



Land and Environment Court
New South Wales

Case Name: Karimbla Properties (No. 61) Pty Ltd v City of Parramatta Council

Medium Neutral Citation: [2024] NSWLEC 1303

Hearing Date(s): Conciliation conference held 20 October, 13 November, 15 December 2023, 2 February, 5 March, 2 April, 29 April, 13 May, 17 May 2024

Date of Orders: 07 June 2024

Decision Date: 7 June 2024

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:
(1) Leave is granted to the Applicant to amend Development Application No. DA/53/2022 and rely upon the amended plans and documents referred to in condition 1 at Annexure A.
(2) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, the Applicant is to pay the Respondent's costs thrown away as a result of amending the Development Application as agreed or assessed.
(3) The Applicant's written request, pursuant to cl 4.6 of the Parramatta (former The Hills) Local Environmental Plan 2012 (PLEP), seeking to vary the development standard for height of buildings as set out at cl 4.3 of the PLEP, is upheld.
(4) The appeal is upheld.
(5) Consent is granted to Development Application DA/53/2022 (as amended) for construction of five, 6-18 storey buildings comprising 336 residential apartments, childcare centre for 75 children, 1,906m² of 18 neighbourhood retail shops, 548 basement car parking

spaces, publicly accessible open spaces and through site links, and roads, landscaping and tree removal, at 263-273 Pennant Hills Road and 18 Shirley Street, Carlingford, subject to the conditions of consent at Annexure A.

| | |
|--------------------|---|
| Catchwords: | DEVELOPMENT APPLICATION – residential apartment building – cl 4.6 written request – height of buildings – agreement between the parties – orders |
| Legislation Cited: | Environmental Planning and Assessment Act 1979, ss 4.5, 4.15, 4.16, 8.7, 8.15 Land and Environment Court Act 1979, s 34 Environmental Planning and Assessment Regulation 2000, cl 55 Environmental Planning and Assessment Regulation 2021, s 29 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 State Environmental Planning Policy (Housing) 2021, Ch 4, Sch 9, ss 145, 147, 148 State Environmental Planning Policy (Planning Systems) 2021, Sch 6, s 2.19 State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6 State Environmental Planning Policy (Transport and Infrastructure) 2021, Ch 3, ss 2.48, 2.118, 2.119, 2.122, 3.23 Parramatta (former The Hills) Local Environmental Plan 2012, cl 2.3, 4.3, 4.6, 5.1, 5.4 |
| Texts Cited: | NSW Department of Planning and Environment, Apartment Design Guide NSW Department of Planning, Industry and Environment, Child Care Planning Guideline NSW Department of Planning and Environment, Planning Circular PS 20-002 |
| Category: | Principal judgment |
| Parties: | Karimbla Properties (No. 61) Pty Ltd (Applicant) City of Parramatta Council (Respondent) |
| Representation: | Counsel: D Loether (Solicitor) (Applicant) |

A Foley (Solicitor) (Respondent)

Solicitors:

Bartier Perry Lawyers (Applicant)

Marsdens Law Group (Respondent)

File Number(s): 2023/178916

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (EPA Act), brought by Karimbla Properties (No. 61) Pty Ltd (the Applicant), against the refusal of Development Application No. DA/53/2022 (the DA) by City of Parramatta Council (the Respondent). At the time of its lodgement on 21 January 2022, the DA sought consent for construction of seven, 10- to 12-storey buildings comprising 629 residential apartments, a child care centre for 110 children, 17 neighbourhood retail shops and 1,146 basement car parking spaces, publicly accessible open spaces and through site links, landscaping, tree removal and demolition at 263-273 Pennant Hills Road and 18 Shirley Street, Carlingford (the site).
- 2 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act) between the parties, which was held on 20 October, 13 November and 15 December 2023, and 2 February, 5 March, 2 April, 29 April, 13 May and 17 May 2024. I presided over the conciliation conference.
- 3 During the conciliation conference, the parties reached agreement as to the terms of a decision in these proceedings that would be acceptable to the parties. The agreement involves the Court upholding the appeal and granting development consent to an amended DA, subject to conditions.
- 4 Of particular note, the proposal has been amended by agreement between the parties to resolve the contentions initially raised by the Respondent, which included issues of building height exceedance, floor space ratio (FSR) exceedance, failure to demonstrate regard for the design quality principles set out in Sch 9 of State Environmental Planning Policy (Housing) 2021 (SEPP

