



New South Wales

Medium Neutral Citation:	Universal Property Group Pty Ltd v Blacktown City Council [2020] NSWLEC 1427
Hearing dates:	Conciliation conference on 9 September 2020
Date of orders:	14 September 2020
Decision date:	14 September 2020
Jurisdiction:	Class 1
Before:	Bish C
Decision:	The Court orders that: (1) The Applicant's written clause 4.6 request, filed with Applicant's Notice of Motion dated 24 July 2020, to vary the height control under clause 4.3 of Appendix 5 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 is upheld; (2) The appeal is upheld; (3) Development Application No. SPP-17-00023, for the construction of four residential flat buildings containing 151 units including basement car parking, landscaping, fencing and associated drainage works on proposed Lot 5 and Lot 6 approved in the subdivision of land known as 305 South Street, Marsden Park legally described as Lot 30 in DP1246320 (formerly legally described as Lot 30 DP262886) approved under DA16-04983, and consolidation of proposed Lot 5 and 6 into one (1) lot, is approved subject to the conditions at Annexure A; (4) In satisfaction of order 2 of the Court's orders made on 29 July 2020 which required the Applicant to pay the Respondent's costs of amending SPP-17-00023 pursuant to s.8.15(3) of the Environmental Planning and Assessment Act 1979 as agreed or as assessed, the Applicant is to pay the Respondent's costs in the sum of \$8,000 within 28 days of receipt of an invoice from the Respondent.
Catchwords:	DEVELOPMENT APPLICATION – residential flat buildings – amenity – height standard non-compliance – cl 4.6 written variation request – conciliation conference – agreement between the parties – orders
Legislation Cited:	Environmental Planning and Assessment Act 1979 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 State Environmental Planning Policy (Sydney Region Growth Centres) 2006
Texts Cited:	Apartment Design Guide Blacktown City Council Growth Centres Development Control Plan 2018
Category:	Principal judgment
Parties:	Universal Property Group Pty Ltd (Applicant) Blacktown City Council (Respondent)
Representation:	Counsel: A Johnson (solicitor) (Applicant) P Hudson (solicitor) (Respondent) Solicitors: Swaab (Applicant) Marsdens Law Group (Respondent)
File Number(s):	2019/397935
Publication restriction:	Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the deemed refusal of Development Application (DA) SPP-17-00023 by Blacktown City Council (hereafter the Council), which seeks the construction of 4 x 5-storey residential flat buildings containing a total of 151 apartments with basement parking, associated landscaping and stormwater works on Lots 5 and 6 in the newly created Lot 30 DP 1246320 (formed under a separate DA 16-04983), also known as 305 South Street, Marsden Park (hereafter the site).
- 2 This Class 1 appeal is made under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 3 The Court agreed to a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 9 September 2020. I presided over the conciliation conference. There were no objectors whom raised issue during notification or spoke at this conciliation.
- 4 Prior to this conciliation conference, and following expert discussion, the applicant sought to amend the supporting plans and documents to the DA. Leave was granted by the Court (Registrar) on 28 July 2020 to amend the DA under appeal.
- 5

Based on these amended plans and documents, together with the DA's initial supporting documents and agreed conditions of consent, the parties reached agreement as to the terms of a decision in the proceedings that would be acceptable to the parties. The decision of the parties is to uphold the appeal and grant consent to DA SPP-17-00023 with conditions.

- 6 Pursuant to Schedule 4A of the EPA Act, based on the capital value of the proposed development, the Sydney Central City Planning Panel (the Panel) was the consent authority for the DA under appeal. On 9 September 2020, prior to making this agreement, the Panel provided delegation to the Council regarding resolving this appeal.
- 7 Pursuant to s 34(3) of the LEC Act, I must dispose of the proceedings in accordance with the parties' decision, if it is a decision that the Court could have made in the proper exercise of its functions. The parties' decision involves the Court exercising its function under s 4.16(1) of the EPA Act and being satisfied, pursuant to s 4.15(1) to grant consent to DA SPP-17-00023 with conditions, as described in Annexure A.
- 8 The parties identified the jurisdictional prerequisites of particular relevance to the Court to be satisfied to grant consent in these proceedings, pursuant to the requirements of s 4.15 of the EPA Act, as consistency with the: State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65); State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX); State Environmental Planning Policy No 55 — Remediation of Land (SEPP 55); and State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (SEPP Growth). In addition, the Blacktown City Council Growth Centres Development Control Plan 2018 (BCCGDCDP) is of consideration to grant consent to the DA.
- 9 In compliance with the requirements of SEPP 65, the DA is supported by amended plans, amenity assessments, and conditions of consent. The parties have undertaken a merit assessment of the plans and supporting documents to the DA that resolve the amenity issues raised in contention. The parties explained to the Court that the proposed development provides appropriate design quality and has had regard to the requirements of SEPP 65 and the Apartment Design Guide (ADG). The parties agree that the requirements of the SEPP 65 are satisfied, specifically cl 30 and relevant objectives, as contended.
- 10 The proposed development is required to comply with the provisions of the SEPP BASIX. A BASIX Certificate relevant to the proposed development is identified in the conditions of consent, in compliance with the SEPP BASIX provisions.
- 11 With regards to SEPP 55, the parties are satisfied that the proposed development complies with cl 7. Based on the Stage 1 contamination site investigation, the recommendations of the report are addressed in the conditions of consent.

