



Land and Environment Court New South Wales

Medium Neutral Citation:	Virtue Property Developments Pty Ltd ATF The Virtue Property Trust v Cumberland Council [2020] NSWLEC 1062
Hearing dates:	Conciliation conference on 4 February 2020
Date of orders:	13 February 2020
Decision date:	13 February 2020
Jurisdiction:	Class 1
Before:	Horton C
Decision:	See orders at [18]
Catchwords:	DEVELOPMENT APPEAL — conciliation conference – residential apartment development – residential flat building – clause 4.6 – exceptions to development standards
Legislation Cited:	Architects Act 2003 Environmental Planning and Assessment Act 1979 Land and Environment Court 1979 Environmental Planning and Assessment Regulation 2000 Parramatta Local Environmental Plan 2011 State Environmental Planning Policy No 55 – Remediation of Land State Environmental Planning Policy No 65 - Design Quality of Residential Apartment Development
Texts Cited:	Apartment Design Guide
Category:	Principal judgment
Parties:	Virtue Property Developments Pty Ltd ATF The Virtue Property Trust (Applicant) Cumberland Council (Respondent)
Representation:	Counsel: C McEwen SC (Applicant) B Lennox (Solicitor) (Respondent) Solicitors: Mills Oakley (Applicant) Storey & Gough (Respondent)
File Number(s):	2018/272511
Publication restriction:	No

JUDGMENT

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. 444/2017 for demolition of existing structures, site remediation, removal of one street tree and the construction of a four storey shop top housing development comprising of basement car parking, ground floor retail and residential apartments at 365 Clyde Street and 48-52 Wellington Road, South Granville.

- 2 The site forms an 'L-shaped' allotment fronting both Clyde Street and Wellington Road, comprising four lots, being: Lot 131 in DP 528534 at 3765 Clyde Street, South Granville, and Lots 1-3 in DP 20945 at 45-52 Wellington Road, South Granville.
- 3 The site is zoned B1 Neighbourhood Centre under the provisions of the Parramatta Local Environmental Plan 2011 (PLEP) in which shop top housing and commercial premises are permitted with consent, and in which zone the objectives are to provide a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood.
- 4 The matter was initially listed before me for hearing on 4-5 February 2020. The proceedings commenced with an onsite view in accordance with the Court's usual practice at which the Court heard a submission from Mr Graeme Allen, who spoke on behalf of a number of residents living on Wellington Road and local businesses, and Councillor Paul Garrad who resides in the local area and is on the Council's Traffic Committee.
- 5 The resident submissions may be summarised as follows:
 - (1) Poor traffic planning and management in the area results in pollution and congestion on the road network, which is a risk to pedestrians including school children and contributes to vehicular accidents occurring in the vicinity, particularly on Wellington Road, Rawson Road and Ferndell Street.
 - (2) Insufficient parking provision on site will result in those wishing to visit the site having to park their vehicles on other properties in the vicinity.
 - (3) Small businesses in the area are concerned at the threat to their business through the new commercial and retail premises in the proposed development.
 - (4) Existing stormwater infrastructure in the local area is under strain and is unlikely to accommodate the proposed development.
- 6 Following the onsite view, and on the application of the parties, the hearing was adjourned and the matter was reallocated to me under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) for a conciliation conference between the parties, which was held on 4 February 2020. I presided over the conciliation conference.
- 7 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 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 4 February 2020.
- 8 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.

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 PLEP seeking a variation of the development standard for the height of buildings set out in cl 4.3 of the PLEP, which has the following objectives:

4.3 Height of buildings

(1) The objectives of this clause are as follows—

- (a) to nominate heights that will provide a transition in built form and land use intensity within the area covered by this Plan,
- (b) to minimise visual impact, disruption of views, loss of privacy and loss of solar access to existing development,
- (c) to require the height of future buildings to have regard to heritage sites and their settings,
- (d) to ensure the preservation of historic views,
- (e) to reinforce and respect the existing character and scale of low density residential areas,
- (f) to maintain satisfactory sky exposure and daylight to existing buildings within commercial centres, to the sides and rear of tower forms and to key areas of the public domain, including parks, streets and lanes.

- 10 The parties explained to me during the conference as to how the requirements of s 4.15 of the EPA Act have been satisfied in order to allow the Court to make the agreed orders at [18].
- 11 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.
- 12 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 cl 28(2)(b) and (c). I am satisfied that the statement provided by Rachid Andary of Fuse Architecture is in a complying form.
- 13 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 Detailed Site Investigation report prepared by EIAustralia dated 2 March 2018, and the Remediation Action Plan prepared by EIAustralia dated 13 March 2018 and I am satisfied that the land will be remediated before the land is used for the purpose for which the development is proposed to be carried out.
- 14 Thirdly, I have read the Applicant's written request seeking to justify the contravention of the height of buildings development standard pursuant to cl 4.6 of the PLEP, prepared by Mr Stuart Barwick of SLB Planning dated 26 November 2019, and which may be summarised as follows:
 - (1) The non-compliance relates to the three buildings comprising the proposed development in that it exceeds the 12m height control as follows:
 - Building A – an exceedance of 3950mm measured at the stair enclosure, and 1650mm measured at the main roof.
 - Building B1 – an exceedance of 2720mm measured at the main roof.
 - Building B2 – an exceedance of 5520mm measured at the lift overrun, and 2050mm measured at the main roof.

