



Land and Environment Court
New South Wales

Case Name: Landmark Group Australia Pty Limited v The Hills Shire Council

Medium Neutral Citation: [2023] NSWLEC 1243

Hearing Date(s): Conciliation Conference 10 May 2023

Date of Orders: 23 May 2023

Decision Date: 23 May 2023

Jurisdiction: Class 1

Before: Espinosa C

Decision: The Court orders that:
(1) The Applicant is to pay the Respondent's costs thrown away in the amount of \$30,000 pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 within 28 days of the date of these orders.
(2) The Written Request pursuant to cl 4.6 of The Hills Local Environmental Plan 2019 (LEP) seeking variation to the maximum height of building control in cl 4.3 of the LEP, prepared by Sutherland & Associates dated April 2022, is upheld.
(3) The appeal is upheld.
(4) Development Application No. 1801/2022/JP for the demolition of existing structures and construction of a residential flat building containing 95 apartments over 2 basement levels, dedication of road widening and strata subdivision is determined by the grant of consent subject to the conditions of consent in Annexure 'A'.

Catchwords: DEVELOPMENT APPEAL – residential flat building – written request to justify the contravention of height of building development standard – Showground Station Precinct - design excellence – flood planning – conciliation conference – agreement between the

parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.16, 8.7, 8.15
Environmental Planning and Assessment Regulation 2021, ss 6, 37
Land and Environment Court Act 1979, ss 34, 39
State Environmental Planning Policy (BASIX) 2004
State Environmental Planning Policy (Housing) 2021, ss 15, 17, 18, 19, 21, 22
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
The Hills Local Environmental Plan 2019, cll 2.2, 2.6, 2.7, 4.1, 4.3, 4.4, 4.6, 5.21, 7.1, 7.2, 7.7, 9.1, 9.2, 9.3, 9.5, 9.8, Pt 9

Texts Cited: NSW Department of Planning and Environment, Apartment Design Guide, 2015
The Hills Development Control Plan 2012

Category: Principal judgment

Parties: Landmark Group Australia Pty Limited (Applicant)
The Hills Shire Council (Respondent)

Representation: Counsel:
A Galasso SC (Applicant)
P Hudson (Solicitor)(Respondent)

Solicitors:
Mills Oakley (Applicant)
Marsdens Law Group (Respondent)

File Number(s): 2022/202323

Publication Restriction: No

JUDGMENT

1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act* 1979 (EPA Act) being an appeal against the refusal of Development Application No. 1801/2022/JP for the demolition of existing structures, tree removal and construction of a part 6, part 7 storey residential flat building containing 100 apartments over basement parking with associated landscaping, public domain works and stratum

subdivision (the Proposed Development) at 16-18 Partridge Avenue and 21-23 Middleton Avenue, Castle Hill legally described as Lot 224 and 225 DP 249973, and Lot 2 and 3 DP 251694 (the Site).

2 The Proposed Development has been amended as detailed in the judgment and the final details of the Proposed Development for which development consent is sought are as follows:

- (1) Demolition of existing structures and tree removal.
- (2) Construction of a part 6, part 7 storey residential flat building (RFB) containing a total of 95 apartments with the following unit mix proposed: 21 x 1 bedroom, 60 x 2 bedroom and 14 x 3 bedroom units.
- (3) 50% of the units are proposed for use as affordable housing within the meaning of the EPA Act.
- (4) The residential flat building is segmented into Building 1 and Building 2, each with separate parking, pedestrian access and stairs/lift cores.
- (5) Parking is provided across two basement levels and the ground floor levels containing a total of 135 car parking spaces (115 residential spaces and 20 visitor spaces) and 41 bicycle parking spaces (including 8 visitor spaces) and 10 motorcycle parking spaces.
- (6) Vehicular access to the site is proposed via a single driveway on Partridge Avenue.
- (7) Communal open space is provided at Level 1 and on the rooftop.
- (8) Several waste storage rooms for waste and recyclables are proposed on the ground level, with a MRV loading dock provided to facilitate collection.
- (9) A 2m wide strip of land along Partridge Avenue is proposed to be dedicated to the Respondent for road widening purposes. Landscaping and other public domain works are also proposed along Partridge Avenue.
- (10) The proposed development includes stratum subdivision with one lot containing Building 1 (with reciprocal rights for Building 2 in respect of the common space on Level 1 with Building 2) and the other lot containing Building 2 (with reciprocal rights for Building 1 in respect of the common space on Level 1 and loading dock and visitor parking at ground level).

