



Land and Environment Court
New South Wales

Case Name: UPG 345 Pty Ltd v The Hills Shire Council

Medium Neutral Citation: [2024] NSWLEC 1752

Hearing Date(s): Conciliation conference on 6 September 2024

Date of Orders: 22 November 2024

Decision Date: 22 November 2024

Jurisdiction: Class 1

Before: Young AC

Decision: The Court orders that:
(1) The appeal is upheld.
(2) Development Application No. 717/2023/JP for demolition of existing structures, consolidation of land, construction of six (6) residential flat buildings consisting of 346 units, basement parking and associated works is approved subject to the conditions in Annexure A.

Catchwords: DEVELOPMENT APPLICATION – construction of residential flat buildings – conciliation conference – agreement reached – orders made

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.15, 8.7, 8.15
Land and Environment Court Act 1979, s 34

Environmental Planning and Assessment Regulation 2021, ss 23, 29, 38
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Ch 9, s 6.65
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004
State Environmental Planning Policy (Housing) 2021, Ch 4, ss 145, 147, Sch 9

State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy (Transport and Infrastructure) 202, s 2.122
The Hills Local Environmental Plan 2019, Pt 9, cll 2.3, 4.3, 4.4, 5.21, 7.2, 9.1, 9.3, 9.4, 9.5, 9.7

Category: Principal judgment

Parties: UPG 345 Pty Ltd (Applicant)
The Hills Shire Council (Respondent)

Representation: Counsel:
J Reid (Applicant)
R McCulloch (Solicitor) (Respondent)

Solicitors:
Macpherson Kelley (Applicant)
The Hills Shire Council (Respondent)

File Number(s): 2024/104303

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) against the refusal by the Sydney Central City Planning Panel of Development Application No. 717/2023/JP (DA).
- 2 The Hills Shire Council is the respondent to the appeal by virtue of s 8.15(4) of the EPA Act, albeit subject to the control and direction of the Sydney Central City Planning Panel in connection with the conduct of the appeal.
- 3 Pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021 (EPA Regulations), The Hills Shire Council has approved amending the DA (Amended DA) in accordance with the amended plans and supporting material listed in the agreed conditions of consent (Condition 1 in Annexure A of this judgment). As the Amended DA is the subject of Court proceedings, the Amended DA is not required to be lodged on the NSW Planning Portal per s 38(4) of the EPA Regulation.

- 4 The Amended DA now seeks approval for demolition of existing structures, consolidation of land, construction of six (6) residential flat buildings consisting of 346 apartments over basement parking with landscaping, stormwater drainage and associated public domain and site works at 1-19 Hughes Avenue, 20-36 Middleton Avenue and 34 Dawes Avenue, Castle Hill, NSW 2154.
- 5 The Court arranged a conciliation conference under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act) between the parties on 6 September 2024. I presided over the conciliation conference.
- 6 On 30 October 2024, the parties submitted an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties.
- 7 This decision involved the Court upholding the appeal and granting development consent to the Amended DA, and subject to conditions in Annexure A.
- 8 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.
- 9 The signed agreement is supported by a Jurisdictional Note from the parties, that sets out the jurisdictional pre-requisites that must be satisfied before the Court can exercise its functions under s 34(3) of the LEC Act.

Jurisdictional Prerequisites

- 10 Based on the Jurisdictional Note, the documents that accompany the Class 1 Application, and the documents referred to in Annexure A, 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, as set out below.

Landowner's Consent

- 11 In accordance with s 23(1) of the EPA Regulation, I am satisfied that the DA was lodged with the consent of the owners of the land to which the development relates.

Public Notification

- 12 The original DA was lodged on 19 October 2022 and notified for 22 days between 24 October 2022 and 14 November 2022 in accordance with The Hills Shire Community Participation Plan. Two (2) submissions were received in response to the notification of the original DA. A modified version of the original DA was further notified for 15 days between 19 May 2023 and 2 June 2023. No submissions were received during that second notification period.

State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience and Hazards SEPP)

- 13 Section 4.6 of the Resilience and Hazards SEPP requires that a consent authority must not grant consent to any development on land unless it has considered whether a site is contaminated land or potentially contaminated land, and if it is, that it is satisfied that the land is suitable (or will be after undergoing remediation) for the proposed use.
- 14 A Preliminary Site Investigation prepared by GEOTESTA and dated 22 June 2022 accompanied the DA. The report indicates that the site has a low risk of soil and groundwater contamination and the site is suitable for the proposed development.
- 15 On this basis, the parties agree and I am satisfied that the likelihood of contamination is low and that the land is suitable for the proposed residential flat building development, subject to the conditions of consent in Annexure A which require (among other matters) the recommendations of the Preliminary Site Investigation to be implemented.

