



Land and Environment Court New South Wales

Medium Neutral Citation:	M Development Group Pty Ltd v Blacktown City Council [2021] NSWLEC 1469
Hearing dates:	Conciliation conference held on 4 August 2021
Date of orders:	17 August 2021
Decision date:	17 August 2021
Jurisdiction:	Class 1
Before:	Bish C
Decision:	See orders at [41]
Catchwords:	DEVELOPMENT APPLICATION – lot consolidation and subdivision – residential flat building – amenity – height standard non-compliance – cl 4.6 written variation request – conciliation conference – agreement between the parties – orders
Legislation Cited:	Biodiversity Conservation Act 2016 Environmental Planning and Assessment Act 1979, s 4.15, 4.16 Environmental Planning and Assessment Regulation 2000, cl 55 Land and Environment Court Act 1979, s34 Roads Act 1993, s 145, Schedule 3 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Infrastructure) 2007 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 Sydney Regional Environmental Plan No 20—Hawkesbury-Nepean River (No 2—1997), cl 4 Water Management Act 2000, s 91
Texts Cited:	Apartment Design Guide Blacktown City Council Growth Centres Development Control Plan 2010
Category:	Principal judgment
Parties:	M Development Group Pty Ltd (Applicant) Blacktown City Council (Respondent)
Representation:	Counsel: E Fleming (Solicitor) (Applicant) D Loether (Solicitor) (Respondent) Solicitors:

File Number(s): 2020/320892

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JUDGMENT

- 1 **COMMISSIONER:** This is an appeal against the deemed refusal of Development Application (DA) DA-SPP-20-00004 by Blacktown City Council (hereafter the Council), which as amended, seeks the consolidation and creation of lots for different purposes, demolition of existing structures and construction of three residential flat buildings with basement parking, earthworks, creation of roads, landscaping and stormwater works on Lot 1 in DP781987, and Lots 3 and 4, Section J in DP193074, known as 205-209 Grange Avenue, Marsden Park (hereafter the site).
- 2 The DA was submitted to Council on 19 May 2020, and after notification, made consistent with relevant planning controls, no submissions in objection were received. Further to this, the amended DA was renotified, and no submissions were received.
- 3 The DA was internally assessed and referred to the NSW Department of Natural Resources Access Regulator (NRAR), Transport for NSW (TfNSW) and NSW Police. Further to the NRAR referral, no objection to the DA was made, although it was noted that a Controlled Activity Approval is required due to works on waterfront land, and General Terms of Approval (GTA's) were provided. TFNSW and NSW Police also provided GTA's for inclusion in the conditions for consent.
- 4 The Class 1 appeal is made under s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act).
- 5 The Court agreed to a conciliation conference, pursuant to s 34 of the *Land and Environment Court Act 1979* (Court Act), without an onsite view, by agreement of the parties. The conciliation was held by MS Teams.
- 6 The application that is now before the Court, specifically seeks:
- consolidation of three lots into one lot;
 - creation of a residential lot (also known as Lot 100);
 - creation of a residue lot;
 - creation of a road lot;
 - demolition of existing structures; and
 - construction of three residential flat buildings, with strata subdivision and associated works including new roads, removal of trees, access driveways to basement car parking, associated drainage works and landscaping works.
- 7 The Court has not had the benefit of a site view, and therefore relies on the expert evidence, photographs, plans and documents supporting the DA that contextualise the site.
- 8 The site is approximately 3.28 hectares (Ha) in area. The surrounding area is under transition with regards to development, consistent with the relative zoning. There are numerous residences surrounding the site, as well as semi-rural lots.
- 9 The site is currently occupied by three dwelling houses with outbuilding structures, and a dam located in the southern portion of the site. The site is covered by stands of native and non-native trees, interspersed by grassed areas.

The Council agreed for the applicant to amend the plans and documents, that support the amended DA, pursuant to cl 55 of the Environmental Planning and Assessment Regulation 2000 (EPA Reg). The amended plans and documents were uploaded to the NSW Planning Portal on 10 August 2021.

