



Land and Environment Court
New South Wales

Case Name: Carlingford Project Pty Ltd v City of Parramatta Council

Medium Neutral Citation: [2024] NSWLEC 1394

Hearing Date(s): Conciliation conference 22 May 2024

Date of Orders: 10 July 2024

Decision Date: 10 July 2024

Jurisdiction: Class 1

Before: Porter C

Decision: The Court orders:
(1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendments made in the sum of \$21,500, in accordance with s 8.15(3) of the Environmental Planning and Assessment Act 1979, within 28 days of these orders.
(2) The appeal is upheld.
(3) Development Application DA No. 845/2022 for demolition of existing structures and construction of a 12 storey mixed used development containing 83 residential units above 3 levels of basement parking, including the removal of trees at 9-11 Thallon Street, Carlingford, is determined by the grant of consent subject to conditions contained in Annexure 'A'.

Catchwords: DEVELOPMENT APPLICATION – shop top housing – conciliation conference – agreement between the parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.16, 7.4, 8.7, 8.15
Land and Environment Court Act 1979, s 34

Environmental Planning and Assessment Regulation 2021, ss 29, 38

State Environmental Planning Policy (Biodiversity and Conservation) 2021, ch 2, ch 10, ss 6.65, 10.10
State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 , s 4.2
State Environmental Planning Policy (Housing) 2021, ch 4, ss 8, 144, 147, sch 7A, sch 9
State Environmental Planning Policy (Resilience and Hazards) 2021, s 4.6
State Environmental Planning Policy (Sustainable Buildings) 2022
State Environmental Planning Policy (Transport and Infrastructure) 2021, ss 2.45, 2.48, 2.99, 2.100
Parramatta (Former The Hills) Local Environmental Plan 2012, cl 2.3, 4.3, 4.4, 4.6, 7.2
Parramatta Local Environmental Plan 2023, cl 1.8A

Cases Cited: Maule v Liporoni & Anor [2002] NSWLEC 25

Category: Principal judgment

Parties: Carlingford Project Pty Ltd (Applicant)
Parramatta City Council (Respondent)

Representation: Counsel:
N Eastman SC (Applicant)
C Campbell (Respondent)

Solicitors:
Mills Oakley (Applicant)
Sparke Helmore Lawyers (Respondent)

File Number(s): 2023/134839

Publication Restriction: Nil

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. 845/2022 for the demolition of existing buildings, tree removal and construction of a 12 storey mixed use development comprising retail and restaurant on the ground floor, 91 apartments above and four levels of basement car parking (DA) at 9-11 Thallon Street, Carlingford, legally known as Lots 1-9 in SP 37411 (site). The

DA is accompanied by a letter of offer to enter into a planning agreement (PA) pursuant to s 7.4 of the EPA Act.

- 2 The proceedings were set down for a hearing for 20 May 2024 to 22 May 2024. Following the amendment of the application on 5 April 2024 and further discussions between the parties, the parties agreed that the contested issues had been resolved. The parties requested that the proceedings be adjourned and listed for a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (LEC Act).
- 3 The Court granted the request and arranged a conciliation conference between the parties, which was held on 22 May 2024. I have presided over the conciliation conference.
- 4 The Respondent, as the relevant consent authority, has approved under s 38 of the Environmental Planning and Assessment Regulation 2021 (EPA Reg) to the Applicant amending DA/845/2022 in accordance with the documents listed at [34] (amended DA). In summary, the changes from the original DA, the 5 April 2024 amended application and the amended DA were:
 - Reconfiguration of the upper element floorplates;
 - Increased setbacks from level 9 and above on the northern façade;
 - Changes to carparking;
 - Further information relation to groundwater;
 - Amended letter of offer for the draft PA, dated 22 May 2024;
 - Further amended documentation.
- 5 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 amended DA and granting development consent subject to conditions of consent.
- 6 I note that as part of the s 34 agreement, the parties have submitted a jurisdictional statement setting out how the proposal has satisfied the jurisdictional requirements and other matters.