- Building C1 – an exceedance of 970mm measured at the main roof.
- Building C2 – an exceedance of 3995mm measured at the lift overrun and 320mm measured at the roof plant.

(2) I am satisfied that the Applicant's written request has adequately addressed the matters required to be demonstrated by subcl 4.6(3) of the PLEP for the following reasons:

- Compliance with the height control is unreasonable or unnecessary as the objectives of the height control is achieved notwithstanding non-compliance as it demonstrates an appropriate transition in height when considered in relation to neighbouring properties and the fall in the land across the site of around 3.5m to minimise visual impact and avoid the disruption of views and the like. Additionally, the stepping back of the Wellington Road frontage where the site adjoins the R2 low density residential zone respects the existing form and character of the area and maintains daylight to adjoining properties in the B1 zone.
- Furthermore, the non-compliance does not result in additional development yield but rather demonstrates an arrangement on the site of the permitted floor space ratio in a manner that exceeds the requirements of the Apartment Design Guide (ADG) for solar access, cross ventilation, and minimum apartment size while being generally compliant with the provisions of the Parramatta Development Control Plan 2011 (PDCP).
- I am also satisfied that there are sufficient environmental planning grounds to justify the contravention as the ground floor uses demonstrate a range of small-scale retail, business and community uses that serve the needs of people who live or work in the surrounding neighbourhood, consistent with the zone objective, and because the exceedance of the height control permits access to rooftop communal and private open space without adverse impacts on adjoining properties.
- Furthermore, the exceedance partly results from a generous northern setback of 11.32m to Building C1 and C2 that facilitates the future development of the adjoining site at 58-62 Wellington Road through, firstly, the provision of open space in a courtyard arrangement that also, secondly, functions as a means of providing for shared vehicular management in a manner that reduces vehicle access on to Wellington Road, consistent with the General Terms of Agreement (GTA) provided by Roads and Maritime Services (RMS).

(3) I am also satisfied that the proposed development is in the public interest as it will be consistent with the objectives of the height control, and with the objectives of the zone (cl 4.6(4)(a)(ii)). In arriving at this opinion of satisfaction, I also consider the proposal addresses the matters raised in public submissions at [5] for the following reasons:

- Provision for a future shared access for vehicles to Wellington Road between the subject site and the site at the intersection of Clyde Street and Wellington Road, currently trading at 'Tyre Express', is likely to result in the removal of existing vehicular access locations, which has the potential to improve the current congestion by reducing waiting times incurred when vehicles turn in to, or out of, these properties. Furthermore, the adoption of the RMS GTA's in the conditions of consent will result in vehicle movements being 'left turn in/left turn out only'.
- On the basis of the Traffic Impact Assessment report prepared by GTA Consultants, I am satisfied that there is sufficient onsite parking for visitors and patrons of the ground floor retail activities. A summary of this report, contained at Table 8 of the Statement of Environmental Effects prepared by SJB Planning dated November 2019, states that 16 car parking spaces are provided by visitors of residents, which exceeds the minimum required by 2 spaces, and 79 car parking spaces are provided for patrons of the retail activities. The total number of car parking spaces exceeds the statutory requirement of 195 spaces by providing 240 spaces.

- As I am satisfied that the range of retail and commercial uses proposed is consistent with the zone objectives, I cannot accept the general concerns expressed at [5(3)] and which appear to be directed at existing uses on the site that will cease in the event the development proceeds, or to the extent that the concerns relate to car parking at those businesses in the Wellington Business Park, this proposal does not and cannot address any perceived deficiencies in the traffic management on those sites.
- Stormwater provision is documented in plans prepared by GAH Consulting engineers, including details of two onsite detention tanks and the upgrade of existing stormwater infrastructure in an easement as noted on drawing H-01.

(4) For the reasons set out above, I conclude that the proposal has adequately addressed those matters required by cl 4.6(4)(a)(i). I have also formed an opinion of satisfaction that the proposal will be in the public interest as required by cl 4.6(4)(a)(ii) of the PLEP, and that the Secretary's concurrence may be assumed in the particular circumstances pursuant to cl 4.6(4)(b).

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 architectural plan referenced DA105, Lower Ground floor plan, dated 17 January 2020 prepared by Fuse Architecture.
- (2) The Applicant is to pay the Respondent's costs thrown away in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979, as agreed or assessed.
- (3) The Applicant's clause 4.6 written request, prepared by SJB Planning for contravention of the maximum height development standard imposed by clause 4.3 of the Parramatta Local Environmental Plan 2011 dated 26 November 2019 is upheld.
- (4) The appeal is upheld.
- (5) Development Application no 444/2017 for demolition of existing structures, site remediation, removal of one street tree and the construction of a four-storey shop top housing development comprising basement car parking, ground floor retail and residential apartments at 365 Clyde Street and 48-52 Wellington Road, South Granville, is approved subject to the conditions contained in Annexure 'A'.

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T Horton

Commissioner of the Court

[Annexure A \(373 KB\)](#)

[Plans Part 1 \(874 KB\)](#)

[Plans Part 2 \(4.65 MB\)](#)

[Plans Part 3 \(8.67 MB\)](#)

[Plans Part 4 \(8.71 MB\)](#)

[Plans Part 5 \(8.59 MB\)](#)

[Plans Part 6 \(12.3 MB\)](#)

[Plans Part 7 \(11.9 MB\)](#)

[Plans Part 8 \(1.75 MB\)](#)

[Plans Part 9 \(2.55 MB\)](#)

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Decision last updated: 14 February 2020