



Land and Environment Court  
New South Wales

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Case Name:	Mogul Stud Pty Ltd v The Hills Shire Council
Medium Neutral Citation:	[2023] NSWLEC 1714
Hearing Date(s):	Conciliation conference on 9 November 2023
Date of Orders:	28 November 2023
Decision Date:	28 November 2023
Jurisdiction:	Class 1
Before:	Dickson C
Decision:	<p>The Court orders:</p> <p>(1) The appeal is upheld.</p> <p>(2) Development consent is granted to Development Application No. 343/2023/JP, as amended, for construction of a seven-storey development consisting of a café, business premises, gym, child care centre and office premises, with an adjoining four-storey car park, associated landscaping and vehicular and pedestrian access at Part Lot 106 in DP 1257660, subject to the conditions set out in Annexure 'A'.</p>
Catchwords:	<p>DEVELOPMENT APPLICATION – mixed use – development – café – business premises – gym – child care centre and office premises – car parking – landscaping and access – conciliation conference – amended plans – agreement between the parties – orders made</p>
Legislation Cited:	<p>Education and Care Services National Regulations, regs 25, 104, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115</p> <p>Environmental Planning and Assessment Act 1979, ss 4.15, 8.7</p> <p>Environmental Planning and Assessment Regulation 2021, s 23</p>

Land and Environment Court Act 1979, s 34  
State Environmental Planning Policy (Industry and  
Employment) 2021, ss 3.1, 3.6, Sch 5  
State Environmental Planning Policy (Planning  
Systems) 2021, Sch 6  
State Environmental Planning Policy (Precincts –  
Central River City) 2021, Appendix 10, ss 2.3, 4.3, 4.6,  
5.10, 6.1  
State Environmental Planning Policy (Resilience and  
Hazards) 2021, s 4.6  
State Environmental Planning Policy (Transport and  
Infrastructure) 2021, ss 2.119, 3.23

Cases Cited: Initial Action Pty Ltd v Woollahra Municipal  
Council (2018) 236 LGERA 256; [2018] NSWLEC 118  
RebelMH Neutral Bay Pty Ltd v North Sydney  
Council [2019] NSWCA 130

Texts Cited: Association of Australasian Acoustical Consultants,  
Guideline for Child Care Centre Acoustic Assessment  
Australian Building Codes Board, National Construction  
Code  
Department of Planning, Industry and Environment,  
Child Care Planning Guideline (September 2021)  
The Box Hill Development Control Plan 2018  
The Hills Development Control Plan 2012

Category: Principal judgment

Parties: Mogul Stud Pty Ltd (Applicant)  
The Hills Shire Council (Respondent)

Representation: Counsel:  
F Rourke (Solicitor) (Applicant)  
P Hudson (Solicitor) (Respondent)

Solicitors:  
Allens Linklaters (Applicant)  
Marsdens Law Group (Respondent)

File Number(s): 2022/325466

Publication Restriction: Nil

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal brought by Mogul Stud Pty Ltd (Applicant) pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the deemed refusal of their development application by The Hills Shire Council. The development application, as amended, seeks consent for demolition and construction of a seven-storey mixed use development consisting of a café, business premises, gym, child care centre and office premises, with an adjoining four-storey car park, associated landscaping and vehicular and pedestrian access (Amended DA). The child care centre is proposed to accommodate 100 children across the age groupings. The development is proposed at 501 Mount Carmel Drive, Box Hill (Part Lot 106 in DP 1257660).
- 2 A conciliation conference was held between the parties pursuant to s 34 of the *Land and Environment Court Act 1979* (LEC Act) on 10 March 2023. That conciliation conference was terminated on 5 June 2023, and the matter was listed for hearing.
- 3 Following the conciliation conference, the parties continued without prejudice discussions and on 26 October 2023 sought orders for a further conciliation conference. A further conciliation conference was listed for 9 November 2023. I presided over the further conciliation conference. 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 for the development application, as amended, and granting development consent subject to the annexed conditions of consent.
- 4 As the presiding Commissioner, I am satisfied that the decision is one that the Court can make in the proper exercise of its functions (this being the test applied by s 34(3) of the LEC Act). I form this state of satisfaction on the basis that:
  - (1) As required by s 23(1) of the Environmental Planning and Assessment Regulation 2021, the development application is lodged with the consent of the owners of the land.
  - (2) The development application was notified and advertised between 2 and 23 September 2023. No submissions were received.

