



## Land and Environment Court New South Wales

<b>Medium Neutral Citation:</b>	<b>JACS Angels Pty Ltd v The Hills Shire Council [2021] NSWLEC 1239</b>
<b>Hearing dates:</b>	Conciliation conference on 15 February 2021
<b>Date of orders:</b>	12 May 2021
<b>Decision date:</b>	12 May 2021
<b>Jurisdiction:</b>	Class 1
<b>Before:</b>	Bindon AC
<b>Decision:</b>	Refer to the orders below at [18]
<b>Catchwords:</b>	DEVELOPMENT APPLICATION – residential flat buildings – cl 4.6 variation to LEP height standard – conciliation conference – agreement between the parties – orders
<b>Legislation Cited:</b>	Environmental Planning and Assessment Act 1979 ss 4.15, 4.16, 8.2, 8.7, 8.15 Environmental Planning and Assessment Regulation 2000 cl 50 Land and Environment Court Act 1979 s 34 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Infrastructure) 2007 cll 101, 104 State Environmental Planning Policy No 55—Remediation of Land cl 7 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development cll 28, 30 State Environmental Planning Policy (Sydney Region Growth Centres) 2006 Appendix 11 cll 2.7, 4.1B, 4.3, 4.4, 4.6, 6.1
<b>Texts Cited:</b>	Apartment Design Guide
<b>Category:</b>	Principal judgment
<b>Parties:</b>	JACS Angels Pty Ltd (Applicant) The Hills Shire Council (Respondent)
<b>Representation:</b>	Counsel: D Tyrell (Solicitor) (Applicant) J Corradini-Bird (Solicitor) (Respondent)  Solicitors: McKees Legal Solutions (Applicant) Marsdens Law Group (Respondent)
<b>File Number(s):</b>	2019/366708
<b>Publication restriction:</b>	No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal brought to the Court under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by the Sydney Central City Planning Panel of Development Application No 1225/2018/JP (the DA) lodged with The Hills Shire Council (the Council). In exercising the functions of consent authority on the appeal, the Court has the power to determine the DA pursuant to ss 4.15 and 4.16 of the EPA Act.
- 2 The DA relates to a 6,597m<sup>2</sup> parcel of land on the corner of Terry Road and Windsor Road at Box Hill, identified as Lot 1381 in DP 1105145 and Lots 136, 137, 139 and 139A in DP 10157 at 1-5 Terry Road and 779-781 Windsor Road (the site). The DA (as amended) sought consent for demolition of existing dwellings and structures, removal of trees, excavation works and construction of three residential flat buildings, varying in height from 7 storeys (Buildings A and C) to 9 storeys (Building B) and containing a total of 139 units and a neighbourhood shop (of 77m<sup>2</sup>), over a common basement of three levels accommodating a total of 205 car spaces.
- 3 The DA was lodged with the Council on 20 December 2017 and publicly notified between 17 January 2018 and 7 February 2018. No submissions were received. On 23 May 2019 the DA was refused by the Sydney Central City Planning Panel, and on 13 November 2019 the Applicant made an application to Council for a Review of Determination application pursuant to s 8.2 of the EPA Act (Review of Determination application). The Review of Determination application (Council reference DA 1225/2018/JP/A) was notified by Council between 19 November 2019 and 10 December 2019. No submissions were received.
- 4 On 21 November 2019 the Applicant commenced these Class 1 proceedings in the Court against the refusal of the DA and on 19 December 2019 the Applicant was granted leave to rely upon amended plans and other documents, as submitted with the Review of Determination application (the Amended DA). On 9 March 2020 the Council filed its Statement of Facts and Contentions (SOFC) based on the Amended DA.
- 5 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, held on 10 August 2020 before Commissioner Walsh. By agreement between the parties there was no site view as part of the s34 conference process. The s34 conciliation conference was terminated by Commissioner Walsh in circumstances where the parties failed to reach an agreement, and a hearing was scheduled for 15 and 16 February 2021.
- 6 On 10 February 2021 the parties advised the Court that they had reached an agreement and requested that the hearing scheduled for 15-16 February 2021 be relisted to a s34 conciliation conference. On 12 February 2021 a signed copy of the s34 agreement was filed with the Court in advance of the s34 conciliation conference.
- 7 As the parties had reached an agreement there was no site visit as part of the s34 conference. The conference was convened before me on 15 February. The Court was taken to the s34 agreement filed on 12 February 2021 and various documents referred to in the agreement, including the draft conditions of consent at Annexure A. Arising from discussions in the s34 conference the parties then made some minor changes to the agreement and some of the conditions of consent. A final signed section 34 agreement dated 23 April 2021 and revised conditions in Annexure A to the agreement were filed with the Court on 23 April 2021.
- 8 The proposal the subject of the s34 agreement differed slightly from that of the Amended DA. The main changes are:
  - (1) The building heights have been changed such that all three buildings are now part 6 and part 7 storeys high.
  - (2)

The number of units has been reduced from 139 to 104, the number of basement levels reduced from 3 to 2, and the number of parking spaces reduced from 205 to 140.