- 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.
- 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.

Jurisdictional Prerequisites

- 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 and explained how the jurisdictional prerequisites have been satisfied. 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.
- 10 I am satisfied that owners consent accompanied the Class 1 appeal. The DA was lodged to the Respondent on 28 October 2022. The Respondent notified the DA between 8 November 2022 to 6 December 2022 and six submissions were received. The first amendment to the DA on 5 April 2024 and was notified between 15 April 2024 to 10 May 2024, no submissions were received. On the first day of the hearing, the Court heard oral submissions from one objector on site.
- 11 The concerns raised in the submissions have been considered by the Respondent and Applicant in reaching agreement on the acceptability of the amended DA.
- 12 I accept the parties' agreement that they have considered the matters in s 7.4 of the EPA Act 1979 in relation to the PA letter of offer and conditions of consent are included at Annexure A.

Water Management Act 2000

- 13 The development requires approval under s 91 of the *Water Management Act 2000*. I accept the parties' agreement that the DA was not lodged as Integrated Development and is not required to obtain approval for a licence at the DA stage (see: *Maule v Liporoni & Anor* [2002] NSWLEC 25 at [86]-[87]). A

condition of consent has been included at Annexure A to obtain the relevant approvals.

Parramatta (Former The Hills) Local Environmental Plan 2012 (PLEP)

- 14 Due to the lodgement date of the DA and pursuant to cl 1.8A of the Parramatta Local Environmental Plan 2023, the DA is saved and PLEP applies instead.
- 15 The site is zoned R1 General Density Residential under the PLEP. The proposed development for shop top housing is permissible with consent. Pursuant to cl 2.3, I have had regard to the objectives of the zone.
- 16 Clause 4.3 height of buildings applies to the site, permitting a maximum height of 28m. The amended DA is 43.15m at its highest point. The amended DA seeks to vary the development standard pursuant to cl 4.6 and is supported by a Request for Variation under Clause 4.6 prepared by Dickson Rothschild dated 9 May 2024 (written request). The parties are satisfied of the merits of the written request. I accept that the written request responds to the mandatory provisions of cl 4.6.
- 17 Clause 4.4 floor space ratio (FSR) applies to the site, permitting a maximum FSR of 1.99:1. The amended DA proposes an FSR of 2.86:1. The amended DA seeks to vary the development standard pursuant to cl 4.6 and is supported by a Request for Variation under Clause 4.6 prepared by Dickson Rothschild dated 9 May 2024 (written request). The parties are satisfied of the merits of the written request. I accept that the written request responds to the mandatory provisions of cl 4.6.
- 18 Clause 7.2 earthworks applies to the amended DA. I accept the parties' agreement that the provisions of cl 7.2 have been considered as demonstrated through the stormwater plans, Geotechnical Investigation assessment prepared by Asset Geo Enviro dated 25 July 2022 (geotechnical report), and Waste Management Plan prepared by Dickens Solutions dated March 2024.

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

- 19 The amended DA includes the removal of trees. The parties agree and I accept that the tree removal is not inconsistent with the provisions of Ch 2.

- 20 The site is located within the Sydney Harbour Catchment area. Due to the lodgement date of the DA, the former provisions of SEPP BC apply in accordance with s 6.65.
- 21 I accept the parties' agreement that the amended DA satisfies the provisions of Ch 10 and s 10.10 on the basis of the stormwater plans that form conditions of consent at Annexure A and the jurisdictional statement. I note that further approvals are required pursuant to the *Water Management Act 2000* in relation to the management of groundwater, dewatering and potential tanking of the basement. Conditions of consent have been included at Annexure A to address this in future approvals from WaterNSW.

