



Land and Environment Court
New South Wales

Case Name: WSDC Box Hill Primitus Development Pty Ltd v The Hills Shire Council

Medium Neutral Citation: [2025] NSWLEC 1679

Hearing Date(s): Conciliation conference held on 10 June, 3 July, and 8 and 15 August 2025

Date of Orders: 19 September 2025

Decision Date: 19 September 2025

Jurisdiction: Class 1

Before: Pullinger AC

Decision: The Court orders that:
(1) Leave is granted to the Applicant to amend Development Application DA 856/2025/JP and rely upon the amended plans and documents referred to in Condition 1 at Annexure A.
(2) Pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 (NSW), the Applicant is to pay the Respondent's costs thrown away as a result of amending the Development Application in the agreed sum of \$8,500 within 28 days of the date of these orders.
(3) The Applicant's written request, pursuant to cl 4.6 of Appendix 10 The Hills Growth Centre Precincts Plan to the State Environmental Planning Policy (Precincts—Central River City) 2021 (THGCPP), seeking to vary the development standard for height of buildings as set out at cl 4.3 of THGCPP, is upheld.
(4) The appeal is upheld.
(5) Consent is granted to Development Application DA 856/2025/JP (as amended) for alterations and additions to an approved residential development, comprising an additional 25 units to the approved 114 units for a new

total of 139 units, incorporating in-fill affordable housing, and a two-storey basement, at 13 Terry Road, Box Hill, subject to the conditions of consent at Annexure A.

Catchwords: DEVELOPMENT APPLICATION – residential apartment building development – cl 4.6 written request – height of building – in-fill affordable housing – agreement between the parties – orders

Legislation Cited: Environmental Planning and Assessment Act 1979 (NSW), ss 4.15, 4.16, 8.7, 8.15
Land and Environment Court Act 1979 (NSW), s 34

Environmental Planning and Assessment Regulation 2021 (NSW), ss 27, 29, 37, 38
State Environmental Planning Policy (Biodiversity and Conservation) 2021, Chs 2, 6
State Environmental Planning Policy (Housing) 2021 Ch 2, Pt 2, Div 1, ss 16, 19, 20, 21, Ch 4, s 147, Sch 9
State Environmental Planning Policy (Precincts—Central River City) 2021, Appendix 10, cll 2.1, 2.3, 4.3, 4.4, 4.6, 5.1, 5.10, 6.1
State Environmental Planning Policy (Resilience and Hazards) 2021, Ch 4, s 4.6
State Environmental Planning Policy (Sustainable Buildings) 2022, s 2.1
State Environmental Planning Policy (Transport and Infrastructure) 2021, s 2.48

Texts Cited: NSW Department of Planning, Apartment Design Guide, July 2015
The Hills Shire Council Community Participation Plan

Category: Principal judgment

Parties: WSDC Box Hill Primitus Development Pty Ltd (Applicant)
The Hills Shire Council (Respondent)

Representation: Counsel:
V Conomos (Solicitor) (Applicant)
T Ward (Solicitor) (Respondent)

Solicitors:
Conomos Legal (Applicant)

File Number(s): 2025/15592

Publication Restriction: Nil

JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7 of the *Environmental Planning and Assessment Act 1979* (NSW) (EPA Act), brought by WSDC Box Hill Primitus Development Pty Ltd (the Applicant), against the deemed refusal of Development Application DA 856/2025/JP (the DA) by The Hills Shire Council (the Respondent).
- 2 At the date of its lodgement on 27 November 2024, the DA sought consent for alterations and additions to an approved residential apartment building development comprising 114 units (as modified in DA 846/2016/JP/A). More specifically, the DA initially sought consent for an additional two storeys to Buildings A and B, and an additional four storeys to Building C, resulting in a total of an additional 34 units, including the provision of 24 units as in-fill affordable housing, and totalling 148 apartments, at 13 Terry Road, Box Hill (the site).
- 3 The Court arranged a conciliation conference under s 34 of the *Land and Environment Court Act 1979* (NSW) (LEC Act) between the parties, which was held on 10 June, 3 July, and 8 and 15 August 2025. I presided over the conciliation conference.
- 4 During the conciliation conference, the parties reached agreement as to the terms of a decision in these proceedings that would be acceptable to the parties. The agreement involves the Court upholding the appeal and granting development consent to an amended DA, subject to conditions.
- 5 Of particular note, the proposal has been amended by agreement between the parties to resolve the contentions raised by the Respondent. These contentions included issues of excessive building height, inadequate provision of public utility infrastructure, incomplete supporting documentation, inadequate deep soil and landscaped area, inadequate communal open space, inadequate building separation compromising visual privacy, inadequate waste

management provisions, and inadequate civil engineering, amongst other contentions.