- (3) Pursuant to State Environmental Planning Policy (Planning Systems) 2021, the proposed development is classed as regionally significant development under Sch 6 as it has a capital investment value of more than 30 million. The Sydney Central Planning Panel has provided agreement for the development application to be determined through an agreement between the parties pursuant to s 34 of the LEC Act.
- (4) State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP RH) applies. As required by s 4.6 of SEPP RH, consideration has been given as to whether the subject site is contaminated. The site has historically been vacant grassland which has been subject to earthworks pursuant to development consents. A Land Use Suitability Assessment accompanies the development application. That assessment concludes that the site is suitable for the proposed development. I accept that the site will be suitable for the proposed development.
- (5) Section 2.119(2) of State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP TI) applies as Lot 106 in DP 1257660 has frontage to Windsor Road which is a classified road. The parties agree and I accept that the proposed development satisfied the conditions of section 2.119(2) as follows:
  - (a) Vehicular access to the proposed development will be via Mount Carmel Drive and Livermore Way, located to the north of Lot 106 in DP 1257660;
  - (b) It will not have any adverse impact on the operation of Windsor Road; and
  - (c) It will not be overly sensitive to traffic noise and is well setback from the adjacent roads.
- (6) As required by s 3.23 of SEPP TI in determining the development application, I have taken into consideration the applicable provisions of the Child Care Planning Guideline. The parties agree and I accept the following summary:
  - The Proposed Development is consistent with the design quality principles contained within Part 2:
    - (a) Context: The design takes advantage of the surrounding context by optimising access by walking and public transport given its proximity to the existing bus stop on Windsor Road and future bus services on Mount Carmel Drive when it becomes operational.
    - (b) Built Form: The scale, bulk and height of the design is appropriate to the character of the surrounding area with respect to the approved retail development to the west.
    - (c) Adaptive learning spaces: The facility has been designed to achieve high levels of amenity for the occupants and to provide a safe and functional layout, with a mix of indoor and outdoor inclusive learning spaces.

- (d) Sustainability: The design utilises sunlight to provide high quality, sustainable play spaces and incorporates solar panels on the rooftop of the commercial building in which the child care centre will be located.
  - (e) Landscape: The landscaping provides an attractive development and integrated learning space with good amenity.
  - (f) Amenity: The facility has been designed to positively influence internal and external amenity for children, staff and neighbours.
  - (g) Safety: The design incorporates passive surveillance and crime prevention through environmental design principles to provide a safe but welcoming environment.
- The Proposed Development is consistent with the Part 3 Matters for Consideration as follows:
  - (a) *3.1 Site selection and location:* the neighbourhood is a good 'fit' for the Proposed Development. The site is conveniently located for a child care centre due to the accessibility and proximity to nearby residential estates (though it does not directly adjoin residential properties). Any potential impacts from traffic, noise, flooding, contamination or social impacts have been adequately assessed and addressed in the technical reports comprising the Amended DA. The parking and pedestrian path layouts have been designed to reduce the likelihood of incidents occurring. The centre will complement the viability of the adjacent retail development and is located close to other compatible uses including educational establishments and an employment area. The site is considered to be suitable for a child care centre as it will provide a valuable service that will compliment other land uses (both existing and future) within Box Hill Inn Village.
  - (b) *3.2 Local character, streetscape and the public domain interface:* the child care centre will be contained within a commercial building which has been designed to reflect the future character of Box Hill Inn Village. Landscaping has been incorporated to soften the edges of the development and to improve the streetscape appearance of the building. Car parking is also well integrated into a building that adjoins the commercial building and has been thoughtfully designed to complement the commercial building. There is a clear delineation between the child care centre and the remainder of the uses in the

commercial building. The child care centre will have adequate fencing and walls around the outdoor play space.

(c) *3.3 Building orientation, envelope, building design and accessibility:* The height, setbacks, floor space ratio, design features, and materials and finishes minimise the impacts of the Proposed Development on local character and surrounding properties. The commercial building which contains the child care centre does not adjoin any residential development and will not have any adverse impacts in terms of aural or visual privacy, or solar access, on surrounding land uses. Indoor play areas will receive adequate solar access through windows and the outdoor play area will be covered to ensure that it can be used through the year. The height of the commercial building is appropriate for the site and the commercial building is sufficiently setback from Mount Carmel Drive and the unnamed road to the north of the building. Accessibility is achieved by providing two points of entry from the ground floor and the Level 3 car park area.

(d) *3.4 Landscaping:* the landscaping has been designed to ensure usable and practical outdoor areas which offer play opportunities for children at the centre. Screen planting is included to offer privacy.

(e) *3.5 Visual and acoustic privacy:* the fencing and planting along the boundary of the external play area will ensure visual privacy at the centre. The Noise Impact Assessment included in the Amended DA has assessed that the noise levels are compliant with the Association of Australasian Acoustical Consultants Guideline for Child Care Centre Acoustic Assessment criteria. The design and layout include mitigation measures to reduce the impacts of noise.