Housing), inconsistency with the Apartment Design Guide (ADG) including inadequate visual privacy and cross viewing, poor pedestrian access and access, poor amenity within common circulation areas, inadequately sized balconies and private open space, inadequate solar access and natural cross ventilation, poor landscape and public domain design, inadequate communal open space and deep soil, traffic impacts, inadequate amenity provided to the childcare uses, and inadequate provision for stormwater management amongst other contentions.

- 5 Agreed design amendments have been made to improve the DA's relationship to the site, its context and the future streetscape, redistributing building form and mass across the site to better relate to topography and to mitigate against overshadowing impacts. The amendments provide adequate deep soil and a public domain of acceptable design quality. Changes have been made to improve internal residential amenity. These agreed amendments also have the effect of reducing the total number of residential units from 629 (as lodged) to 336 (as amended) and achieving compliance with the site's FSR control.
- 6 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 amended DA.
- 7 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 8 In that regard, I am satisfied the DA was made with the consent of the owner of the land, evidenced within the Class 1 Application accompanying this matter.
- 9 The DA was publicly notified on three instances - from 2 to 23 February 2022, from 16 September to 10 October 2023 and from 7 February to 28 February 2024. A total of 12 submissions were received by the Respondent raising concerns with traffic and parking congestion, overshadowing, building height, impacts on property values and concerns for a concurrent Planning Proposal potentially affecting the site. One objector addressed the Court during the conciliation conference on 20 October 2023 sharing similar concerns. The

parties agree, and I am satisfied, that the amended DA and conditions of consent now satisfactorily address the matters raised in public submissions. Accordingly, I am satisfied that s 4.15(1)(d) of the EPA Act has been appropriately addressed.

- 10 The parties agree, and I am satisfied, that the Parramatta (former The Hills) Local Environmental Plan 2012 (PLEP) is the relevant local environmental planning instrument. The site is partly zoned R4 High Density Residential, and partly RE1 Public Recreation. Further, a small portion of the site is zoned SP2 Infrastructure. The proposed development, comprising residential apartments, a childcare facility and neighbourhood shops - characterised as mixed use development - is permissible with consent within the R4 zone. Development for the purposes of roads and recreation areas is permissible within the RE1 zone.
- 11 The parties agree, and I am satisfied, that pursuant to cl 2.3 of the PLEP, the amended DA is consistent with the R4 High Density Residential zone objectives, which include to provide for the housing needs of the community within a high density residential environment, to provide a variety of housing types within a high density residential environment, to enable other land uses that provide facilities or services to meet the day to day needs of residents, and to encourage high density residential development in locations that are close to population centres and public transport routes.
- 12 Similarly, the parties agree, and I am satisfied, the amended DA is consistent with the RE1 Public Recreation zone objectives, which include to enable land to be used for public open space or recreational purposes, to provide a range of recreational settings and activities and compatible land uses, and to protect and enhance the natural environment for recreational purposes.
- 13 The parties agree, and I am satisfied, that all principal development standards of the PLEP have been met by the amended DA, with the exception of cl 4.3 - Height of buildings.
- 14 In such an instance, cl 4.6(3) of the PLEP requires consideration of a written request from the Applicant demonstrating that compliance with this development standard is unreasonable or unnecessary in the circumstances of