State Environmental Planning Policy (Biodiversity and Conservation) 2021 (Biodiversity and Conservation SEPP)

- 16 The DA was lodged prior to the 21 November 2022 amendments to the Biodiversity and Conservation SEPP. In accordance with s 6.65 of the SEPP, the former provisions apply including Chapter 9, as the site is located within the Hawkesbury-Nepean Catchment.
- 17 Based on the Statement of Environmental Effects and associated expert reports that accompanied the DA as well as the implementation of relevant conditions of consent in Annexure A, the parties agree and I am satisfied that

the relevant flooding, water quality, environmental, vegetation provisions under Chapter 9 of the Biodiversity and Conservation SEPP have been adequately taken into account in the design and ongoing management of the development.

State Environmental Planning Policy (Housing) 2021 (Housing SEPP)

- 18 Chapter 4 of the Housing SEPP applies to the development for the purposes of residential flat buildings and consists of erection of new buildings that are at least three (3) storeys above the ground and contain at least four (4) dwellings.
- 19 Section 145(2) of the Housing SEPP provides that before determining a development application, the consent authority must refer it to the relevant local design review panel for advice on the quality of the design of the development. The Hills Shire Council referred the original DA to The Hills Design Review Panel, which issued the Design Advisory Meeting Report dated 27 September 2023.
- 20 Section 147 further provides that development consent must not be granted to residential apartment development unless the consent authority has considered the quality of the design of the development, the Apartment Design Guide and any advice received from a design review panel.
- 21 Pursuant s 29 of the EPA Regulation, a development application that relates to residential apartment development must also be accompanied by a statement by a qualified designer, which addresses the matters in s 29(2) of the EPA Regulation. The DA is supported by a design verification statement contained in the Architectural Design Report dated 13 November 2023 prepared by Amit Julka, a registered architect (NSW Reg.10002), which addresses the matters required by s 29(2).
- 22 Based on the above documentation, the parties agree and I am satisfied that the Amended DA has been designed by a registered architect and that the relevant design principles set out in Sch 9 of the Housing SEPP and the Apartment Design Guide have been adequately considered, and the comments made by The Hills Design Review Panel adequately addressed in the final design of the development.

State Environmental Planning Policy (Transport and Infrastructure) 2021 (Transport and Infrastructure SEPP)

- 23 The development is a traffic-generating development pursuant to s 2.122 of the Transport and Infrastructure SEPP as it proposes 300 or more dwellings and 200 or more car parking spaces.
- 24 In accordance with s 2.122, The Hills Shire Council provided written notice of the DA to Transport for NSW (TfNSW). The DA is also supported by a Revised Traffic and Parking Assessment Report by Varga Traffic Planning dated 13 April 2023.
- 25 Based on the Revised Traffic and Parking Assessment Report, the parties agree and I am satisfied that the Site's accessibility, traffic safety, road congestion and parking implications as well as the comments by TfNSW have been adequately addressed, in accordance with the requirements of the Transport and Infrastructure SEPP.

State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (BASIX SEPP)

- 26 The DA is accompanied by BASIX Certificates issued by SLR Consulting on 23 October 2024. The parties agree and I am satisfied that these certificates meet the requirements of the BASIX SEPP.

The Hills Local Environmental Plan 2019

- 27 The Hills Local Environmental Plan 2019 (LEP) is the relevant local environmental planning instrument that applies to the site.
- 28 The site is zoned R4 High Density Residential and the proposed development (including demolition of existing structures) is permissible with consent under the LEP. In accordance with cl 2.3 of the LEP, the parties agree and I am satisfied that the DA is consistent with the objectives of the R4 zone.
- 29 Clause 4.3 (Height of buildings) of the LEP applies to the site, which allows a maximum height of 21m. At a maximum height of 20.98m, the parties agree and I am satisfied that the Amended DA complies with the maximum height control under the LEP.