(f) *3.6 Noise and air pollution:* as assessed in the Noise Impact Assessment, noise levels in the child care facility are expected to be within acceptable levels. The facility will not be located in an area that is of high pollution risk. The commercial building is located a short distance from Windsor Road to avoid vehicle pollution.

(g) *3.7 Hours of operation:* the proposed hours of operation between 7am to 6pm Monday to Friday will not adversely impact the amenity of surrounding properties and are consistent with adjoining and co-located land uses.

(h) *3.8 Traffic, parking and pedestrian circulation:* a safe pedestrian environment is achieved, as the parking for the child care centre is separate from other uses and will be marked accordingly. The parking is as close to the building as practically possible and is provided in accordance with the rates in the Box Hill Development Control Plan 2018 (DCP 2018). Swept paths are provided with the Traffic Impact Assessment accompanying the Amended DA to demonstrate manoeuvrability throughout the car park. The Traffic Impact Assessment has also assessed the potential traffic impacts on surrounding land uses.

(7) The Proposed Development is consistent with the Education and Care Services National Regulations identified in Part 4:

(a) *4.1 Indoor space requirements:* the indoor space and storage requirements of reg 107 are satisfied. Each child has a minimum of 3.25m<sup>2</sup> of unencumbered indoor space and the facility provides sufficient storage space.

(b) *4.2 Laundry and hygiene facilities:* a laundry room is provided, satisfying reg 106.

(c) *4.3 Toilet and hygiene facilities:* age appropriate toilets are provided for in accordance with reg 109.

(d) *4.4 Ventilation and natural light:* good ventilation will be achieved through a mix of natural cross ventilation and air conditioning. The Proposed Development will comply with the light and ventilation and minimum ceiling height requirements of the National Construction Code. The design meets the requirements of reg 110.

(e) *4.5 Administrative space:* a staff room, meeting room and director space is provided in the facility, meeting the requirements of reg 111.

(f) *4.6 Nappy change facilities:* nappy change facilities are provided in accordance with reg 112.

(g) *4.7 Premises designed to facilitate supervision:* all rooms in the facility ensure optimal surveillance is possible, through the use of

glass windows and doors and suitable layout in accordance with reg 115.

- (h) *4.8 Emergency and evacuation procedures:* the Amended DA includes a Plan of Management with Emergency and Evacuation procedures for the centre.
  - (i) *4.9 Outdoor space requirements:* 706.4m<sup>2</sup> of unencumbered play area is provided which satisfies the requirements of reg 108.
  - (j) *4.10 Natural environment:* in accordance with reg 113, the landscaping provides ample opportunities for exploration of the natural environment, including a sandpit, pots with sensory planting, fruit trees and open space play areas.
  - (k) *4.11 Shade:* the proposed roof overhang will provide adequate shading to the outdoor play areas, in accordance with reg 114.
  - (l) *4.12 Fencing:* appropriately high fencing is proposed to enclose the outdoor space such that children cannot go through, over or under it. The fencing will be designed as an acoustic fence. This meets the requirement of reg 104.
  - (m) *4.13 Soil assessment:* A Land Use Suitability Assessment accompanied the DA which concludes that the site is suitable for the Proposed Development. This satisfies reg 25(d).
- (8) Section 3.6 of the State Environmental Planning Policy (Industry and Employment) 2021 (SEPP I&E) provides that a consent authority must not grant consent to an application to display signage unless it is satisfied that the signage is consistent with the objectives set out in s 3.1(1)(a) and the signage satisfies the assessment criteria in Sch 5. The parties agree and I accept that the assessment criteria of Sch 5 of the SEPP I&E are satisfied with respect to character of the area, special areas, views and vistas, streetscape, setting or landscape, site and building, associated devices and logos with advertisements and advertising structures, illumination and safety. Further, the amended architectural plans show indicative locations for wayfinding signage of '501 Mount Carmel Drive'. The elevations also show indicative locations for other signage that will be the subject of separate approval.
- (9) The Site is located in the B2 Local Centre and B7 Business Park zones under Appendix 10: The Hills Growth Centres Precincts Plan of the State Environmental Planning Policy (Precincts – Central River City) 2021 (SEPP Precincts). The Proposed Development is permissible with consent in the B2 Local Centre and B7 Business Park zones. As required by s 2.3(2) of SEPP Precincts in determining the development application, I have considered the objectives of the zone in determining the development application.
- (10) Pursuant to s 4.3 Height of Buildings of the SEPP Precincts, the area of the site zoned B2 Local Centre is subject to a maximum building height of 16 metres. The area of the site zoned B7 Business Park is subject to a maximum building height of 24 metres. The proposed development is