- 6 Agreed, design amendments have now been made to improve the proposed building's relationship to the site and its context. Changes have been made to improve the quantity and quality of communal open space, and to provide a significant extent of deep soil towards the centre of the site. Upper level setbacks have been increased to the primary corner of the site and internally within the site. Additional information has been provided to the satisfaction of the Respondent, and other issues such as visual privacy and waste management have been resolved.
- 7 These amendments also have the effect of reducing the total number of proposed dwellings from 148 to 139, with 22 of these dwellings being provided as in-fill affordable housing for a period of fifteen years.
- 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. The parties' decision involves the Court exercising the function under s 4.16 of the EPA Act to grant consent to the amended DA.
- 9 There are jurisdictional prerequisites that must be satisfied before this function can be exercised.
- 10 In that regard, I am satisfied the DA was made with the consent of the owner of the land, evidenced within the Class 1 Application accompanying this matter.
- 11 The DA was publicly notified in accordance with the Respondent's Community Participation Plan between 28 November and 19 December 2024. No submissions were received by the Respondent.
- 12 The parties agree and I am satisfied that the amended DA does not need to be re-notified, as the nature of amendments do not result in new or greater impacts.
- 13 Accordingly, I am satisfied that s 4.15(1)(d) of the EPA Act has been appropriately addressed.

- 14 The parties agree, and I am satisfied, that Appendix 10 The Hills Growth Centre Precincts Plan of State Environmental Planning Policy (Precincts—Central River City) 2021 (THGCPP) is the relevant local environmental planning instrument.
- 15 Pursuant to cl 2.1 of THGCPP, the site is zoned part R4 High Density Residential, part R3 Medium Density Residential and part SP2 Infrastructure. The amended DA - characterised as residential apartment development - is permissible with consent within the R4 zone. The proposed residential apartment development is situated on the portion of the site zoned R4.
- 16 The parties agree, and I am satisfied, that pursuant to cl 2.3 of THGCPP, the amended DA is consistent with the R4 High Density Residential zone objectives.
- 17 Pursuant to cl 4.3 of THGCPP - Height of buildings - the site benefits from a development standard for building height of 21m. However, certain provisions set out within Ch 2 of State Environmental Planning Policy (Housing) 2021 (SEPP Housing), dealing with affordable housing, make up to an additional 30% building height available in exchange for the provision of a proportion of in-fill affordable housing units.
- 18 The amended DA seeks to rely upon 27.5% additional building height - an amount determined by the total gross floor area (GFA) proposed - taking the resultant building height development standard to 26.775m. The amended DA proposes a maximum building height of 29.3m, which exceeds the development standard by 2.525m or 9.43%.
- 19 In such an instance, cl 4.6(3) of THGCPP requires the consent authority (the Court in this instance) to be satisfied the Applicant has demonstrated that compliance with the relevant development standard is unreasonable or unnecessary in the circumstances of the case, and that there are sufficient environmental planning grounds to justify contravening the development standard.

20 Accordingly, the Applicant has provided a written document seeking to vary the height of building development standard, prepared by Planning Ingenuity and dated 8 September 2025.

21 The parties agree, and I am satisfied, that this written document adequately justifies the proposed variance to the height of buildings development standard for the following reasons:

- (1) The amended DA is agreed to be of an appropriate form and scale that is compatible with the existing streetscape and anticipated future character of the immediate locality.
- (2) The existing modified development consent (DA 846/2016/JP/A) was approved at a maximum height of 22.9m, despite the 21m maximum building height control.
- (3) As such, the existing approved development on the site established a height exceedance, accepted by the Respondent, of approximately half a storey.
- (4) The amended DA seeks to access building height bonuses available within Ch 2 of SEPP Housing in exchange for the provision of a proportion of the GFA as in-fill affordable housing for a period of fifteen years consistent with the policy objectives of SEPP Housing.
- (5) The amended DA results in a final building form that perpetuates a maximum height exceedance of approximately half a storey - albeit several storeys taller than the earlier approved building.
- (6) The amended DA generally presents to the primary street frontage as an eight-storey residential apartment building with its two uppermost floors set back from the street and differentiated from the typical floors below.
- (7) The amended DA does not give rise to unreasonable adverse overshadowing impacts or cross viewing with neighbouring properties.
- (8) The objectives of THGCPP R4 High Density Residential land use zone include to provide for the housing needs of the community within a high density residential environment; to provide a variety of housing types within a high density residential environment; and to enable other land uses that provide facilities or services to meet the day to day needs of residents. I am satisfied the amended DA is consistent with these objectives.
- (9) The relevant objectives of cl 4.3 of THGCPP - Height of buildings - include to establish the maximum height of buildings on land within the Box Hill Precinct or Box Hill Industrial Precinct; to minimise visual impact and protect the amenity of adjoining development and land in terms of solar access to buildings and open space; and to facilitate higher density development in and around commercial centres and

major transport routes. I am satisfied the amended DA is consistent with these objectives.

