Land and Environment Court

New South Wales

Case Name:	CA Camperdown Pty Ltd v Georges River Council
Medium Neutral Citation:	[2019] NSWLEC 1109
Hearing Date(s):	Conciliation conference on 15 March 2019
Date of Orders:	15 March 2019
Decision Date:	15 March 2019
Jurisdiction:	Class 1
Before:	O'Neill C
Decision:	See [21] below
Catchwords:	DEVELOPMENT APPLICATION: conciliation conference; agreement between the parties; exceedance of the height of buildings development standard.
Legislation Cited:	Environmental Planning and Assessment Act 1979 Kogarah Local Environmental Plan 2012 Land and Environment Court Act 1979
Cases Cited:	Four2Five Pty Ltd v Ashfield Council [2015] NSWLEC 90 Initial Action Pty Ltd v Woollahra Municipal Council [2018] NSWLEC 118 Randwick City Council v Micaul Holdings Pty Ltd [2016] NSWLEC 7 Wehbe v Pittwater Council (2007) 156 LGERA 446
Category:	Principal judgment
Parties:	CA Camperdown Pty Ltd (Applicant) Georges River Council (Respondent)
Representation:	Solicitors: A Landro, Colin Biggers & Paisley Lawyers (Applicant)

	A Epstein, HWL Ebsworth Lawyers (Respondent)
File Number(s):	2018/213640
Publication Restriction:	No

JUDGMENT

1 **COMMISSIONER**: This is an appeal pursuant to the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No. 2017/0421 for an 8 storey mixed use development containing 52 residential apartments, retail/commercial tenancies and 2 and 3 levels of basement car parking (the proposal) at 42-46 Connells Point Road and 2-6 Allen Street, South Hurstville (the site) by Georges River Council (the Council).

2 The Court arranged a conciliation conference between the parties, in accordance with the provisions of s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), which was held on 15 March 2019 and I presided over the conciliation conference. At the conciliation conference, the parties reached agreement as to the terms of a decision in the proceedings that was acceptable to both parties. The agreement included amendments to the proposal, as follows:

- The bulk and scale of the building envelope has been reduced including stepping the upper levels by reducing the footprint of each upper level progressively;
- The number of apartments has been reduced from 57 to 52; and
- A rooftop garden and common open space area has been added at the rooftop and the lift core has been extended to provide access to the rooftop garden and common open space area. The extension of the lift core, including the fire stair, exceeds the height of buildings development standard for the site.

3 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' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application. There are jurisdictional prerequisites that must be satisfied before this function can be exercised, pursuant to cl 4.6 of the Kogarah Local Environmental Plan 2012 (LEP 2012).

Planning framework

4 The site is zoned B2 Local Centre pursuant to LEP 2012. The objectives of the B2 zone are:

> • 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.

5 The height of buildings development for the site is 21m (Height of Buildings Map Sheet HOB_004 of LEP 2012). The objectives of the height of buildings development standard, at cl 4.3(1) of LEP 2012 are:

> (a) to establish the maximum height for buildings,
>
> (b) to minimise the impact of overshadowing, visual impact and loss of privacy on adjoining properties and open space areas,
>
> (c) to provide appropriate scale and intensity of development through height controls.

6 The FSR development standard for the site is 2.5:1 (Floor Space Ratio Map Sheet FSR_004 of LEP 2012) and the proposal complies with the FSR development standard with a FSR of 2.5:1.

Contravention of the height of buildings development standard

7 The proposal has a maximum height of RL 61.27, which is a height above existing ground level of 23.636m. The height of buildings development standard for the site is 21m. The numerical exceedance is 2.636m.

8 The applicant provided a written request seeking to justify the contravention of the height of buildings development standard prepared by Pacific Planning, dated February 2019 Issue G.

9 Clause 4.6(4) of LEP 2012 establishes preconditions that must be satisfied before a consent authority or the Court exercising the functions of a consent authority can exercise the power to grant development consent (*Initial Action Pty Ltd v Woollahra Municipal Council* [2018] NSWLEC 118 [13] ("*Initial Action*")). The consent authority must form two positive opinions of satisfaction under cl 4.6(4)(a). As these preconditions are expressed in terms of the opinion or satisfaction of a decision-maker, they are a "jurisdictional fact of a special kind", because the formation of the opinion of satisfaction enlivens the power of

the consent authority to grant development consent (*Initial Action* [14]). The consent authority, or the Court on appeal, must be satisfied that the applicant's written request has adequately addressed the matters required to be addressed by cl 4.6(3) and that the proposal development will be in the public interest because it is consistent with the objectives of the contravened development standard and the zone, at cl 4.6(4), as follows:

> (4) Development consent must not be granted for development that contravenes a development standard unless:
>
> (a) the consent authority is satisfied that:
>
> (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subclause (3), and
>
> (ii) the proposed development will be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out, and
>
> (b) the concurrence of the Secretary has been obtained.

10 On appeal, the Court has the power under cl 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(2) LEC Act, but should still consider the matters in cl 4.6(5) (*Initial Action* [29]).