the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

- 15 Clause 4.6(4) of the PLEP requires the consent authority to be satisfied that the Applicant's written request has adequately addressed the matters required by cl 4.6(3), and that the proposed development will be in the public interest because it is consistent with the objectives of the particular development standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 16 Additionally, cl 4.6(4)(b) of the PLEP requires the concurrence of the Planning Secretary be obtained, while cl 4.6(5) requires the Planning Secretary to consider whether, in granting this concurrence, the proposed contravention of the development standard raises any matters of significance for State environmental planning, the public benefits of maintaining the standard, and any other matters required to be considered by the Planning Secretary. Given the earlier written advice of the Planning Secretary (in the form of Planning Circular PS 20-002 issued on 5 May 2020), the Court may assume the concurrence of the Planning Secretary in this matter.
- 17 The amended DA proposes five buildings across the areas zoned R4 High Density, referred to as Buildings A, B, C, D and G, and these parts of the site are mapped within the PLEP with two separate height of building controls, being 27m and 33m.
- 18 As required by cl 4.6 of the PLEP, the Applicant has provided a written request seeking to vary the height of buildings development standard, prepared by Planning Ingenuity and dated 28 March 2024.
- 19 The parties agree, and I am satisfied, that the written request adequately justifies the proposed variance to the height of buildings development standard for the following reasons:
 - (1) Buildings A and G are each consistent with the 27m and 33m height of building development standards respectively.
 - (2) Building B proposes a maximum building height of 50.1m, exceeding the development standard of 27m by 23.1m and representing a variation of approximately 85.5%.

- (3) Building C proposes a maximum building height of 54.9m, exceeding the development standard of 27m by 27.9m and representing a variation of approximately 103%.
 - (4) Building D proposes a maximum building height of 60.75m, exceeding the development standard of 27m by 33.75m and representing a variation of approximately 125%.
 - (5) The amended DA is agreed to be a more appropriately varied form and scale - between six and 18 storeys - that is compatible with the existing streetscape and desired future character of the locality.
 - (6) The areas of exceedance to the maximum building height standard generally arise as a result of amending the DA by agreement to redistribute building mass away from more sensitive neighbouring buildings and toward the more elevated portions of the site.
 - (7) The DA has been amended during the conciliation conference to resolve the Respondent's other contentions, such that the redistribution of building mass and increased building heights serve to reduce the site coverage and improve the configuration and amenity of the street level and associated public domain.
 - (8) The proposed height exceedance does not give rise to unreasonable adverse visual impacts, overshadowing, disruption to views or loss of privacy to neighbouring properties.
 - (9) The objectives of the PLEP Zone R4 High Density Residential land use zone include to provide for the housing needs of the community within a high density residential environment, to provide a variety of housing types within a high density residential environment, to enable other land uses that provide facilities or services to meet the day to day needs of residents, and to encourage high density residential development in locations that are close to population centres and public transport routes. I am satisfied the amended DA meets these objectives.
 - (10) The objectives of cl 4.3 of the PLEP include to ensure the height of buildings is compatible with that of adjoining development and the overall streetscape, and to minimise the impact of overshadowing, visual impact, and loss of privacy on adjoining properties and open space areas. I am satisfied the amended DA meets these objectives.
- 20 Consequently, I am satisfied the Applicant's cl 4.6 written request adequately justifies the proposed variation to the height of buildings development standard, and I find to uphold the written request.
- 21 The parties agree, and I am satisfied, that pursuant to cl 5.1 of the PLEP - Relevant acquisition authority - the amended DA does not propose any built form over that portion of the site to be dedicated as a classified road (consistent with that portion of the site zoned SP2).