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- The site is located within the R3 Medium Density Residential Zone, as described in the SEPP Growth, Appendix 5. The proposed development is permissible in the zone. The parties agree that the relevant provisions of the SEPP Growth are addressed to their satisfaction by the supporting documents and amended plans to the DA under appeal. The parties agree that the objectives of the zone are satisfied.
- 13 The proposed development exceeds the numeric requirement of cl 4.3 (height standard) of the SEPP Growth. All other relevant numeric development standards are satisfied.
- 14 It is accepted by the parties that a cl 4.6 written request for variation of the height standard is required to be considered by the Court to grant consent to the DA, pursuant to cl 4.6 of the SEPP Growth.
- 15 The written request for (height) variation explains that the height of the proposed development exceeds by a maximum of 0.3m the height standard of 16m, as specified in cl 4.3 of the SEPP Growth. This exceedance in height occurs primarily in portions of the Buildings that relate to roof edges, parapets and lift overruns.
- 16 The cl 4.6 (height) written request explains that the exceedance in the height standard does not result in a development that is out of character with the local area, is minor and not perceived adversely from the streetscape. The proposed development responds to the emerging surrounding developments.
- 17 According to the written request, there are no adverse impacts as a result for the areas of non-compliance with the (height) development standard for the proposed development. The proposed development is not inconsistent with the zone objectives or relevant development standard. The portions of the non-compliant building form are not readily discernible in the context of the site.
- 18 The proposed height of the development satisfies the objectives of the zone and the height standard. As the proposed development is in character with the local area, the non-compliance results in no adverse amenity impacts and satisfies the relevant height objectives, compliance with the height standard would therefore be both unreasonable and unnecessary.
- 19 The written request considers that a variation of the height development standard, pursuant to cl 4.3 of the SEPP Growth is therefore satisfied, and flexibility of the standard is justified.
- 20 Having reviewed the (cl 4.6) written request, I agree that the written request for variation of the height standard addresses the requirements of cl 4.6(3) of the SEPP Growth by describing sufficient environmental planning grounds to justify the development standard exceedance, and that strict compliance would be both unreasonable and unnecessary for the proposed development on this site. Therefore, cl 4.6(4)(a)(i) of the SEPP Growth is satisfied.
- 21 The proposed development as described to the Court is consistent with the objectives of the zone and the height (cl 4.3) standard, as established in the SEPP Growth. The breach is limited to portions of the roof and lift overrun that will not cause undue concern to surrounding residents or those on the site. The height non-compliance does

not result in adverse impact to the residents of the proposed development, adjoining properties or the character of the local area. The proposed development is therefore in the public interest, satisfying cl 4.6(4)(a)(ii).

- 22 I accept the cl 4.6's written explanation that there is no significant consequence to State or Regional environmental planning matters as a result of varying the development standard in this instance. Therefore, variation of the height development standard is not inconsistent with cl 4.6(4)(b) or (5) of the EPA Act.
- 23 I am satisfied that the requirements of cl 4.6 of the SEPP Growth have been addressed and that a variation in the height standard, as provided in cl 4.3, should be accepted. The proposed development is not restricted from considering a variation in the height development standard, as described in cl 4.6 of the SEPP Growth.
- 24 Based on the amended plans and supporting documents to the DA, the contentions that relate to the controls as specified in the BCCGCDP are achieved to the satisfaction of the parties. The parties agree that the amended plans address any potential amenity impacts that would warrant refusal of the DA.
- 25 The parties agree that the requirements of the BCCGCDP are complied with, based on the amended plans, supporting documents to the DA and conditions of consent. The proposed development was publicly notified in accordance with the BCCGCDP. During the initial notification period, no submissions were received by Council.
- 26 Further to this, due to the site's proximity to the future North South Rail corridor, Transport for NSW (TFNSW) recommended conditions of consent, which were adopted by the parties.
- 27 Based on the amended plans and supporting documents to the DA including a (cl 4.6) written request for variation of the height development standard, the contentions as expressed in the Statement of Facts and Contentions are explained to the Court as resolved to the satisfaction of the parties.
- 28 I am satisfied that there are no jurisdictional impediments to this agreement and that DA SPP-17-00023 should be granted, as it satisfies the requirements of s 4.15(1) of the EPA Act.
- 29 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.
- 30 The Court orders that:
- (1) The Applicant's written clause 4.6 request, filed with Applicant's Notice of Motion dated 24 July 2020, to vary the height control under clause 4.3 of Appendix 5 of the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* is upheld;
 - (2) The appeal is upheld;
 - (3) Development Application No. SPP-17-00023, for the construction of four residential flat buildings containing 151 units including basement car parking, landscaping, fencing and associated drainage works on proposed Lot 5 and Lot

6 approved in the subdivision of land known as 305 South Street, Marsden Park legally described as Lot 30 in DP1246320 (formerly legally described as Lot 30 DP262886) approved under DA16-04983, and consolidation of proposed Lot 5 and 6 into one (1) lot, is approved subject to the conditions at **Annexure A**;

- (4) In satisfaction of order 2 of the Court's orders made on 29 July 2020 which required the Applicant to pay the Respondent's costs of amending SPP-17-00023 pursuant to s.8.15(3) of the *Environmental Planning and Assessment Act 1979* as agreed or as assessed, the Applicant is to pay the Respondent's costs in the sum of \$8,000 within 28 days of receipt of an invoice from the Respondent.

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Sarah Bish

Commissioner of the Court

[Annexure A \(578915, pdf\)](#)

Amendments

15 September 2020 - Correction to coversheet.

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Decision last updated: 15 September 2020