3 On 3 April 2023, the parties appeared before me for hearing at which time the Applicant moved on Notices of Motion filed 30 March 2023, 31 March 2023 and 3 April 2023. I made the following orders on 3 April 2023:

- (1) The Motion filed 30 March 2023 is granted.

- (2) The Applicant is granted leave to rely on amended documents and plans as follows:
 - (a) Arboricultural Impact Assessment Rev 12.4 (135 pages) March 2023
- (3) The Court, in exercising the functions of The Hills Shire Council, as the relevant consent authority, under s 39(2) of the *Land and Environment Court Act 1979* (LEC Act), agrees, under s 37(1) of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation), to the Applicant amending Development Application No. 1801/2022/JP in accordance with the document listed above.
- (4) The Applicant is to pay the Respondent's reasonable costs thrown away as a result of the amended in accordance with s 8.15(3) of the EPA Act, as agreed or assessed.
- (5) The Motion filed 31 March 2023 is granted.
- (6) The Applicant is granted leave to rely on amended documents and plans as follows:
 - (a) Schedule of Amendments dated 15 March 2023
 - (b) Amended Architectural Plans dated 15 March 2023
 - (c) Amended Stormwater Concept Plans Rev F dated 29 March 2023
 - (d) Amended Landscape Plans, Issue S dated 15 March 2023
 - (e) BASIX Stamped Architectural plans (dated 15 March 2023) dated 30 March 2023
 - (f) Amended BASIX Certificate dated 30 March 2023
 - (g) Letter from Sutherland Planning dated 15 March 2023 providing landscape area calculation
- (7) The Court, in exercising the functions of The Hills Shire Council, as the relevant consent authority, under s 39(2) of the LEC Act, agrees, under s 37(1) of the EPA Regulation, to the Applicant amending Development Application No. 1801/2022/JP in accordance with the documents listed above.
- (8) The Applicant is to pay the Respondent's reasonable costs thrown away as a result of the amended in accordance with s 8.15(3) of the EPA Act, as agreed or assessed.
- (9) The Motion filed in Court on 3 April 2023 is granted.
- (10) The Applicant is granted leave to rely on amended documents and plans as follows:
 - (a) Schedule of Amendments dated 3 April 2023
 - (b) Amended Architectural Plans dated 3 April 2023
 - (c) NatHERS stamped plans dated 30 March 2023

- (d) Amended Landscape Plans, Issue T dated 3 April 2023
 - (e) Arboricultural Impact Assessment Rev 13.1 (16 pages) 30 March 2023
 - (f) SEPP 65 Statement dated 29 March 2023
 - (g) Stormwater Flooding Statement Issue A dated March 2023
 - (h) Flood Impact Assessment Issue C dated March 2023
 - (i) Flood Evacuation Response Plan Issue A dated March 2023
- (11) The Court, in exercising the functions of The Hills Shire Council, as the relevant consent authority, under s 39(2) of the LEC Act, agrees, under s 37(1) of the EPA Regulation 2021, to the Applicant amending Development Application No. 1801/2022/JP in accordance with the documents listed above.
- (12) The Applicant is to pay the Respondent's reasonable costs thrown away as a result of the amended plans in accordance with s 8.15(3) of the EPA Act, as agreed or assessed.
- 4 The hearing was adjourned ultimately to 10 May 2023, to allow additional time for the parties to consider the updated TUFLOW model and on 18 April 2023, the parties filed the Supplementary Joint Flood Report which confirmed that the balance of flood matters in dispute were capable of resolution by way of conditions.
- 5 The Court arranged a conciliation conference under s 34(1) of the LEC Act between the parties, which was held on 10 May 2023. I presided over the conciliation conference.
- 6 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 development consent to the development application subject to conditions. Accordingly, the hearing was vacated.
- 7 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. In making the orders to give effect to the agreement between the parties, I was not required to, and have not, made any merit assessment of the issues that were originally in dispute between the parties.