- 22 The parties agree, and I am satisfied, that pursuant to cl 5.4 of the PLEP - Controls relating to miscellaneous permissible uses - the DA proposes neighbourhood shops which are each consistent with the requirement to not exceed 100sqm of retail floor area.
- 23 The parties agree, and I am satisfied, that State Environmental Planning Policy (Planning Systems) 2021 (SEPP Planning Systems) is an additional relevant environmental planning instrument. Pursuant to s 2.19(1) of SEPP Planning Systems and as set out in Sch 6, the amended DA is declared to be regionally significant development. Consequently, the Sydney Central City Planning Panel (SCCPP) is the relevant consent authority for the purposes of s 4.5 of the EPA Act.
- 24 The Respondent has received correspondence from the SCCPP's legal representative advising that the SCCPP is content for the Respondent to conduct this appeal.
- 25 The parties agree, and I am satisfied, that State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience and Hazards) is an additional relevant environmental planning instrument. The Applicant has provided a Remediation Action Plan, prepared by ADE Consulting Group Pty Ltd and dated 6 December 2023, which sets out for the method to remediate the site to an acceptable state.
- 26 Agreed conditions of consent reflecting the recommendations of the Remediation Action Plan requirements are imposed. Accordingly, I am satisfied the amended DA addresses those matters outlined in s 4.6 of SEPP Resilience and Hazards.
- 27 The parties agree, and I am satisfied, that the amended DA is subject to the provisions of Ch 4 of SEPP Housing.
- 28 Consistent with s 145 of SEPP Housing, the Respondent referred the DA to the Design Excellence Advisory Panel (DEAP) for comment on a number of instances during March, June, July and October 2022. Advice received from the DEAP has been considered by the parties and has informed design amendments made to resolve the Respondent's contentions in this matter.

- 29 Further, and pursuant to the provisions of the Environmental Planning and Assessment Regulation 2021 (EPA Reg), the Applicant's architect, Fender Katsalidis (and its nominated architect Mr Robert Mirams - NSW registered architect 7272) has prepared a Design Verification Statement, fulfilling the requirements of s 29 of the EPA Reg and confirming that the amended DA achieves the Design principles set out in Sch 9 of SEPP Housing. This statement also sets out how the objectives of Parts 3 and 4 of the ADG have been achieved in the design of the amended DA. Accordingly, I am satisfied the amended DA meets the requirements of s 147 of SEPP Housing.
- 30 The parties agree, and I am satisfied, that the amended DA complies with the non-discretionary development standards set out at s 148 of SEPP Housing.
- 31 The parties agree, and I am satisfied, that State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP Infrastructure) is an additional relevant environmental planning instrument.
- 32 Pursuant to s 2.48 of SEPP Infrastructure, the DA was referred to Ausgrid, whose responded on 18 April 2024, stating:

“Prior to any construction being carried out, plans must be submitted to Ausgrid for approval to determine whether the development will affect Ausgrid’s network or easements. The developer must identify any potential impacts of the proposed construction and operation on the existing utility infrastructure and service provider assets and demonstrate how these will be protected or impacts mitigated.

Ausgrid notes that the proponent has commenced consultation with Ausgrid regarding the potential construction impact by the development to the Ausgrid underground assets.

Once consultation has been finalised the proponent will be provided a letter by Ausgrid to confirm Ausgrid is satisfied with the designs and appropriate controls placed to mitigate risks related to civil structural aspects. A construction certificate is not to be issued for this development until Ausgrid has provided such letter.”

- 33 Agreed conditions of consent reflecting Ausgrid’s requirements are imposed.

- 34 Further, and pursuant to s 2.118 of SEPP Infrastructure, there is a small portion of the site along Pennant Hills Road which is reserved for the purposes of a classified road. I am satisfied that none of the forms of development listed in s 2.118(1) of SEPP Infrastructure is proposed to be carried out within that portion of the site.
- 35 Pursuant to s 2.119 of SEPP Infrastructure, the site has frontage to a classified road. I am satisfied that the relevant matters listed at s 2.119(2) of the SEPP have been appropriately addressed. Specifically, no vehicular access is proposed from the site to Pennant Hills Road. The amended DA is supported by a Transport Impact Assessment, which indicates that the safety, efficiency and ongoing operation of Pennant Hills Road will not be adversely impacted by the development. The amended DA is accompanied by an Acoustic Report which specifies measures to ameliorate traffic noise and vehicle emissions for those naturally ventilated apartments that would be otherwise affected by traffic noise.
- 36 Pursuant to s 2.122 of SEPP Infrastructure, the amended DA is considered to be traffic-generating development. The amended DA was referred to TfNSW, which issued correspondence to the Respondent on 19 December 2023 stating:

“TfNSW has undertaken a review of all the documentation and correspondence to date and advises that the agency is amenable to the proposed civil works (i.e., kerb and gutter and works and stormwater connection) on Pennant Hills Road, subject to the conditions outlined in TAB A being included in any development consent issued by the relevant consent authority.