The applicant's written request to contravene the height of buildings development standard

11 The first opinion of satisfaction required by cl 4.6(4)(a)(i) is that the applicant's written request seeking to justify the contravention of a development standard has adequately addressed the matters required to be demonstrated by cl 4.6(3) (see *Initial Action* [15]), as follows:

> (a) that compliance with the development standard is unreasonable or unnecessary in the circumstances of the case, and
>
> (b) that there are sufficient environmental planning grounds to justify contravening the development standard

12 The applicant bears the onus to demonstrate that the matters in cl 4.6(3) have been adequately addressed by the written request in order to enable the Court, exercising the functions of the consent authority, to form the requisite opinion of satisfaction (*Initial Action* [25]).

13 The common ways in which an applicant might demonstrate that compliance with a development standard is unreasonable or unnecessary are summarised by the Chief Judge in *Wehbe v Pittwater Council* (2007) 156 LGERA 446 [42]-[51] ("*Wehbe*") and repeated in *Initial Action* [17]-[21]. Although *Wehbe* concerned a SEPP 1 objection, the common ways to demonstrate that compliance with a development standard is unreasonable or unnecessary in *Wehbe* are equally applicable to cl 4.6 (*Initial Action* [16]):

(1) the objectives of the development standard are achieved notwithstanding non-compliance with the standard;

(2) the underlying objective or purpose of the development standard is not relevant to the development, so that compliance is unnecessary;

(3) underlying objective or purpose would be defeated or thwarted if compliance was required, so that compliance is unreasonable;

(4) the development standard has been abandoned by the council;

(5) the zoning of the site was unreasonable or inappropriate so that the development standard was also unreasonable or unnecessary (note this is a limited way of establishing that compliance is not necessary as it is not a way to effect general planning changes as an alternative to strategic planning powers).

14 The five ways to demonstrate compliance is unreasonable/unnecessary are not exhaustive, and it may be sufficient to establish only one way (*Initial Action* [22]).

15 The applicant's written request justifies the contravention of the height of buildings development standard on the basis that compliance is unreasonable or unnecessary because the objectives of the zone and development standard are achieved notwithstanding non-compliance with the numerical standard.

16 The grounds relied on by the applicant in the written request under cl 4.6 must be "environmental planning grounds" by their nature, and environmental planning grounds is a phrase of wide generality (*Four2Five Pty Ltd v Ashfield Council* [2015] NSWLEC 90 [26]) as they refer to grounds that relate to the subject matter, scope and purpose of the EPA Act, including the objects of the Act (*Initial Action* [23]). The environmental planning grounds relied upon must be sufficient to justify contravening the development standard and the focus is on the aspect of the development that contravenes the development standard, not the development as a whole (*Initial Action* [24]). Therefore the

environmental planning grounds advanced in the written request must justify the contravention of the development standard and not simply promote the benefits of carrying out the development as a whole (*Initial Action* [24]).

17 The consent authority or the Court on appeal does not have to directly form the opinion of satisfaction regarding the matters in cl 4.6(3), but only indirectly form the opinion of satisfaction that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3) (*Initial Action* [25]).

18 I am satisfied, pursuant to cl 4.6(4)(a)(i), that the applicant's written request has adequately addressed the matters required to be demonstrated by cl 4.6(3). The applicant's written request defends the exceedance of the height of buildings development standard by the lift core in order to access the rooftop area as a justified response to the increased amenity afforded to the future residents of the development by the provision of the garden and common open space area added to the rooftop. I am satisfied that justifying the aspect of the development that contravenes the development standard on this basis can be properly described as an environmental planning ground within the meaning identified by his Honour in *Initial Action* [23].

Whether the proposal is in the public interest because it is consistent with the objectives of the contravened development standard and the zone

19 The second opinion of satisfaction in cl 4.6(4)(a)(ii) is that the proposed development will be in the public interest because it is consistent with the objectives of the development standard that is contravened and the zone objectives. The consent authority must be satisfied that the development is in the public interest because it is consistent with these objectives, not simply that the development is in the public interest (*Initial Action* [27]). The consent authority must be directly satisfied about the matters in cl 4.6(4)(a)(ii) (*Initial Action* [26]).

20 I am satisfied that the proposed development will be in the public interest because it is consistent with the objectives of the height of buildings development standard. The exceedance of the height of buildings development standard by the lift core, including the fire stair, does not result in additional

amenity impacts on adjoining and neighbouring development and the extension of the lift core will not be visible from the public domain at street level. A lack of adverse amenity impacts is one way of demonstrating consistency with the objectives of a development standard (see *Initial Action* [94](c) and *Randwick City Council v Micaul Holdings Pty Ltd* [2016] NSWLEC 7 [34]).

Orders

21 The orders of the Court are:

(1) Leave is granted for the applicant to amend the application by relying on the documentation listed in Condition 1 of Annexure A.

(2) The Applicant is to pay the Respondent's costs in accordance with section 8.15(3) of the *Environmental Planning and Assessment Act 1979* as agreed in the amount of $18,000.

(3) The written request to depart from the height standard on the site set out in "Clause 4.6 Exception to Development Standard - Height of Building" variation request prepared by Pacific Planning dated February 2019 pursuant to the *Kogarah Local Environmental Plan 2012* is upheld.

(4) The appeal is upheld.

(5) Development Application No. 2017/0421 for demolition of existing structures and construction of an 8 storey mixed use development containing 52 residential apartments, 3 retail/commercial tenancies and 3 levels of basement parking at 42-46 Connells Point Road and 2-6 Allen Street, South Hurstville, is approved, subject to the conditions of consent at Annexure A.

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Susan O'Neill

Commissioner of the Court

Annexure A (474 KB, pdf)

Plans (13.6 MB, pdf)

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