- 9 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. The parties have identified the jurisdictional prerequisites of relevance in these proceedings and how they are satisfied. The parties agree that there are no jurisdictional prerequisites in these proceedings which would prevent the Court from exercising its function under s 34(3) of the LEC Act.

#### *Satisfaction of jurisdiction*

- 10 The Council is subject to the control and direction of the Sydney Central City Planning Panel (Panel) in connection with the s34 proceedings pursuant to s 8.15(4) of the EPA Act. The Panel has confirmed that it consents to the execution of the s34 agreement.
- 11 In relation to State Environmental Planning Policy (Sydney Region Growth Centres) 2006 Appendix 11 - The Hills Growth Centre Precincts Plan (SEPP Growth Centres Precinct Plan) the relevant provisions are:
- (1) The development is for the purposes of residential flat buildings and a shop, which are uses permissible with consent in the R4 High Density Residential Zone (R4 Zone), and is consistent with the objectives of the R4 Zone. Demolition is permissible under cl 2.7 of the SEPP Growth Centres Precinct Plan.
  - (2) The maximum height of the development, at 24.74m (Building B) and 22.5m (Building C) contravenes the 21.0m height of buildings development standard at cl 4.3 of the SEPP Growth Centres Precinct Plan.
  - (3) The parties agree that the written request seeking a variation to the height standard, prepared pursuant to cl 4.6 of the SEPP Growth Centres Precinct Plan by DFP Planning and dated 10 December 2020 (Clause 4.6 variation request) is acceptable and should be upheld. For the reasons contained in the Clause 4.6 variation request, I am satisfied that the applicant's written request has demonstrated that compliance with the development standard is unnecessary or unreasonable in the circumstances of this case, and there are sufficient environmental planning grounds to justify contravening the development standard. The provisions of cl 4.6(3) of the SEPP Growth Centres Precinct Plan are therefore satisfied.
  - (4) I am also satisfied, for the reasons set out in the Clause 4.6 variation request, that the written request has addressed how the proposed development will be in the public interest because it is consistent with the objectives of the standard and the objectives for development in the R4 Zone in which the development is proposed to be carried out. The provisions of cl 4.6(4) of the SEPP Growth Centres Precinct Plan are therefore satisfied.
  - (5) The development has a floor space ratio (FSR) of 1.5:1 which does not contravene the FSR development standard at cl 4.4 of the SEPP Growth Centres Precinct Plan of 2.0:1.
  - (6) The development has a residential density of 160 dwellings per hectare which does not contravene the minimum permissible density development standard of 30 dwellings per hectare at cl 4.1B of the SEPP Growth Centres Precinct Plan.

- (7) The application documentation has established that public utility infrastructure is available or can be made available when required in accordance with cl 6.1 of the SEPP Growth Centres Precinct Plan.
- 12 The parties have advised that draft amendments to the SEPP Growth Centres relating to the residential development standard referred to in the SOFC have not progressed and are not in force.
- 13 In relation to State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65) and associated Apartment Design Guide (ADG):
- (1) The design quality principles of SEPP 65 and the relevant provisions of the ADG have been taken into consideration, and the parties agree the proposed development demonstrates that adequate regard has been given to them. Clauses 28 and 30 of SEPP 65 have therefore been satisfied.
- (2) The Amended DA is supported by a SEPP 65 Design Verification Statement prepared by Steve Kennedy of Kennedy Associates Architects dated 9 December 2020 (Design Verification Statement) in satisfaction of the requirement in cl 50(1A) of the Environmental Planning and Assessment Regulation 2000 (EPA Regulation). The Design Verification Statement confirms that the proposed development has been designed to be consistent with the design quality principles of SEPP 65 and display a high level of compliance with the provisions of the ADG.
- 14 State Environmental Planning Policy No 55—Remediation of Land (SEPP 55), and in particular cl 7, applies to the land and requires consideration of any contamination and associated remediation. A Preliminary Site Investigation Report (by B Environ Group, dated November 2018), Detailed Site Investigation Report (by Foundation Earth Sciences, dated May 2020) and a Remediation Action Plan prepared by Foundation Earth Sciences, dated September 2020 (RAP) have been provided in accordance with SEPP 55. The site can be made suitable for the proposed development, subject to the remediation works being undertaken as recommended in the RAP, which is referenced in Condition 1 of the conditions of consent.
- 15 In relation to the State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (the BASIX SEPP), a BASIX Certificate number 880438M\_03 has dated 11 December 2020 been provided demonstrating compliance with the BASIX SEPP, and is referenced in the conditions of consent.
- 16 State Environmental Planning Policy (Infrastructure) 2007 (SEPP Infrastructure) applies pursuant to the provisions of cl 101 as the site has a frontage to a classified road (Windsor Road) and because the proposal is for traffic-generating development containing more than 75 dwellings and the site has regular and/or pedestrian access to the classified road (cl 104 SEPP Infrastructure).
- (1) The cl 101 provisions of the SEPP Infrastructure are satisfied because:
- (a) where practicable and safe, vehicular access to the land is provided by a road other than the classified road, and
- (b) the safety, efficiency and ongoing operation of the classified road will not be adversely affected by the development as a result of—
- (i) the design of the vehicular access to the land, or
- (ii) the emission of smoke or dust from the development, or
- (iii) the nature, volume or frequency of vehicles using the classified road to gain access to the land, and