As part of the above review, the agency has recently been working with Council and the Applicant regarding the scope and timing associated with the delivery of traffic control signals (TCS) as ‘Works in Kind’ by the Applicant at the intersection of Pennant Hills Road and Evans Road.

Following recent discussions between all parties, TfNSW is amenable for the delivery of TCS at the intersection of Pennant Hills Road and Evans Road to be tied to the Planning Proposal pathway and subsequent DA for the proposed additional development uplift of approximately 10,000m² across the subject

site with the agreed layout of the signalised intersection provided at TAB B. The agency is currently liaising with the Department of Planning and Environment on whether the delivery of the above traffic control signals as 'Works in Kind' could be credited against the Housing and Productivity Contribution levies applicable to the proposed development."

- 37 Agreed conditions of consent reflecting TfNSW's requirements are imposed and I am satisfied that s 2.122 of SEPP Infrastructure has been appropriately addressed.
- 38 The parties agree and I am satisfied, that Ch 3 of SEPP Infrastructure applies to the amended DA as it proposes a centre-based child care facility within Building G. The child care facility will accommodate a total of 75 children and 20 staff. The detailed design and fit-out of the centre will be subject to a future development application.
- 39 Pursuant to s 3.23 of SEPP Infrastructure, the provisions of the Child Care Planning Guideline (CCPG) must be considered before the amended DA can be determined. The parties note, and I am satisfied, that the space provided for the child care facility within Building G is capable of meeting the required unencumbered indoor and outdoor play area.
- 40 The parties agree, and I am satisfied, that the amended DA remains subject to the provisions of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004. Accordingly, a BASIX certificate No 1733105M_09, dated 3 May 2024, has been provided with the amended DA. Agreed conditions of consent are imposed to ensure compliance with the BASIX certificate.
- 41 Having considered each of the preceding jurisdictional requirements and having formed the necessary view required by s 34(3) of the LEC Act, I find it is appropriate to make the orders agreed to by the parties and now dispose of the matter.
- 42 The Court notes that:
- (1) Pursuant to cl 55 of the Environmental Planning and Assessment Regulation 2000, the Applicant has amended the DA with the approval of the Respondent.

- (2) The Applicant has lodged the amended DA with the Court on 17 May 2024.

Orders

43 The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application No. DA/53/2022 and rely upon the amended plans and documents referred to in condition 1 at Annexure A.
- (2) Pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, the Applicant is to pay the Respondent's costs thrown away as a result of amending the Development Application as agreed or assessed.
- (3) The Applicant's written request, pursuant to cl 4.6 of the Parramatta (former The Hills) Local Environmental Plan 2012 (PLEP), seeking to vary the development standard for height of buildings as set out at cl 4.3 of the PLEP, is upheld.
- (4) The appeal is upheld.
- (5) Consent is granted to Development Application No. DA/53/2022 (as amended) for construction of five, 6-18 storey buildings comprising 336 residential apartments, childcare centre for 75 children, 1,906m² of 18 neighbourhood retail shops, 548 basement car parking spaces, publicly accessible open spaces and through site links, and roads, landscaping and tree removal, at 263-273 Pennant Hills Road and 18 Shirley Street, Carlingford, subject to the conditions of consent at Annexure A.

M Pullinger

Acting Commissioner of the Court

Annexure A

Architectural Plans Part 1

Architectural Plans Part 2

Architectural Plans Part 3 Pages 1-10

Architectural Plans Part 3 Pages 11-20

Architectural Plans Part 4

Architectural Plans Part 5

Architectural Plans Part 6

Architectural Plans Part 7

Architectural Plans Part 8

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.