



Land and Environment Court
New South Wales

Case Name: UPG 122 Pty Ltd v The Hills Shire Council

Medium Neutral Citation: [2024] NSWLEC 1266

Hearing Date(s): Conciliation conference 15 May 2024

Date of Orders: 21 May 2024

Decision Date: 21 May 2024

Jurisdiction: Class 1

Before: Walsh C

Decision: The orders of the Court, as amended on 27 May 2024, are as follows:

- (1) The Applicant is granted leave to file the Amended Development Application referred to at [35] with the Court.
- (2) The written requests prepared by Think Planners dated 6 November 2023 for Proposed Lot 1 and Proposed Lot 2 made pursuant to section 4.6 of Appendix 10 of the State Environmental Planning Policy (Precincts—Central River City) 2021 seeking to vary the height of buildings standard in section 4.3(2) of Appendix 10 of the State Environmental Planning Policy (Precincts—Central River City) 2021 are upheld.
- (3) The appeal is upheld.
- (4) Development Application No 1625/2022/JP, for the demolition of existing structures, subdivision of land into 2 superlots, infrastructure works, and the staged construction of 12 residential flat buildings and basement car parking, landscaping and civil works on land legally described as Lot 403 and Lot 404 in Deposited Plan 1283241 (formally Lot 3 and Lot 4 in Deposited Plan 27502) and known as 34-36 Terry Road, Box Hill, NSW, 2765, and Lot 1 in DP 237578 (33 Terry Road, Box Hill NSW 2765), Lot 3 in DP

1238298 (38Z Terry Road, Box Hill), Lot 2 DP 1238298 (38 Terry Road, Box Hill), Lot 101 in DP 1296785 (8 Terry Road, Box Hill NSW 2765), and Lot 102 in DP 1296785 (Maunder Street, Box Hill NSW 2765) is determined by the grant of deferred commencement consent subject to the conditions at Annexure A, as amended.

Catchwords: DEVELOPMENT APPLICATION – conciliation conference – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 4.16, 8.7
Land and Environment Court Act 1979, ss 34, 39

Environmental Planning and Assessment Regulation 2021, ss 29, 37
State Environmental Planning Policy (Housing) 2021, Ch 4, s 147
State Environmental Planning Policy (Precincts – Central River City) 2021, Appendix 10, ss 2.3, 2.6, 2.7, 4.1, 4.3, 4.6, 6.1
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy (Transport and Infrastructure) 2021, s 2.122

Cases Cited: Ballina Shire Council v Palm Lake Works Pty Ltd [2020] NSWLEC 41
Baron Corporation Pty Limited v Council of the City of Sydney (2019) LGERA 338; [2019] NSWLEC 61
Wehbe v Pittwater Council (2007) 156 LGERA 446; [2007] NSWLEC 827

Category: Principal judgment

Parties: UPG 122 Pty Ltd (Applicant)
The Hills Shire Council (Respondent)

Representation: Counsel:
J Reid (Applicant)
S Kondilios (Solicitor) (Respondent)

Solicitors:
Macpherson Kelley (Applicant)

Hall and Wilcox (Respondent)

File Number(s): 2022/321610

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal under the provisions of s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal of Development Application No 1625/2022/JP (DA) by The Hills Shire Council (Council).
- 2 The DA, as amended, seeks consent for the demolition of existing structures, subdivision of land into two “superlots”, infrastructure works, and staged construction of twelve residential flat buildings and basement car parking, landscaping and civil works. The site has the street address of 8, 33, 34-36, 38 and 38Z Terry Road, Box Hill, and is formally identified as Lot 403 and Lot 404 in DP 1283241, Lot 1 in DP 237578, Lot 2 and Lot 3 in DP 1238298, and Lot 101 and Lot 102 in DP 1296785 (site).
- 3 Responding to a request from the parties on 15 May 2024, the Court arranged a conciliation conference between them under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), which was held on the same day and at which I was appointed to preside.
- 4 After the conciliation conference, the parties reached an 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 development consent to the DA, as amended, subject to conditions.
- 5 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.
- 6 The parties’ decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the DA. There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties sought to assist here by compiling a jurisdictional note (received 15 May 2024 and

updated on 16 May 2024). Mindful of this advice, I find as follows in regard to jurisdiction.

State Environmental Planning Policy (Precincts – Central River City) 2021

- 7 I accept the advice of the parties on the applicability of State Environmental Planning Policy (Precincts – Central River City) 2021 to the DA.