- 11 Based on the amended DA 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 parties agree that the contentions of Council have been considered and are resolved. The decision of the parties is to uphold the appeal and grant consent to DA-SPP-20-00004 with conditions.
- 12 Pursuant to s 34(3) of the Court 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 of the EPA Act and being satisfied, pursuant to s 4.15, to grant consent to DA-SPP-20-00004, with amended plans in Annexure 'A' and conditions in Annexure 'B'.
- 13 The parties identified the jurisdictional prerequisites of particular relevance for the Courts consideration as consistency with the: EPA Reg; State Environmental Planning Policy No 55 — Remediation of Land (SEPP 55); State Environmental Planning Policy No 65 – Design Quality of Residential Apartment Development (SEPP 65); State Environmental Planning Policy (Infrastructure) 2007 (SEPP Infrastructure); State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX); Sydney Regional Environmental Plan No 20—Hawkesbury-Nepean River (No 2—1997) (SREP 20); and State Environmental Planning Policy (Sydney Region Growth Centre) 2006 (SEPP Sydney). In addition, the relevant requirements of the Blacktown City Council Growth Centres Development Control Plan 2010 (DCP) are considered.
- 14 The proposed development is located in close proximity to a creek line (Bells Creek), and therefore NRAR requires a Controlled Activity Approval, pursuant to s.91 of the *Water Management Act 2000* (WM Act). NRAR have provided GTA's for inclusion in the conditions of consent, which are also provided in Annexure B. The parties agree, and the Court accepts, that based on the evidence provided, that the requirements of the WM Act are addressed.
- 15 In compliance with the requirements of SEPP 55, the DA is supported by contamination reports and conditions of consent, which address the relevant requirements for consideration.
- 16 In compliance with the requirements of SEPP 65, the DA is supported by amended plans and conditions of consent. The parties agree that the proposed development, as amended, provides appropriate design quality and amenity, and has had regard to the requirements of SEPP 65 and the Apartment Design Guide (ADG), specifically amenity. The amended DA relies on an amended Design Verification Certificate, dated 22 June 2021. The parties agree that the relevant requirements of the SEPP 65 are satisfied, which resolves the relevant contentions.
- 17 The site is located adjacent to Grange Road, which is a classified road under the control of TfNSW, although vested to Council, pursuant to s 145 of the *Roads Act 1993*. Based on the proposed development, cl 104 of the SEPP Infrastructure applies, as described in Schedule 3. The DA was referred to TfNSW, whom after consideration of amended road design, provided GTA's.
- 18 The site forms part of a regional drainage basin system, with the southern portion of the site zoned SP2 to support this function, therefore water quality and quantity management are a consideration. The parties agree that the amended DA has considered and addressed the matters relevant to cl 4 of the SREP 20.

The proposed development is required to comply with the provisions of the SEPP BASIX. A BASIX Certificate, relevant to the proposed development, as amended, has been sighted, and is identified in the conditions of consent, in compliance with the SEPP BASIX provisions.

- 20 The site is located within the Marsden Park Precinct, therefore the provisions in Appendix 12 of the SEPP Sydney are relevant for consideration. The site is situated across three planning zones, being: the R3 Medium Density Residential Zone; E3 Environmental Management Zone; and SP2 Local Drainage Zone. The proposed development is permissible relative to each zone. The parties agree that the relevant objectives of the zones, as described in the SEPP Sydney, are satisfied.
- 21 The proposed development satisfies the relevant provisions of the SEPP Sydney, however does exceed the numeric requirement of cl 4.3 (height standard). All other relevant numeric development standards are satisfied.
- 22 It is accepted by the parties that a cl 4.6 written request seeking a variation of the height standard (cl 4.3) is required to grant consent to the DA, pursuant to cl 4.6 of the SEPP Sydney, and that the Court must be satisfied to grant consent to the DA.
- 23 The written request for (height) variation explains that the maximum height of the proposed development exceeds the SEPP Sydney (cl 4.3) height standard. This exceedance in height is primarily limited to the roof form and lift overruns in portions of the buildings across the site. The amended DA exceeds the height control as follows: proposed Building A parapet by 1.2m (8.5% exceedance); proposed Building B parapet by 1.65m (11.78%) and lift overrun by 1.2m (8.5%); and proposed Building C Parapet by 0.8m (5.7%) and lift overrun by 2.6m (18.5%).
- 24 The cl 4.6 (height) written request explains that the site has been modified beyond its natural form to accommodate historic development, although is still naturally sloping. The elements of the proposed buildings that exceed the height standard do not result in a development that is out of character with the local area and is not perceived adversely from the streetscape. The proposed development responds to the existing sloping topography and also seeks to reduce excavation. The non-compliant height elements do not impact amenity adversely for adjoining residents, and there are sufficient environmental planning grounds for a variation in height.
- 25 According to the written request, there are no adverse impacts to visual bulk, solar access or privacy as a result of the non-compliance with the (height) development standard for the proposed development. The proposed development is consistent with the zone objectives and relevant development standard (cl 4.3). The portions of the non-compliant building form are not readily discernible in the context of the site, and will appear compatible with existing and future building heights sought in the surrounding area.
- 26 The proposed height of the development satisfies the objectives of the zone and the height standard (cl 4.3). As the non-compliant portions of the proposed development are in character with the local area, no adverse amenity impacts result, the relevant height objectives are satisfied, compliance with the height standard would be unreasonable.
- 27 The (cl 4.6) written request considers that a variation of the height development standard, pursuant to cl 4.3 of the SEPP Sydney is therefore satisfied, and flexibility of the standard is justified. There is no public benefit in maintaining the height standard on the site, as the proposed development is consistent with the character, bulk and scale of the surrounding context.