- 8 The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the development application.
- 9 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties identified the jurisdictional prerequisites of relevance in these proceedings to be the terms of cl 4.6 of The Hills Local Environmental Plan 2019 (THLEP) to vary a development standard. The parties explained how the jurisdictional prerequisites of cl 4.6 and other provisions of THLEP as well as how the jurisdictional prerequisites of various State Environmental Planning Policies have been satisfied in an agreed jurisdictional statement which I have considered and summarise where relevant below.
- 10 Owner's consent to the Proposed Development has been provided and filed with the Class 1 Application. Between 25 May 2022 to 15 June 2022, the Proposed Development was publicly exhibited by the Respondent. One objecting submission was received on the basis that it would result in adverse construction and overshadowing impacts.
- 11 The Site is zoned R4 High Density Residential under THLEP and the Proposed Development, a residential flat building (RFB), is permissible with consent (cl 2.2, THLEP). Consent is sought for the demolition of the existing structures as required by cl 2.7, THLEP.
- 12 The categorisation of the Proposed Development as an RFB together with the location of the Site within the Showground Station Precinct is relevant to a number of development standards and other controls. The development standards and control within Pt 9 of THLEP, which apply to the Showground Precinct prevail over the other development standards and controls which apply to the whole local government area of The Hills Shire.
- 13 The Proposed Development proposes to consolidate four allotments totalling a lot size area of 3,798m². Notwithstanding the contravention of cl 4.1 minimum subdivision lot size development standard of 4,000m² for an RFB, cl 9.1 of THLEP provides as follows:

“Despite any other provision of this Plan, development consent may be granted to development on a lot within the Showground Station Precinct in a

zone shown in Column 2 of the table to this clause for a purpose shown in Column 1 of the table, if the area of the lot is equal to or greater than the area specified for that purpose and shown in Column 3 of the table.”

- 14 The Proposed Development seeks consent for the erection of an RFB greater than 11m in height (Column 1) within Zone R4 High Density Residential (Column 2) and accordingly, the minimum lot size is 3,600m² (Column 3), rendering the Proposed Development compliant with the minimum lot size development standard.
- 15 The subdivision proposed by the Proposed Development is permitted with development consent which is duly sought (cl 2.6, THLEP and s 22 State Environmental Planning Policy (Housing) 2021 (Housing SEPP)).
- 16 The Site is subject to a maximum height of building (HOB) development standard of 21m (cl 4.3, THLEP). The Proposed Development seeks consent for a HOB of 25.27m which exceeds this development standard by 4.27m or 20.3%.
- 17 The Applicant relies on a Written Request prepared by Sutherland & Associates dated April 2022 pursuant to cl 4.6 of the THLEP seeking to justify the contravention of the HOB development standard in cl 4.3 of the THLEP, filed with the Class 1 Application (Tab 9). The parties agree that the cl 4.6 Written Request provided by the Applicant justifies this non-compliance, in circumstances where the exceedance is limited to the roof top elements / lift over run. The architectural plans demonstrate that the roof includes a decorative element, does not include any advertising or FSR and will not cause adverse overshadowing (cl 5.6, THLEP).
- 18 The Court is satisfied that the Applicant’s Written Request seeking to justify the contravention of the development standard in cl 4.3 of the THLEP has adequately addressed the matters required to be demonstrated by cl 4.6(3) of the THLEP and that the proposed development would be in the public interest because it is consistent with the objectives of the particular standard and the objectives for development within the zone in which the development is proposed to be carried out.
- 19 The Proposed Development has a floor space ratio (FSR) of 2.08:1. The Site is subject to a maximum FSR of 1.6:1 pursuant to cl 4.4(2) of the THLEP,

however, s 17(1)(a)(i) of the Housing SEPP provides an FSR incentive of an additional 0.5:1 for affordable housing developments, bringing the total permissible FSR for the Proposed Development 2.1:1. I note that the Proposed Development includes a 2m wide strip of land along Partridge Avenue that will be dedicated to Council for road widening purposes and that pursuant to cl 9.2 of THLEP, this land is included for the purpose of calculating FSR.