Appendix 10 (The Hills Growth Centre Precincts Plan)

- 8 Appendix 10 (The Hills Growth Centre Precincts Plan) is applicable to the site, and with respect to this Precinct Plan:

- The site is zoned variously as: R1 General Residential, R4 High Density Residential and SP2 Infrastructure (Local Road Widening). Development for residential flat buildings is permissible in both the R1 and R4 zones.
- The DA, as amended proposes the subdivision of the site such that the R4 Zone of the site is "Lot 1" and the R1 Zone of the site is "Lot 2".
- Subdivision of land is permissible with consent under s 2.6. Demolition works are permissible with consent under s 2.7 of the Precinct Plan. Section 2.3(2) requires the consent authority to have regard to the objectives for development in a zone when determining a development application in respect of land within the zone. The parties advise that this has occurred and they drew my attention to the zone objectives for each relevant zone and indicated their shared view that the proposal was consistent with zone objectives, relevantly.
- Section 6.1 is concerned with public utility infrastructure and the parties have advised me of the arrangements that have been made in regard to water, electricity and sewage management. I am satisfied that adequate arrangements have been made to make relevant public utility infrastructure available when required.

- 9 The parties advise that certain residential flat buildings proposed in the DA would breach the development standard relating to maximum building height. This is in respect to the buildings within both proposed Lots 1 and 2 (ie in the R4 and R1 zone). This is dealt with below. The proposal complies with relevant floor space ratio (FSR) controls and other development standards.

Consideration of breach of development standard

- 10 Section 4.6 of the Precinct Plan makes provision for consent to be granted for development even though the development would contravene a development standard. There are a series of applicable preconditions (as applicable to this DA mindful of the lodgement date of 3 May 2022). The parties advise that they

believe the preconditions have been satisfied. It will be seen that I agree with their conclusion.

- 11 To open the door to the powers of s 4.6, the Applicant has provided written requests relating to the contravention which seek to justify the contravention. There are two separate written requests, in response to the different planning controls applying to proposed Lots 1 and 2.

Lot 1 building height contraventions

- 12 The applicable written request was prepared by Think Planners, is dated 6 November 2023 and comprised Tab 7 to Exhibit EJF-1 filed with the Court on 8 November 2023 (WR1).
- 13 The applicable building height control for Lot 1 is 21m. WR1 includes a “height blanket map” indicating the breaches of the building height standard for individual residential flat buildings. The breaches relate generally to the roof area edges and lift overruns. The maximum height comprising a lift overrun is 23.2m comprising a 10.4% (2.2m) breach, according to WR1.
- 14 WR1 satisfies me that compliance with the development standard is unreasonable or unnecessary, in the circumstances, because the objectives of the development standard are achieved notwithstanding the contravention of this standard (*Wehbe v Pittwater Council* (2007) 156 LGERA 446; [2007] NSWLEC 827 at [42] (*Wehbe*)). The objectives of the building height standard pursuant to s 4.3(1) of the Precinct Plan are as follows:
- (a) to establish the maximum height of buildings on land within the Box Hill Precinct or Box Hill Industrial Precinct,
 - (b) to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space,
 - (c) to facilitate higher density development in and around commercial centres and major transport routes.
- 15 Firstly, I would note that Objective (a) is an example of those objectives best understood as explanatory of the purpose of the building height standard (*Baron Corporation Pty Limited v Council of the City of Sydney* (2019) LGERA 338; [2019] NSWLEC 61 (Baron) at [49]). This particular objective is already achieved through the prescription of the height standard itself. But in any event,

I note and accept the advice in WR1 that it is uneven topography rather than an attempt to increase building heights beyond that aimed for in the locality (eg. to increase yield) that brings about the breach. The essence of the established building height for the area is achieved and in turn I find the proposal consistent with the first objective. WR1 also explains how visual impact is minimised and solar amenity protected having regard to Objective (b). The quality of the design form and the fact of the proposed buildings having road boundaries on three sides are key factors here. I accept this explanation that Objective (b) is achieved with the proposal. I accept the explanation in WR1 that the proposal achieves Objective (c) given its provision of additional high density housing close to Box Hill Town Centre.

- 16 I am also satisfied that WR1 has demonstrated that there are sufficient environmental planning grounds to justify the contravention of the building height standard. This is essentially again because the proposal provides for the number of storeys and density anticipated by the controls, including in relation to the FSR standard. The acceptable argument is that these quite modest breaches relate to variations in ground level and to comply with the height standard would make for development inconsistent with the planning ambitions for the site in this area intended for higher density development.
- 17 The above findings mean the requirements of s 4.6(4)(a)(i) are satisfied with respect to the buildings on Lot 1.
- 18 I am also satisfied that the development is in the public interest, with respect to s 4.6(4)(a)(ii) and relating to consistency with the relevant development standard and zone objectives. I adopt the reasoning provided in the written request in regard to consistency with the objectives behind the relevant building height standard. I am also satisfied that the development is consistent with the applicable R4 zone objectives. This is because the proposed development will: (1) quite clearly and directly provide for community housing needs in this quite high density setting, (2) provide for variety in housing type through its apartment mix and (3) not be at odds with enabling non residential uses to meet local needs.