- (c) the development is of a type that is not sensitive to traffic noise or vehicle emissions, or is appropriately located and designed, or includes measures, to ameliorate potential traffic noise or vehicle emissions within the site of the development arising from the adjacent classified road.
  - (d) The development application was referred to Transport for NSW (“**TfNSW**”). Recommended conditions of consent were provided and have been included in the conditions of consent.
- (2) The cl 104 provisions of the SEPP Infrastructure are satisfied because:
- (a) The application was referred to TfNSW. Recommended conditions of consent were provided and have been included in the conditions of consent.
  - (b) The other matters required to be taken into consideration in clause 104(3)(b) have been taken into consideration.

*Disposal of proceedings in accordance with the parties’ decision*

- 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’ agreement.
- 18 The Court orders:
- (1) The applicant is granted leave to amend the development application and rely on the amended plans referred to in Condition 1 of Annexure “**A**” to this agreement as follows: -

Introduction	DA 01	I	18/09/2020
Design Analysis 3	DA 07	H	18/09/2020
Proposed external works plan	DA 10	I	18/09/2020
Proposed Level 01	DA 12	H	18/09/2020
Proposed Level 00 – pre road opening	DA 13.1	B	18/09/2020
Proposed Level 00	DA 13	K	17/09/2020
Proposed Level 01	DA 14	K	18/09/2020
Proposed Level 02	DA 15	K	18/09/2020
Proposed Level 03	DA 16	K	18/09/2020
Proposed Level 04	DA 17	K	18/09/2020
Proposed Level 05	DA 18	K	18/09/2020
Proposed Level 06	DA 19	K	18/09/2020
Proposed Level 07	DA 20	K	18/09/2020

Proposed Roof Level	DA 21	K	18/09/2020
North West / Terry Road Elevations	DA 23	J	18/09/2020
South / Windsor (service) Road Elevations	DA 24	J	18/09/2020
East / North East Elevations	DA 25	J	18/09/2020
Courtyard Elevations	DA 26	I	18/09/2020
Section D	DA 27	I	18/09/2020
Sections E and F	DA 28	I	18/09/2020
Finishes	DA 29	H	18/09/2020
Subdivision Plan	DA 39	C	18/09/2020
Storage Summary	DA 40	C	18/09/2020
Fence Details	DA 46	C	18/09/2020
Fence Details 2	DA 47	C	18/09/2020
Service Road – Proposed Works	DA 49	A	18/09/2020
Numbering Plan (9 pages)			23 December 2020
BASIX Certificate 880438M_03			11 December 2020
Applicant's letter of offer to enter into a planning agreement			11 February 2021

- (2) The applicant is to pay the respondent's costs thrown away pursuant to s8.15(3) of the *Environmental Planning and Assessment Act 1979* as agreed or assessed.
- (3) The Applicant's written request under clause 4.6 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 ("**SEPP Growth Centres**") – Appendix 11 The Hills Growth Centre Precincts Plan ("**Precinct Plan**") (**SEPP**) seeking a variation of the height of buildings development standard under clause 4.3(2) of the SEPP is upheld.
- (4) The Appeal is upheld.
- (5) Development Application No. 1225/2018/JP for the demolition of existing structures, removal of trees, excavation works and construction of 3x residential flat buildings (Building A, Building B and Building C) containing a total of 4 x home business SOHO units (3x 2 bedroom and 1 x 3 bedroom) and 100 units (10 x 1 bedroom, 71 x 2 bedroom and 19 x 3 bedroom units) over two levels of basement car parking accommodating 140 car parking spaces (114 x residential, 21 x visitor and 5 x retail spaces), resident gym and a

neighbourhood shop at 1-5 Terry Road and 779-781 Windsor Road, Box Hill,  
NSW is approved subject to the conditions set out in Annexure "A" to this  
agreement.

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**J Bindon**

**Acting Commissioner of the Court**

[Annexure A \(1317354,.pdf\)](#)

[Plan \(1092874,.pdf\)](#)

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Decision last updated: 12 May 2021