- 22 Consequently, I am satisfied the Applicant's cl 4.6 written document adequately justifies the proposed variation to the height of buildings development standard, and I find to uphold the written request.
- 23 The parties agree, and I am satisfied, that all remaining principal development standards of THGCPP have been met by the amended DA.
- 24 In particular, and pursuant to cl 4.4 of THGCPP, the site is subject to a FSR development standard of 2:1. Similar to the height of building development standard, Ch 2 of SEPP Housing makes up to an additional 30% FSR available for the provision of in-fill affordable housing.
- 25 The parties agreed, and I am satisfied, that the amended DA seeks to rely upon 27.5% additional FSR (in exchange for the provision of 13.75% of the resultant GFA as in-fill affordable housing for fifteen years), which results in a maximum FSR development standard of 2.55:1. The amended DA complies with this development standard.
- 26 The parties agree, and I am satisfied, that pursuant to cl 5.1 of THGCPP - Relevant acquisition authority - a portion of the site is marked for acquisition as 'Local Road Widening' by virtue of its SP2 Infrastructure zoning. Road widening dedication and acquisition was approved as part of the earlier DA846/2016/JP and is not altered by the amended DA.
- 27 The parties agree, and I am satisfied, that pursuant to cl 5.10 of THGCPP - Heritage conservation - the site is not an identified heritage item, nor is it situated within a Heritage Conservation Area.
- 28 The parties agree, and I am satisfied, that pursuant to cl 6.1 of THGCPP - Public utility infrastructure - the Applicant has provided letters from Billbergia, dated 28 July 2025 and AA Power Engineering, dated 19 May 2025. These letters are agreed to satisfactorily demonstrate that public utility infrastructure essential for the proposed development is available for the site.

- 29 The parties agree, and I am satisfied, that State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Resilience) is an additional relevant environmental planning instrument.
- 30 Chapter 4 of SEPP Resilience deals with remediation of land. Pursuant to s 4.6 of SEPP Resilience, the parties agree, and I am satisfied, that the original development consent (DA846/2016/JP) determined the site to be suitable for the proposed development. The amended DA does not raise any issues that were not dealt with in the original consent. The conditions of the existing consent dealing with contamination continue to apply, and the amended DA remains suitable for the approved use.
- 31 The parties agree, and I am satisfied, that State Environmental Planning Policy (Biodiversity and Conservation) 2021 (SEPP BC) is an additional relevant environmental planning instrument.
- 32 Chapter 2 of SEPP BC deals with vegetation in non-rural areas. The parties agree and I am satisfied, that the amended DA does not differ from the original consent in respect of its impact on existing trees on the land.
- 33 Chapter 6 of SEPP BC deals with water catchments. The site is situated within the catchment of the Hawkesbury Nepean River, which is a regulated catchment. The amended DA does not differ from the original consent in respect of its impact on water quality within the catchment.
- 34 The parties agree, and I am satisfied, that State Environmental Planning Policy (Transport and Infrastructure) 2021 (SEPP Infrastructure) is an additional relevant environmental planning instrument.
- 35 Section 2.48 of SEPP Infrastructure applies to the amended DA since the site is crossed by an easement for electricity purposes. The DA was referred to the electricity supply authority, Endeavour Energy, which provided its reply on 28 November 2024. The authority's response has been taken into consideration by the parties in reaching this agreement.
- 36 The parties agree, and I am satisfied, that the amended DA is subject to the provisions of State Environmental Planning Policy (Sustainable Buildings) 2022 (SEPP Sustainable Buildings). Consistent with s 2.1 of SEPP Sustainable

Buildings and pursuant to s 27 of the Environmental Planning and Assessment Regulation 2021 (EPA Reg), a BASIX certificate, No 674075M_04, dated 4 August 2025, has been provided with the amended DA. Agreed conditions of consent are imposed to ensure compliance with the BASIX certificate.