- 30 Clause 4.4 (Floor space ratio) of the LEP applies to the development which imposes a maximum floor space ratio of 1.6:1. However, the site is located within the Showground Station Precinct to which Pt 9 of the LEP applies. Under cl 9.7(2) of the LEP, and despite cl 4.4, the consent authority may consent to development that does not exceed an increased floor space ratio of 2.3:1 subject to a range of criterion. With a floor space ratio of 2.06:1, the parties agree and I am satisfied that the Amended DA complies with both the maximum floor space ratio and the applicable criterion in cl 9.7(2) of the LEP.
- 31 Clause 5.21 (Flood planning) of the LEP applies to the site. Based on the Statement of Environmental Effects, a Flood Impact Statement prepared by Northup and dated 18 October 2024 and the conditions of consent in Annexure A, the parties agree and I am satisfied that the Amended DA will not adversely impact local flood behaviour and adequately addresses the requirements under cl 5.21(2) and 5.21(3) of the LEP.
- 32 Clause 7.2 (Earthworks) of the LEP applies to the development. The DA is supported by a Statement of Environmental Effects and a range of expert reports in regard to engineering, contamination, geotechnical, arboriculture and waste management. Based on these documents and the conditions of consent in Annexure A, the parties agree and I am satisfied that the Amended DA will not disrupt or have a detrimental effect on drainage patterns and soil stability, will not affect the likely future use or development of the land and will adopt appropriate measures to avoid or minimise impacts on drainage patterns, as required by cl 7.2(3) of the LEP.
- 33 Clause 9.1 (Minimum lot sizes for residential flat buildings) of the LEP applies to the development and provides that development consent may only be granted to a “residential flat building” development with a building height of 11m or more and on a lot within the Showground Station Precinct in the R4 zone, if the lot has a minimum area of 1,800m². The parties agree and I am satisfied that the site has a total area of 18,703m² and therefore complies with cl 9.1 of the LEP.
- 34 Clause 9.3 (Minimum building setbacks) of the LEP applies to the development and 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 to Middleton Avenue is equal to or greater than 10m. Having regard to the architectural, landscape and engineering plans, the parties agree and I am satisfied that the Amended DA proposes a 10m front building setback to Middleton Avenue, and therefore complies with cl 9.3 of the LEP.

- 35 Clause 9.4 (Development requiring the preparation of a development control plan) of the LEP applies to site and provides that development consent must not be granted for development on land to which this clause applies unless a development control plan that provides for the matters specified in cl 9.4(4) has been prepared for or applies to the land. In this case, the parties agree and I am satisfied that The Hills Development Control Plan 2012 is a development control plan that satisfies the requirements of cl 9.4 of the LEP.
- 36 Clause 9.5 (Design excellence) of the LEP applies and provides that development consent must not be granted to the development unless the consent authority considers that it exhibits design excellence. Having regard to the architectural plans accompanying the DA, the parties agree and I am satisfied that the Amended DA appropriately addresses the matters prescribed under cl 9.5(4) of the LEP, and considers that the development exhibits design excellence.

Remaining matters in section 4.15 of the EPA Act

- 37 Based on the Statement of Environmental Effects, various expert reports accompanying the DA and the recommended conditions of consent in Annexure A, the parties agree and I am satisfied that the Amended DA can be approved taking into consideration the matters in s 4.15(1) of the EPA Act, including in regard to the likely impacts of the development, the suitability of the site and the public interest.
- 38 Under s 4.15(1)(d) of the EPA Act, I am required to consider submissions made on the DA. In this case, two (2) submissions were made by way of objection during the public notification period for the original DA, raising the issues of site isolation of No.36 Middleton Avenue and overshadowing to the dwelling on that site. However, No.36 Middleton Avenue has since become

part of the site the subject of the DA with the relevant landowner's consent filed with the Court. I am therefore satisfied that the issues raised in submissions have been adequately addressed by the amendments to the DA.

Conclusion

- 39 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 against the discretionary matters that arise pursuant to an assessment under s 4.15(1) of the EPA Act.
- 40 I have considered the jurisdictional prerequisites and I am satisfied on the basis of the evidence before me that the agreement of the parties is a decision that the Court could have made in the proper exercise of its functions.
- 41 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.

Orders

- 42 The Court orders:
- (1) The Applicant is granted leave to file the Amended Development Application with the Court.
 - (2) The Applicant is to pay the Respondent's costs thrown away pursuant to section 8.15(3) of the *Environmental Planning and Assessment Act 1979*, in the agreed sum of \$15,000 within 28 days of the date of these orders.
 - (3) The Appeal is upheld.
 - (4) Development Application No. 717/2023/JP, as amended, for the demolition of existing structures, consolidation of land, tree removal and construction of six (6) residential flat buildings consisting of 346 apartments over basement parking with landscaping, stormwater drainage and public domain and associated site works on land legally described as Lots 202-207 in DP249973, Lots 301,302,304-313 in DP252593, Lot 303 in DP252593 and Lot 505 in DP258587 and known as 1-19 Hughes Avenue, 20-36 Middleton Avenue and 34 Dawes Avenue, Castle Hill, NSW, 2154, is determined by the grant of development consent subject to the conditions at Annexure.

M Young

Acting Commissioner of the Court

Annexure A

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