- 20 A portion of the Site (on the western boundary) is flood affected by a 1% Annual Exceedance Probability (AEP) storm event. Clause 5.21 of THLEP provides for Flood planning as follows:

(2) Development consent must not be granted to development on land the consent authority considers to be within the flood planning area unless the consent authority is satisfied the development—

- (a) is compatible with the flood function and behaviour on the land, and
- (b) will not adversely affect flood behaviour in a way that results in detrimental increases in the potential flood affectation of other development or properties, and
- (c) will not adversely affect the safe occupation and efficient evacuation of people or exceed the capacity of existing evacuation routes for the surrounding area in the event of a flood, and
- (d) incorporates appropriate measures to manage risk to life in the event of a flood, and
- (e) will not adversely affect the environment or cause avoidable erosion, siltation, destruction of riparian vegetation or a reduction in the stability of river banks or watercourses.

(3) In deciding whether to grant development consent on land to which this clause applies, the consent authority must consider the following matters—

- (a) the impact of the development on projected changes to flood behaviour as a result of climate change,
- (b) the intended design and scale of buildings resulting from the development,
- (c) whether the development incorporates measures to minimise the risk to life and ensure the safe evacuation of people in the event of a flood,
- (d) the potential to modify, relocate or remove buildings resulting from development if the surrounding area is impacted by flooding or coastal erosion.

- 21 The parties agree that the Proposed Development together with the agreed conditions of consent demonstrate that the Proposed Development is

compatible with the flood function, will not adversely affect the Site or surrounds and minimises any potential flood risks. I am satisfied that cl 5.21 of THLEP is satisfied having considered the following documents:

- (1) Flood Evacuation Response Plan prepared by Telford dated March 2023;
- (2) Stormwater Concept Plans prepared by Telford Rev H; and
- (3) the Supplementary Joint Flood Report filed 18 April 2023.

22 The Site is not identified as being affected by acid sulfate soils and the parties agree that the extent of the proposed earthworks are unlikely to result in significant or adverse disruption to drainage patterns (cl 7.1, THLEP). Having considered the Statement of Environmental Effects (SEE) and the Geotechnical Report, both filed with the Class 1 Application, I am satisfied that cl 7.1 and 7.2 of THLEP have been duly satisfied.

23 Design excellence considerations are required by cll 7.7 and 9.5 of THLEP. I am satisfied that the Applicant has met with Respondent Council's Design Review Panel and has incorporated Panel's recommendations into the Proposed Development.

24 Clause 9.5(5) of THLEP is relevant to the Showground Station Precinct and the Proposed Development because it will be higher than 21 metres but less than 66 metres in height and the clause provides as follows:

(5) In addition, development consent must not be granted to development to which this clause applies unless—

(a) if the development is in respect of a building that is, or will be, higher than 21 metres or 6 storeys (or both) but not higher than 66 metres or 20 storeys (or both)—

(i) a design review panel reviews the development, and

(ii) the consent authority takes into account the findings of the design review panel, or

25 The Respondent has provided to the Court the findings of the design review panel in the Respondent's Bundle of Documents filed 24 March 2023 titled "Design Review Panel Design Advisory Meeting Report" dated 24 August 2022.