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 Sydney 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 Sydney is satisfied.

- 29 The proposed development as described to the Court is consistent with the objectives of the zone (for the R3 zone) and the height (cl 4.3) standard, as established in the SEPP Sydney. The breach in height is limited to portions of the roof form that will not cause undue concern to (existing and future) surrounding residents, the streetscape, or those residing 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).
- 30 I accept the cl 4.6's 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, and that there is no public benefit to maintaining the standard for the proposed development. Therefore, variation of the height development standard is not inconsistent with cl 4.6(4)(b) or (5) of the EPA Act.
- 31 I am satisfied that the requirements of cl 4.6 of the SEPP Sydney have been addressed and that a variation in the height standard, as provided in cl 4.3, should be granted.
- 32 The parties agree that the site is serviced by adequate water and sewer, to be connected to Sydney Water's requirements. Also, that electricity and telecommunication services are available to the site, which will be sufficient for the proposed development, connected in accordance with the requirements of the relevant authority. The requirements of cl 6.1(1) of the SEPP Sydney are satisfied.
- 33 The site is subject to flooding, mapped as flood prone, and therefore subject to consideration of cl 19 of the SEPP Sydney, pursuant to cl 19(1). The amended DA is supported by a Flood Report, which the parties agree is based on a flood model that relates to flooding on the site and relevant to the proposed development. The parties agree that the proposed habitable floor levels are above the designated flood planning level (FPL), there are no significant adverse offsite impacts and the appropriate stormwater management structures are designed to manage flows within and across the site. The parties explain that the proposed development has considered the provisions of cl 19(2) and that there are no adverse impact resulting from proposed development on the site.
- 34 The site contains native vegetation, including that belonging to the River Flat Eucalypt Forest and Cumberland Plain Woodland, listed as Endangered Ecological community (EEC) in the *Biodiversity Conservation Act 2016* (BC Act). The parties agree that the 'project footprint' is located within 'Biocertified' land, therefore further ecological assessment is not required to satisfy the BC Act. The applicant however, has agreed to Council's request for a Biodiversity Management Plan. The proposed development is constrained to the northern portion of the site, which contains native vegetation of the lowest biodiversity value. A Vegetation Management Plan (VMP) supports the amended DA to protect the native vegetation that is to be retained in the southern portion of the site.
- 35 Based on the amended plans and supporting documents to the DA, the contentions that relate to the controls as specified in the DCP are achieved to the satisfaction of the parties. The parties agree that the amended plans, together with amended supporting

documents and agreed conditions of consent address any potential amenity or flooding impacts that would warrant refusal of the DA.

- 36 The parties agree that the requirements of the DCP 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 DCP. During the initial and subsequent notification periods for the DA, no submissions were received by Council.
- 37 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. The parties also explain that there are no jurisdictional impediments to making the agreement or for the Court making the orders, as sought.
- 38 I am satisfied, based on the evidence before me, that there are no known jurisdictional impediments to this agreement and that SPP-20-00004 should be granted, as it satisfies the requirements of s 4.15 of the EPA Act.
- 39 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.
- 40 The Court notes that the Council, as the relevant consent authority, has pursuant to cl 55 of the EPA Reg, agreed to amend Development Application SPP-20-00004, and uploaded the amended plans and documents on the NSW Planning Portal, which were filed with the Court on 28 June and 4 August 2021, and are listed in Annexure A.
- 41 The Court orders that:
- (1) The Applicant's written request by Think Planners dated 5 August 2021 to vary the height of building standard at clause 4.3 of Appendix 12 of the State Environmental Planning Policy (Sydney Region Growth Centres) 2006 (**Growth Centres SEPP**) pursuant to clause 4.6 of the Growth Centres SEPP is upheld.
 - (2) The appeal is upheld.
 - (3) Development Application No. SPP-20-00004 for consent to:
 - (a) consolidate the existing three (3) lots into one (1) lot,
 - (b) Torrens title subdivision of the consolidated lot into three (3) lots (comprising 1 lot for the proposed residential flat building, 1 lot for the proposed road, 1 residue lot); and
 - (c) construction of 3 x residential flat buildings and associated works including new roads, demolition of structures, removal of trees, access driveways to basement car parking, associated drainage works and landscaping works with strata subdivision on land legally described as Lot 1 in DP781987 and Lots 3 & 4, Section J in DP193074, known as 205-209 Grange Avenue, Marsden Park, is approved subject to the conditions at **Annexure B**.

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Sarah Bish

Commissioner of the Court

[Annexure A \(189129,.pdf\)](#)

[Annexure B \(1011572,.pdf\)](#)

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Decision last updated: 17 August 2021