Lot 2 building height contraventions

- 19 The applicable written request for Lot 2 was also prepared by Think Planners and dated 6 November 2023. It was behind Tab 8 to Exhibit EJF-1, filed with the Court on 8 November 2023 (WR2).
- 20 The applicable building height control for Lot 2 is 16m. WR2 includes a "height blanket map" indicating the breaches of the building height standard. The breaches again generally relate to the roof area and lift overruns, but exceed somewhat into the top floor accommodation level. A maximum height including a lift overrun is 19.1m comprising a 19.3% (3.1m) breach, according to WR2.
- 21 WR2 also successfully demonstrates that the objectives of the development standard are achieved notwithstanding the contravention of this standard. The same objectives of the building height standard apply (see [14]). I note and accept the advice in WR2 that again, it is uneven topography rather than an attempt to increase building heights beyond that aimed for in the locality (eg to increase yield) that brings about the breach. The essence of the established building height for the area, and for example planned number of storeys, is achieved. In turn I find the proposal consistent with the first objective. In accordance with WR2 I also accept that in this instance the development will minimise visual impact given its physical juxtaposition with the Box Hill Town Centre (building height of 24m) and Zone R4 lands (building height 21m) height contraventions. That is these particular height contraventions will not be notable given the higher buildings in the immediate setting. Again because of the fact that the development would have road boundaries on three sides means that solar access loss to buildings and open space is minimised.
- 22 I am also satisfied that WR2 has demonstrated that there are sufficient environmental planning grounds to justify the contravention of the building height standard. This is essentially again because the proposal provides for the number of storeys and density anticipated by the controls.
- 23 The above findings mean the requirements of s 4.6(4)(a)(i) are satisfied with respect to the buildings on Lot 2.
- 24 With respect to s 4.6(4)(a)(ii) and whether the development is in the public interest relating to consistency with the relevant development standard and

zone objectives I can again find positively. I adopt the reasoning provided in WR2 in regard to consistency with the objectives behind the relevant building height standard. I am also satisfied that the development is consistent with the applicable R1 zone objectives. This is because the proposed development will quite clearly and directly provide for varying housing needs (consistent with the first two zone objectives). The development is also not at odds with enabling the other land uses referenced in the third and fourth zone objectives.

Overall findings with respect to building height contravention

- 25 The requirements of s 4.6(4)(a) have been met in regard to the breaches of the building height standard in relation to both proposed Lots 1 and 2.
- 26 On appeal, the Court has the power under s 4.6(2) to grant consent to development that contravenes a development standard without obtaining or assuming the concurrence of the Secretary of the Department of Planning and Environment, pursuant to s 39(2) of the LEC Act, but should still consider the matters in s 4.6(5). I have considered these matters and find nothing of significance arises.
- 27 In accordance with the above findings, the conditions which are required to be satisfied before the permissive power in s 4.6(2) is enlivened have been met. Consequently, there is power for the Court to grant consent to the proposal notwithstanding the contravention of the building height standard at s 4.3 of Appendix 10 of the Precinct Plan.

State Environmental Planning Policy (Housing) 2021 and related matters

- 28 The proposed development includes development of residential apartments of at least three storeys. I accept the advice of the parties on the applicability of State Environmental Planning Policy (Housing) 2021 (Housing SEPP), and in particular the provisions of Ch 4. Section 147 includes certain matters a consent authority must give consideration to in the determination of development application. Council advises that this has occurred. Here I note these provisions go in hand with certain requirements of s 29 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation) to at least some extent. I note that in accordance with s 29(1) of the EPA Regulation the required design verification statement has been provided (by a

registered architect) and was filed in the proceedings (Exhibit EJP-2 Tab 9 filed 30 April 2024). This design verification has responded directly to the matters raised in s 147(1)(a) and (b) of the Housing SEPP.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 29 As required by s 4.6(1), consideration needs to be given to whether the site is contaminated, and if it is, that it is satisfied that the site is suitable (or will be suitable after undergoing remediation) for the proposed use. The DA was accompanied by a Contamination site Investigation Report prepared by Geotesta dated 14 October 2020 in relation to the site, and which includes certain recommendations which have been accommodated in consent conditions. I accept the advice of the parties that the site can be made suitable for its intended use.

