, prepared by City Plan Strategy and Development Pty Ltd, and dated February 2019. I have reviewed the written request. It indicates there are areas along the south-eastern extent of the building that exceed the height standard by up to 2.66 metres, due to the location of edge planters, residential cores, lift over-runs and acoustic louvres. Having reviewed its contents, I am satisfied that the written request has adequately addressed the matters required to be demonstrated, under the relevant provisions of cl 4.6(4)(a)(i) of the KLEP. The reasons for my decision in regard to satisfaction are outlined below (using the findings established in *Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 for decision framing purposes):
2. The written request has adequately demonstrated that compliance with the height development standard is unreasonable or unnecessary in the circumstances of the case. This has occurred through the written request demonstrating that compliance with the objectives of the standard has been achieved, notwithstanding the non-compliance. Specifically, it was demonstrated that:
3. The height of the development is appropriate for the scale of the different centres within the hierarchy of Ku-ring-gai centres in part because of the minor extent of non-compliance and in part because of the relatively isolated instances of non-compliance with this site’s height controls.
4. In particular as a consequence of western boundary setbacks, an appropriate transition in scale between the site and the adjoining lower density residential zones is achieved which protects local amenity. It is indicated that the contraventions bring no material impacts.
5. The proposed built form is compatible with the size of the land to be developed. This is demonstrated by the proposal’s compliance with the applicable FSR control and the minor and/or isolated nature of the height contravention.
6. The written request has also adequately demonstrated that there are sufficient environmental planning grounds to justify contravening the development standard. This is through its indication that the height exceedance in part responds to a planning ambition for, in particular, the north-east corner of the development to play a role as a local landmark, with architectural detailing in response. The written request also submits that a design response to the sloping nature of the site results in some stepping of built form resulting in occasional contravention (with some areas of the building also well under the height control as the built form steps down the hill). It is indicated that some minor additional overshadowing would be cast to the most affected residential units on the south-eastern side of Balfour Street but that these units would retain at least four (4) hours of solar access between 9am and 3pm.
7. In regard to cl 4.6(4)(a)(ii) of the KLEP, I am also directly satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the development standard and the objectives for development of the zone in which the development is proposed to be carried out. I am satisfied directly with the points made in the written submission in regard to the consistency with the objectives of the development standard (see above). In regard to the B2 Local Centre zone objectives, I note the proposal as an integrated, mixed use development with good public transport access and which can provide for housing, employment and for a range of services for local residents and others. In this sense the development seems entirely aligned with the zone objectives.
8. In regard to cl 4.6(4)(b) of the KLEP, it is my view that this proposal does not raise any matters of State or regional significance in planning terms, and as such this provision is of no concern in regard to this proposal.

Conclusion

1. I am satisfied that the parties’ decision is one that the Court could have made in the proper exercise of its functions. As the parties’ decision is a decision that the Court could have so made, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties’ decision. I note that I have had no direct regard to the overall merits of the application in coming to this position.
2. The Court orders:
3. Leave is granted to the Applicant to rely upon the amended plans listed in Condition 1 at Annexure ‘A’.
4. Pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act* 1979 (“EP&A Act”), the Applicant is to pay those costs of the Respondent that were thrown away as a result of amending the development application in a sum as agreed or assessed.
5. The Applicant’s written request pursuant to clause 4.6 of the *Ku-ring-gai Local Environmental Plan* *(Local Centres)* 2012 (“KLEP 2012”) seeking to justify the breach of the height of buildings development standard pursuant to clause 4.3 of KLEP 2012 dated February 2019 has been considered and I have formed the necessary opinion of satisfaction under clause 4.6(4) of KLEP 2012. Consequently, the Applicant’s written request is well founded and is upheld.
6. The appeal in respect of the property known as 376-390 Pacific Highway, 1 Balfour Street and Balfour Lane, Lindfield, is upheld.
7. Development Application DA0197/18 for lot consolidation, demolition of the existing supermarket, partial demolition of heritage item, relocation of Balfour Lane and construction of a 6 storey mixed use building comprising shop top housing including 70 apartments, supermarket, liquor store, coffee shop, offices (first floor of heritage item), car parking and associated works at 376-390 Pacific Highway, 1 Balfour Street and Balfour Lane, Lindfield, is approved subject to the conditions at Annexure “A”.

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P Walsh

Commissioner of the Court

[Annexure A (550 KB)](http://www.caselaw.nsw.gov.au/asset/5dae2fa8e4b0ab0bf607301d.pdf)

[Civil Drawings (7.60 MB)](http://www.caselaw.nsw.gov.au/asset/5d677026e4b0ab0bf60717ac.pdf)

[Landscape Plans Part 1 (9.68 MB)](http://www.caselaw.nsw.gov.au/asset/5d6770d4e4b0ab0bf60717cb.pdf)

[Landscape Plans Part 2 (10.2 MB)](http://www.caselaw.nsw.gov.au/asset/5d6770f8e4b0ab0bf60717f2.pdf)

[Landscape Plans Part 3 (5.53 MB)](http://www.caselaw.nsw.gov.au/asset/5d67711ee4b0ab0bf607181a.pdf)

[Staging Plans (4.57 MB)](http://www.caselaw.nsw.gov.au/asset/5d6772bde4b0ab0bf6071905.pdf)

[Architectural Plans Part 1 (9.80 MB)](http://www.caselaw.nsw.gov.au/asset/5d677178e4b0ab0bf6071844.pdf)

[Architectural Plans Part 2 (9.56 MB)](http://www.caselaw.nsw.gov.au/asset/5d677199e4b0ab0bf607186b.pdf)

[Architectural Plans Part 3 (8.08 MB)](http://www.caselaw.nsw.gov.au/asset/5d6771b5e4b0ab0bf6071891.pdf)

[Architectural Plans Part 4 (10.3 MB)](http://www.caselaw.nsw.gov.au/asset/5d6771d9e4b0ab0bf60718b1.pdf)

[Architectural Plans Part 5 (9.83 MB)](http://www.caselaw.nsw.gov.au/asset/5d6771ffe4b0ab0bf60718da.pdf)

[Subdivision Plan (142 KB)](http://www.caselaw.nsw.gov.au/asset/5d677235e4b0ab0bf6071903.pdf)

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Amendments

22 October 2019 - Annexure A reattached for these proceedings, to correct prior wrong attachment having been uploaded

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