compliant with the maximum building height applicable to the B2 zoned portion of the site, but seeks a variation to the maximum building height in the in B7 zoned portion of the site. Accordingly, the development application relies on a variation to the height development standard pursuant to s 4.6 of the SEPP Precincts. The development application is accompanied by a written request prepared by Planning Ingenuity dated 4 April 2023. The written request addresses the matters set out at s 4.6(3) of the SEPP Precincts including having regard to the tests summarised in *Initial Action Pty Ltd v Woollahra Municipal Council* (2018) 236 LGERA 256; [2018] NSWLEC 118.

- (a) Pursuant to s 4.6(4)(a) of the SEPP Precincts, the Court, in exercising the functions of the consent authority, must be satisfied of both of the matters in subss 4.6(4)(a)(i) and (ii), being:
    - (i) the applicant's written request has adequately addressed the matters required to be demonstrated by subsection (3), and
    - (ii) the proposed development will 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 ...
  - (b) Only if the requirements in subss 4.6(3) and (4) are met will the power in subs 4.6(2), to grant consent to development that contravenes the development standard, be enlivened: *RebelMH Neutral Bay Pty Ltd v North Sydney Council* [2019] NSWCA 130 per Preston CJ at [24].
  - (c) I am satisfied, for the reasons outlined in the written request, that it is unreasonable and unnecessary to comply with the height control in the circumstances of this case as the objectives of the standard are met, notwithstanding the non-compliance. Further, I am satisfied that the grounds advanced in the written request are sufficient environmental planning grounds to justify contravening the development standard.
  - (d) I am also satisfied that the proposed development will be in the public interest because it is consistent with the relevant objectives of the development standard and the objectives for development within the B7 Business Park Zone in which the development is proposed to be carried out.
  - (e) Finally, I accept, after a consideration of the matters identified in s 4.6(5) of SEPP Precincts, that the concurrence of the Planning Secretary is not required having regard to Planning Circular PS 20-002 dated 5 May 2020.
  - (f) Having regard to all of the above matters, I am satisfied that I should uphold the s 4.6 variation request in relation to the maximum height standard in SEPP Precincts.
- (11) Pursuant to s 5.10 Heritage Conservation of the SEPP Precincts, the site is located within the boundary of Aboriginal Heritage Impact Permit

No. C0001068 (AHIP) which was issued to Welsh Property Consulting Pty Ltd on 22 May 2015. The parties confirm that the archaeological salvage and collection activities authorised under the AHIP were completed in 2015. On 20 May 2022, the AHIP was varied to apply for 10 years and be transferred to the Applicant.

- (12) Pursuant to s 6.1 Public utility infrastructure of the SEPP Precincts, I am satisfied that the public utility infrastructure that is essential for the proposed development is available or adequate arrangements have been made to make that infrastructure available when required.
  - (13) DCP 2018 and the Hills Development Control Plan 2012 (DCP 2012) apply to the site. The statement of environmental impacts and the agreed jurisdictional note details the compliance of the proposed development with both DCP 2018 and DCP 2012. In determining the development application, I have considered the provisions of both development control plans: s 4.15(1) of the EPA Act.
- 5 Having reached the state of satisfaction that the decision is one that the Court could make in the exercise of its functions, s 34(3)(a) of the LEC Act requires me to “dispose of the proceedings in accordance with the decision”. The LEC Act also requires me to “set out in writing the terms of the decision” (s 34(3)(b)).
- 6 In making the orders to give effect to the agreement between the parties, the parties have not raised, and I am not aware of any jurisdictional impediment to the making of these orders. Further, I was not required to make, and have not made, any assessment of the merits of the development application against the discretionary matters that arise pursuant to an assessment under s 4.15 of the EPA Act.
- 7 The Court notes that the Applicant’s written request to vary the height of building standard in s 4.3 in SEPP Precincts prepared by Planning Ingenuity dated 4 April 2023 is upheld.
- 8 The Court orders that:
- (1) The appeal is upheld.
  - (2) Development consent is granted to Development Application No. 343/2023/JP, as amended, for construction of a seven-storey development consisting of a café, business premises, gym, child care centre and office premises, with an adjoining four-storey car park, associated landscaping and vehicular and pedestrian access at Part Lot 106 in DP 1257660, subject to the conditions set out in Annexure 'A'.

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**D Dickson**

**Commissioner of the Court**

Annexure A (391793, pdf)

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