26 The Applicant's planner, Mr Aaron Sutherland of Sutherland and Associates prepared a document dated 31 March 2023 which addresses design excellence at pages 12 and 13 which relevantly provides as follows:

"It is my opinion that the Court as consent authority can be satisfied that the findings of the design review panel have been taken into account and in accordance with Clause 9.5(3) of The Hills LEP 2019 the consent authority can be satisfied that the development as amended exhibits design excellence for the following reasons:

- The proposal provides for a residential flat development that is consistent with the Showground Precinct Structure Plan which requires the provision high density residential development on the subject and surrounding sites as part of the Showground Station Priority Precinct.
- The impact of the proposal with respect to design and site planning is positive. The proposed distribution of built form and massing of the building across the site is the result of a considered analysis of the context of the site and the desire to deliver a positive urban design outcome. The proposal incorporates a diversity of scale and form across the site. The proposal generates a high level of visual interest with modulation to the skyline as well as creating an engaged ground floor plane incorporating landscaping.
- The building exhibits a high level of environmental performance, provides a high level of amenity and an attractive contemporary architectural expression.
- The proposed materials and finishes are of a high quality and will contribute positively to the locality.
- The proposal demonstrates fine grain active frontages with the building's architecture combined with the public domain improvements that will serve to activate and enliven the street frontages.
- The proposed development does not adversely impact view corridors from the public domain.
- The proposed development has maximised internal amenity having regard to the constraints of the site.
- The proposal achieves the principles of ecologically sustainable development.
- The proposed development will not result in any significant adverse impacts (existing or proposed) on the same site or on neighbouring sites in terms of solar access, separation, setbacks, amenity and urban form.
- The proposal will have a compatible built form relationship within surrounding development when these sites are redeveloped in accordance with the Showground Precinct Structure Plan.
- The proposal provides for cycle, vehicular and service access and is designed to comply with relevant Australian Standards in terms of circulation and access requirements.

- The redevelopment of the site will deliver substantial public benefits for the community with upgrades to the public domain enhancing the amenity and liveability for residents, workers and visitors. The proposal also includes the widening of the footpath along Partridge Avenue. A number of existing vehicular crossings will become redundant resulting in additional space for on-street parking in Partridge Avenue.
- The proposed development includes a comprehensive design for the landscaping of the site and all public domain areas surrounding the site. The proposal will result in a residential development within a suitably landscaped setting having regard to the urban context of the site. The landscaping proposed represents an integral element in ensuring the development has an appropriate contextual fit and will positively contribute to the forthcoming character of the Showground Station Precinct.
- The proposal will deliver affordable housing and is the first affordable housing project in the Showground Station precinct and provides much needed accommodation for the community in this locality.”

- 27 I am satisfied that the findings of the design review panel have been appropriately considered.
- 28 A 10m setback from Middleton Avenue is required pursuant to the Building Setback Map STB_016 of THLEP. The basement level is setback 10.135m from Middleton Ave and the upper levels propose setbacks varying between 6m side setbacks to over 10m street frontage setback in satisfaction of cl 9.3 of THLEP which provides that Development consent must not be granted to development on land within the Showground Station Precinct unless the front building setback of any building resulting from the development is equal to, or greater than, the distance shown for the land on the Building Setback Map.
- 29 A maximum of 5,000 dwellings is permitted within the Showground Station Precinct (cl 9.8, THLEP). The Proposed Development seeks consent for 95 units and as the 5,000 residential threshold has not yet been delivered in the precinct, I am satisfied that the Proposed Development will not exceed this control.
- 30 In terms of the Housing SEPP, the following provisions apply, and the parties agree that the Proposed Development, satisfies these provisions as follows:
- (1) The proposed conditions of consent are acceptable and satisfy s 15;
 - (2) 50% of the units are proposed for use as affordable housing thereby satisfying s 17;