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

- 22 Chapter 4 of the Housing SEPP applies to the amended DA in accordance with Sch 7A, s 8 (2A) and s 144. Section 147 requires consideration of the design principles contained in Sch 9 and the Apartment Design Guide (ADG).
- 23 Relevantly, s 29 of the EPA Reg requires that residential apartment development must be accompanied by a statement prepared by a qualified designer in relation to the design principles within Sch 9 of the Housing SEPP and Parts 3 and 4 ADG.
- 24 The parties agree and I accept that the amended DA meets the provisions of the Housing SEPP on the basis of the SEPP 65 Design Verification Statement completed by the nominated qualified designers Robert Nigel Dickson and Paul Oreshkin (registered architect numbers 5364 and 7774) dated 12 March 2024. I note that the DA was considered by the Design Excellence Advisory Panel.

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

- 25 Sections 2.45 and 2.48 in relation to electrical assets apply to the development, which was referred to Endeavour Energy. Endeavour Energy did not object to the development and provided conditions of consent, which have been incorporated at Annexure A.
- 26 The provisions of s 2.99 apply to the site as it is located with the requisite proximity of a rail corridor (Parramatta Light Rail). The parties submitted that TfNSW rejected the referral and responded to the referral that the DA '...is not

anticipated to have any impacts on the interface/assets of the Parramatta Light Rail' (Tab 11 of the Respondent's Bundle of Documents).

27 Section 2.100 applies to the development and requires an assessment of noise or vibration impacts. The amended DA is accompanied by an Acoustic Assessment prepared by Acoustic Logic dated 6 October 2022 which concludes that the development will comply subject to the implementation of the recommended acoustic measures. These have been incorporated into the conditions of consent at Annexure A.

28 I accept the parties' agreement that the relevant provisions of SEPP TI have been satisfied.

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

29 The provisions of s 4.6 of SEPP RH apply to the site. The amended DA is accompanied by an amended Statement of Environmental Effects prepared by Dickson Rothschild dated 12 March 2024 which states that the site has a history of residential zoning and contamination is unlikely. This was previously endorsed by the Respondent's internal referral of 11 January 2023 (based on the original DA). Accordingly, the parties agree, and I accept that the provisions of s 4.6 of SEPP Resilience and Hazards have been satisfied.

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

30 The DA was lodged prior to the commencement of State Environmental Planning Policy (Sustainable Buildings) 2022. In accordance with the savings provisions under s 4.2, State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 (SEPP BASIX) applies instead. An amended BASIX Certificate accompanies the amended DA that meets the requirements.

Conclusion

31 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.

32 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.

- 33 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.
- 34 The Court notes that the Respondent has approved, as the relevant consent authority, under s 38 of the EPA Reg to the Applicant amending DA/845/2022 to rely upon the following amended plans and documents:

Drawing No.	Issue	Plan Title	Dated
Landscape Plans – Planning Agreement offer			
1 of 2	B	Proposed Park Concept layout	14/03/2024
Reports			
Amended Clause 4.6 Variation Request – Floor Space Ratio (Rev E) prepared by Dickson Rothschild dated 9 May 2024			
Amended Clause 4.6 Variation Request – Height of Building (Rev F) prepared by Dickson Rothschild dated 9 May 2024			
Amended BASIX Certificate, NatHERS Certificate and stamped plans prepared by LC Consulting Engineers dated 15 May 2024			
VPA Letter of Offer prepared by Carlingford Project Pty Ltd dated 22 May 2024			

Orders:

- 35 The Court orders:
- (1) The Applicant is to pay the Respondent's costs thrown away as a result of the amendments made in the sum of \$21,500, in accordance with s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, within 28 days of these orders.
 - (2) The appeal is upheld.

- (3) Development Application DA No. 845/2022 for demolition of existing structures and construction of a 12 storey mixed used development containing 83 residential units above 3 levels of basement parking, including the removal of trees at 9-11 Thallon Street, Carlingford, is determined by the grant of consent subject to conditions contained in Annexure 'A'.

.....

S Porter

Commissioner of the Court

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.