- 37 The parties agree, and I am satisfied, that SEPP Housing is an additional relevant environmental planning instrument.
- 38 Chapter 2 of SEPP Housing deals with Affordable Housing and the amended DA is subject to the relevant provisions for in-fill affordable housing set out at Pt 2, Div 1.
- 39 Relevantly, I am satisfied that development for the purposes of residential apartment buildings is permitted with consent in the R4 High Density Zone pursuant to THGCPP. The affordable housing component proposed within the amended DA is equivalent to 13.75% of the total FSR, and all of the proposed development is located within a defined 'accessible area'.
- 40 Pursuant to s 16(1) of SEPP Housing, the relevant FSR development standard is calculated by adding the base FSR for the land (2:1 pursuant to THGCPP) to an additional FSR of 27.5%, based on the proposed affordable housing component.
- 41 For the subject site and amended DA, this equates to a total FSR of 2.55:1, and it is agreed that the amended DA complies with the resultant FSR development standard proposing 13,859 sqm of GFA.
- 42 Consistent with s 16(2) of SEPP Housing, the amended DA allocates 1,954 sqm of GFA as the in-fill affordable housing component, in the form of 22 identified units, which is equivalent to a minimum of 13.5% of the maximum FSR.
- 43 Section 19(2) of SEPP Housing provides a number of relevant non-discretionary development standards. The amended DA complies with all relevant non-discretionary development standards.
- 44 Section 20 of SEPP Housing sets out certain design requirements. The parties agree, and I am satisfied, that the amended DA is compatible with the desired

character of the local area, noting that the operation of THGCPP means that the local area is a precinct undergoing transition.

- 45 Section 21(1)(a) of SEPP Housing requires that, commencing at occupation certificate, the development will provide the in-fill affordable housing component for a period of 15 years. Further, s 21(1)(b) requires the consent authority (the Court in this instance) to be satisfied that the affordable housing component will be managed by a registered Community Housing Provider (CHP). Accordingly, an agreed condition of consent is imposed requiring the identification of a CHP prior to issue of occupation certificate.
- 46 The parties agree, and I am satisfied, that the amended DA is subject to the provisions of Ch 4 of State Environmental Planning Policy (Housing) 2021 (SEPP Housing).
- 47 Pursuant to the relevant provisions of SEPP Housing, the EPA Reg, the Applicant's architect, BKA Architecture (and its nominated architect Mr John Baker - NSW registered architect 3552) has prepared a Design Verification Statement dated 5 August 2025, fulfilling the requirements of s 29 of the EPA Reg and confirming that the amended DA achieves the Design principles set out in Sch 9 of SEPP Housing. This statement also sets out how the objectives of Parts 3 and 4 of the Apartment Design Guide have been achieved in the design of the amended DA.
- 48 Accordingly, I am satisfied the amended DA meets the requirements of s 147 of SEPP Housing.
- 49 The parties agree, and I am satisfied, that those remaining relevant matters set out at s 4.15 of the EPA Act have been taken into consideration, and that the amended DA warrants the grant of consent, subject to conditions.
- 50 Having considered each of the preceding jurisdictional requirements and having formed the necessary view required by s 34(3) of the LEC Act, I find it is appropriate to make the orders agreed to by the parties and now dispose of the matter.
- 51 The Court notes that:

- (1) Pursuant to ss 37 and 38 of the Environmental Planning and Assessment Regulation 2021 (NSW), the Applicant has amended the DA with the approval of the Respondent.
- (2) The Applicant has lodged the final amended DA with the Court on 12 September 2025.

Orders

52 The Court orders that:

- (1) Leave is granted to the Applicant to amend Development Application DA 856/2025/JP and rely upon the amended plans and documents referred to in Condition 1 at Annexure A.
- (2) Pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* (NSW), the Applicant is to pay the Respondent's costs thrown away as a result of amending the Development Application in the agreed sum of \$8,500 within 28 days of the date of these orders.
- (3) The Applicant's written request, pursuant to cl 4.6 of Appendix 10 The Hills Growth Centre Precincts Plan to State Environmental Planning Policy (Precincts—Central River City) 2021 (THGCPP), seeking to vary the development standard for height of buildings as set out at cl 4.3 of THGCPP, is upheld.
- (4) The appeal is upheld.
- (5) Consent is granted to Development Application DA 856/2025/JP (as amended) for alterations and additions to an approved residential development, comprising an additional 25 units to the approved 114 units for a new total of 139 units, incorporating in-fill affordable housing, and a two-storey basement, at 13 Terry Road, Box Hill, subject to the conditions of consent at Annexure A.

M Pullinger

Acting Commissioner of the Court

Architectural Plans Part1 (33.2 MB, pdf)

Architectural Plans Part2 (36.7 MB, pdf)

Architectural Plans Part3 (5.44 MB, pdf)

Annexure A (717 KB, pdf)

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