State Environmental Planning Policy (Transport and Infrastructure) 2021

- 30 Section 2.122, concerned with traffic generating development, applies to the DA. The parties advise that the required consultation with Transport for NSW (TfNSW) has occurred and that its submission has been taken into consideration, along with the other matters at s 2.122(4)(b). According to the parties, the submission from TfNSW has been factored into consent conditions.

Considerations in relation to “related engineering works” proposed off site

- 31 The parties explained the background to this proposal to me in regard to certain works towards the completion of regional stormwater infrastructure. Engineering works related to the proposal are proposed to occur on Lot 100 DP 1228241, which abuts the site. To be clear these works, on Lot 100 DP 1228241, are not part of the DA before me and there is no owner’s consent in regard to works on that parcel in any event. However, the parties’ advise, and I accept, that the proposed future development (engineering works) on Lot 100 DP 1228241 are sufficiently connected to the proposal before me to warrant consideration as a likely impact of this DA (*Ballina Shire Council v Palm Lake Works Pty Ltd* [2020] NSWLEC 41 at [30]). In this regard, I note that the works on Lot 100 DP 1228241 have been subject to environmental assessment (Joint Engineering Expert Report filed 17 April 2024 Appendix D: Terry and Mason Road, Box Hill Detention Basins - Review of Environmental Factors prepared

by Ecological Australia), which has been a consideration in the parties agreed position with respect to approving the proposal subject to conditions. Here I note that Condition 1 of Part A of the agreed consent conditions has been inserted as a deferred commencement condition requiring separate development consent to be obtained for these off-site works prior to operational consent being granted in regard to the DA before me. I am satisfied that sufficient assessment of impact has occurred in regard to these proposed off-site works and that there are no jurisdictional bars which arise with regard to them.

Other matters

- 32 In regard to s 4.15(1)(d) of the EPA Act, I note that one objecting submission has been received. The parties advised how there has consideration to this objection.

Conclusion

- 33 With the above findings, I am satisfied that the jurisdictional pre-requisites have been met and the parties' decision is one that the Court could have made in the proper exercise of its functions. In turn, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.
- 34 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. The LEC Act also required me to "set out in writing the terms of the decision" (s 34(3)(b)). The final orders have this effect.

Notation

- 35 In regard to the amendments to the application, it is noted that a number of changes to plans and documentation originally filed with the Court have previously been formalised. With the finalised agreement, some further amendments have been made with the agreement of Council. In regard to this the Court notes that Council has agreed, as the relevant consent authority, under section 38(1) of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending Development Application No 1625/2022/JP to rely upon the following further amended documents, as filed with the Court:

Documents			
1	BASIX Certificates	SLR Consulting Pty Ltd	2 May 2024
	Certificate No. 1280101M_03		
	Certificate No. 1280913M_02		
	Certificate No. 1267353M_04		
2	NatHERS Certificates	SLR Consulting Pty Ltd	2 May 2024
	Certificate No. 0009424110		
	Certificate No. D82H3MV5EZ		

Orders

36 The orders of the Court, as amended on 27 May 2024, are as follows:

- (1) The Applicant is granted leave to file the Amended Development Application referred to at [35] with the Court.
- (2) The written requests prepared by Think Planners dated 6 November 2023 for Proposed Lot 1 and Proposed Lot 2 made pursuant to section 4.6 of Appendix 10 of the State Environmental Planning Policy (Precincts—Central River City) 2021 seeking to vary the height of buildings standard in section 4.3(2) of Appendix 10 of the State Environmental Planning Policy (Precincts—Central River City) 2021 are upheld.
- (3) The appeal is upheld.
- (4) Development Application No 1625/2022/JP, for the demolition of existing structures, subdivision of land into 2 superlots, infrastructure works, and the staged construction of 12 residential flat buildings and basement car parking, landscaping and civil works on land legally described as Lot 403 and Lot 404 in Deposited Plan 1283241 (formally Lot 3 and Lot 4 in Deposited Plan 27502) and known as 34-36 Terry

Road, Box Hill, NSW, 2765, and Lot 1 in DP 237578 (33 Terry Road, Box Hill NSW 2765), Lot 3 in DP 1238298 (38Z Terry Road, Box Hill), Lot 2 DP 1238298 (38 Terry Road, Box Hill), Lot 101 in DP 1296785 (8 Terry Road, Box Hill NSW 2765), and Lot 102 in DP 1296785 (Maunder Street, Box Hill NSW 2765) is determined by the grant of deferred commencement consent subject to the conditions at Annexure A, as amended.

P Walsh

Commissioner of the Court

321610.22 Annexure A

Amendments

27 May 2024 - By consent and pursuant to UCPR 36.17, the decision in these proceedings, published on 21 May 2024, has been varied to alter certain textual references in Annexure A.

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.