



Land and Environment Court New South Wales

Medium Neutral Citation:

**Kingdom Towers 1 Pty Ltd v Liverpool City Council
[2019] NSWLEC 1396**

Hearing dates:

Conciliation conference on 21 June 2019; 9 August 2019

Date of orders:

23 August 2019

Decision date:

23 August 2019

Jurisdiction:

Class 1

Before:

Horton C

Decision:

The Court orders that:

- (1) The Applicant is granted leave to rely on the amended plans and reports referred to in Condition A.1 of the conditions at Annexure 'A' to these orders.
- (2) The Applicant's written request pursuant to cl 4.6 of the Liverpool Local Environmental Plan 2008 (LLEP) seeking to justify the breach of the building separation clause 7.4 by Mairead Hawes dated 19 July 2019 has been considered and I have formed the necessary opinion of satisfaction under clause 4.6(4) of the LLEP that the Applicant's written request adequately addresses the matters required to be demonstrated by subclause (3) thereof.
- (3) The appeal is upheld
- (4) Development Application No.625/2018 for consolidation of four (4) lots and construction of a mixed use development consisting of 192 hotel rooms and 72 residential apartment units with 2 ground floor commercial/retail tenancies over 17 storeys and provision of 5 basement parking levels at 402 Macquarie Street, 180-186 & 190 Terminus Street, Liverpool is approved subject to the conditions of consent at Annexure 'A'.

Catchwords:

DEVELOPMENT APPEAL – conciliation conference – residential apartment development – residential flat building – clause 4.6 – exceptions to development standards – agreement between the parties – orders

Legislation Cited:

Architects Act 2003
Environmental Planning and Assessment Regulation 2000
Environmental Planning and Assessment Act 1979
Land and Environment Court 1979
Liverpool Local Environmental Plan 2008

State Environmental Planning Policy No 55 – Remediation of Land

State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development (SEPP65)

Texts Cited:

Apartment Design Guide

Category:

Principal judgment

Parties:

Kingdom Towers 1 Pty Ltd (Applicant)
Liverpool City Council (Respondent)

Representation:

Counsel:
P Rigg (Applicant)
M Knight (Solicitor)(Respondent)

Solicitors:

Liverpool City Council (Respondent)

File Number(s):

2018/325422

Publication restriction:

No

JUDGMENT

- 1 COMMISSIONER: This Class 1 appeal concerns a development application brought before the Court under s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of Development Application No. DA-625/2018 by Liverpool City Council (the Respondent) which seeks approval for the consolidation of four (4) lots and construction of a mixed use development consisting of 192 hotel rooms and 72 residential apartment units with 2 ground floor commercial/retail tenancies over 17 storeys and provision of 5 basement parking levels at 402 Macquarie Street, 180-186 & 190 Terminus Street, Liverpool.
- 2 The site is legally described as Lot 1 in DP 798853, Lot in DP 589509, and Lots 1-2 in DP741869, with a total site area of 2,303m².
- 3 The site is zoned B4 Mixed Use under the provisions of the Liverpool Local Environmental Plan 2008 (LLEP) which permits hotel or motel accommodation, commercial premises and residential flat buildings with consent.
- 4 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 21 June 2019, after which the conciliation conference was adjourned to allow the applicant to prepare amended plans. The conciliation conference was convened again on 9 August 2019. I presided over the conciliation conferences.
- 5 At the conciliation conference on 9 August 2019, 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 conditional development

consent to the development application. A signed agreement prepared in accordance with s 34(10) of the LEC Act was filed with the Court on 20 August 2019.