- (3) The following relevant non-discretionary development standards listed in s 18 are satisfied by the Proposed Development:
- (a) the Site has an area greater than 450m² (s 18(a));
 - (b) 1,913m² (or 50.5%) of landscaped area is proposed which complies with the 30% minimum requirement (s 18(c));
 - (c) 962m² of deep soil is proposed in satisfaction of the 15% minimum requirement and stipulated dimensions (s 18(d));
 - (d) more than 70% of the units receive 3 hours of solar access in mid-winter (s 18(e));
 - (e) 135 car parking spaces are proposed, satisfying s 18(g); and
 - (f) the internal areas of the apartments comply with the applicable Apartment Design Guide (ADG) provisions (s 18(h)).
- 31 The parties inform the Court that they have considered and agree that the Proposed Development is compatible with the desired future character of the area (s 19(3), Housing SEPP).
- 32 The conditions of consent require compliance with s 21 of the Housing SEPP at Condition 127, in that the affordable housing component of the development will be used for that purpose and managed by a registered community housing provider for at least 15 years.
- 33 The parties agree and the Court is satisfied that the Proposed Development demonstrates compliance with the relevant ADG provisions, particularly with regard to solar access, building separation, cross ventilation and bedroom sizes as supported by the Design Verification Statement prepared by DKP (referred to in the Conditions of Consent as “SEPP 65 Statement prepared by DKO”) filed with the Class 1 Application and the Natural Ventilation Assessment prepared by SLR version 1.5 dated December 2022.
- 34 I am satisfied that in relation to potential contamination, s 4.6 of the State Environmental Planning Policy (Resilience and Hazards) 2021 is satisfied as the Site has been historically used for residential purposes and there is no proposed change of use which is supported by the SEE and Preliminary Site Investigation both filed with the Class 1 Application.
- 35 The proposal is “BASIX affected development pursuant” under s 6 of the Environmental Planning and Assessment Regulation 2021 (EPA Regulation) and accordingly an amended BASIX certificate and stamped plans are

provided in satisfaction of this requirement (State Environmental Planning Policy (BASIX) 2004).

- 36 Although not a jurisdictional pre-requisite to the grant of consent, the parties have informed the Court that they are satisfied that the Proposed Development, has considered and addressed the relevant provisions in The Hills Development Control Plan 2012 and the EPA Regulation.
- 37 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. I refer to and adopt the reasons given by the parties as I have set them out above in this judgment.
- 38 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.

Notations:

- 39 The Court notes that:
- (1) The Hills Shire Council, as the relevant consent authority, has agreed under s 37(1) of the Environmental Planning and Assessment Regulation 2021 to the Applicant amending Development Application No. 1801/2022/JP in accordance with the relevant materials comprising Exhibits CC-1, AC-1, CC-2, CC-3 and the following documents:
 - (a) Amended Subdivision Plan, prepared by Norton Survey Partners dated 5 May 2023; and
 - (b) Amended Landscape Plans Sheets 2, 3, 10 and 13 (up to Rev U), prepared by Paul Scrivener dated 13 April 2023;
 - (c) Letter from Senica regarding BASIX matters dated 12 April 2023; and
 - (d) Architectural Ground Floor Plan drawing DA202 (Rev H), prepared by DKO Architecture dated 14 April 2023.

Together, the "Amended Application".

- (2) The documents listed in [39(1)] were filed with the Court on 10 May 2023.
- (3) An agreement has been reached between the parties as to the total costs to be payable by the Applicant to the Respondent pursuant to s 8.15(3) of the EPA Act in accordance with Order 40(1) below.

Orders:

40 The Court orders that:

- (1) The Applicant is to pay the Respondent's costs thrown away in the amount of \$30,000 pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* within 28 days of the date of these orders.
- (2) The Written Request pursuant to cl 4.6 of The Hills Local Environmental Plan 2019 (LEP) seeking variation to the maximum height of building control in cl 4.3 of the LEP, prepared by Sutherland & Associates dated April 2022, is upheld.
- (3) The appeal is upheld.
- (4) Development Application No. 1801/2022/JP for the demolition of existing structures and construction of a residential flat building containing 95 apartments over 2 basement levels, dedication of road widening and strata subdivision is determined by the grant of consent subject to the conditions of consent in Annexure 'A'.

E Espinosa

Commissioner of the Court

Annexure A

Architectural, landscape and public domain works plans

Amendments

23 May 2023 - Amendment to correct typographical error in the name of the attached plans.

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.