- 6 The parties ask me to approve their decision as set out in the s 34 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 s 34 agreement.
- 7 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. There are jurisdictional prerequisites that must be satisfied before this function can be exercised, including a written request made pursuant to cl 4.6 of the LLEP seeking a variation of the development standard for the building separation set out in cl 7.4 of the LLEP.
- 8 The parties explained to me during the conference as to how the requirements of the LLEP have been satisfied in order to allow the Court to make the agreed orders at [18].
- 9 Firstly, as the proposed development is for residential apartment development, the provisions of State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development (SEPP65) apply.
- 10 Where an application relates to residential apartment development, cl 50(1A) of the Environmental Planning and Assessment Regulation 2000 requires that the application must be accompanied by a statement by a qualified designer, defined at cl 3 as a person registered as an architect in accordance with the *Architects Act* 2003. The statement must conform to the provisions of cl 50(1AB), which include attestations in relation to cll 28(2)(b) and (c). I am satisfied that the statement provided by Grand Cheng (Reg No.7884) is in a complying form.
- 11 Secondly, 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 by reference to the preliminary contamination assessment report prepared by Geotechnique dated 1 December 2017.
- 12 Thirdly, I am satisfied that the proposed development exhibits design excellence pursuant to cl 7.5 of the LLEP given the consideration of the development by the Liverpool Design Excellence Panel, and the amended plans which are responsive to advice from the Respondent's urban design expert.
- 13 Fourthly, I have read the Applicant's written request seeking to justify the contravention of the building separation development standard, prepared by Mairead Hawes dated 19 July 2019, and which may be summarised as follows:
- (1) The non-compliance relates to the eastern side boundary only, where the provisions of cl 7.4 of the LLEP requires separation distances of 12m between buildings for levels 7 -14, and requires 28m separation distances for level 15 and above.
 - (2)

The proposed development has a zero setback to the eastern boundary at level 7 and 8, and a 12m setback from level 9 and above in consideration of the adjoining site at 180-188 Macquarie Street which has a setback of 6.1m from the boundary at level 7 and 8.

- 14 I am satisfied that the written request adequately addressed the matters required to be demonstrated by cl 4.6 of LLEP for the following reasons:
- (1) The façade to the eastern boundary adopts the design guidance contained in the Apartment Design Guide, Section 2F Building separation, to ensure privacy to the adjoining building which has been recently developed and so is unlikely to undergo further development in the near future. As a consequence, the proposed development achieves the objectives of the development standard notwithstanding the numerical non-compliance with cl 7.4 of the LLEP and so strict compliance with the development standard can be said to be unreasonable or unnecessary.
 - (2) The contravention of the numerical control, found at cl 7.4(2)(d) and (e) is a consequence of the irregular shape of the site, and a built form that is consistent with the higher density residential development sought on a site indicated as a 'key site' in the LLEP. Furthermore, the contravention will not impose an adverse impact on the solar access of the adjoining sites, and so there are sufficient environmental planning grounds to support the contravention of the development standard.
 - (3) The proposed development satisfies the objectives of the B4 Mixed Use zone, and is consistent with the objectives for development in Liverpool City Centre as set out in cl 7.1 of the LLEP. Furthermore, the proposed development satisfies the objectives of the development standard by proposing a blank wall for the length of the interface with the adjoining building.
- 15 I am 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.
- 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 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.
- 18 The Court orders that:
- (1) The Applicant is granted leave to rely on the amended plans and reports referred to in Condition A.1 of the conditions at Annexure 'A' to these orders.
 - (2) The Applicant's written request pursuant to cl 4.6 of the Liverpool Local Environmental Plan 2008 (LLEP) seeking to justify the breach of the building separation clause 7.4 by Mairead Hawes dated 19 July 2019 has been considered and I have formed the necessary opinion of satisfaction under clause 4.6(4) of the LLEP that the Applicant's written request adequately addresses the matters required to be demonstrated by subclause (3) thereof.
 - (3) The appeal is upheld
 - (4) Development Application No.625/2018 for consolidation of four (4) lots and construction of a mixed use development consisting of 192 hotel rooms and 72 residential apartment units with 2 ground floor commercial/retail tenancies over

17 storeys and provision of 5 basement parking levels at 402 Macquarie Street, 180-186 & 190 Terminus Street, Liverpool is approved subject to the conditions of consent at Annexure 'A'.

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T Horton

Commissioner of the Court

[Annexure A \(885 KB\)](#)

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Decision last updated: 02 September 2019