



Land and Environment Court  
New South Wales

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| Case Name:               | Hyside Projects Subtwo Pty Ltd v Strathfield Municipal Council   |
| Medium Neutral Citation: | [2023] NSWLEC 1217   |
| Hearing Date(s):         | Conciliation conference on 3 February, 15 March and 22 March 2023  |
| Date of Orders:          | 05 May 2023  |
| Decision Date:           | 5 May 2023   |
| Jurisdiction:            | Class 1  |
| Before:                  | Harding AC   |
| Decision:                | <p>The Court orders that:</p> <p>(1) The Appeal is upheld.</p> <p>(2) Development Application No. DA 2021/327, for the construction of an additional 20 storeys above the approved 8 storey building, to result in a 28-storey tower, at premises known as 21 Parramatta Road, Homebush, is determined by the grant of Development Consent subject to the conditions set out in Annexure “A”.</p> <p>(3) The Applicant is to pay those costs of the Respondent thrown away, as a result of amending the development application pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979, in the agreed amount of \$2000.</p> |
| Catchwords:              | DEVELOPMENT APPLICATION – alterations and additions to shop top housing – conciliation conference – agreement between the parties – orders   |
| Legislation Cited:       | <p>Environmental Planning and Assessment Act 1979, ss 8.7, 8.15</p> <p>Land and Environment Court Act 1979, s 34</p> <p>State Environmental Planning Policy (Building</p>  |

Sustainability Index: BASIX) 2004  
State Environmental Planning Policy No 65—Design  
Quality of Residential Flat Development, Pt 2  
State Environmental Planning Policy (Resilience and  
Hazards), s 4.6  
Strathfield Local Environmental Plan 2012, cll 4.3, 4.3A,  
4.4, 4.4A, 4.6, 6.1, 6.2, 6.4, 6.9, 7.1, Pt 7

Category: Principal judgment

Parties: Hyside Projects Subtwo Pty Ltd (Applicant)  
Strathfield Municipal Council (Respondent)

Representation: Counsel:  
V Conomos (Solicitor) (Applicant)  
M Mallos (Solicitor) (Respondent)

Solicitors:  
Conomos Legal (Applicant)  
Strathfield Municipal Council (Respondent)

File Number(s): 2022/322537

Publication Restriction: No

## JUDGMENT

- 1 **COMMISSIONER:** This is an appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act 1979* (EPA Act) by Hyside Projects Subtwo Pty Ltd (Applicant) against the deemed refusal by Strathfield Municipal Council (the Respondent) of Development Application no. DA 2021/327.
- 2 The application is for the construction of 20 additional storeys above the approved 8 storey building, to result in a 28-storey tower at 21 Parramatta Road, Homebush, otherwise known as Lot 3 in DP 1219481. The application was lodged with Strathfield Municipal Council on 20 December 2021.
- 3 The Court arranged a conciliation conference between the parties pursuant to s 34 of the *Land and Environment Court Act 1979* (the LEC Act). The conciliation conference commenced on 3 February 2023.
- 4 The parties reached an agreement at the conciliation conference as to the terms of a decision, in the proceedings, that would be acceptable to the parties.

The agreement was to support the grant of Development Consent, subject to agreed conditions.

- 5 Pursuant to s 34(3) of the LEC Act of the LEC Act, I must dispose of the proceedings in accordance with the parties' agreement if the proposed decision, the subject to the agreement, is a decision that the Court could have made in the proper exercise of its functions.
- 6 There are jurisdictional prerequisites that must be satisfied before this function can be exercised. The parties have identified the jurisdictional prerequisites of relevance in these proceedings and how they are satisfied. The parties agree that there are no jurisdictional prerequisites which would prevent the Court from exercising its function under s 34(3) of the LEC Act.
- 7 I am satisfied that the decision is one that the Court could make in the proper exercise of its functions. In reaching that state of satisfaction, I note the following:
  - (1) The Land is zoned B4 – Mixed use development, pursuant to Strathfield Local Environmental Plan 2012 (SLEP 2012). Development for the purposes of commercial premises and shop top housing is permitted within this zone with development consent in accordance with the Land Use Table in the SLEP 2012.
  - (2) Height of buildings (cl 4.3): The application includes an exceedance of the 80m maximum Height of Building standard in cl 4.3A of SLEP. The amended application is accompanied by a cl 4.6 written request to vary the maximum height standard, prepared by BBC Consulting Planners and dated February 2023. The Respondent is satisfied that the request meets the requirements of cl 4.6 and is well founded.
  - (3) The written request sets out that the proposal results in a maximum building height of 89.53m (when measured to the top of the lift overrun) which exceeds the maximum permitted height by 9.53m (or 11.90%). The written request states the lift overrun is the highest element of the proposed building. The lift overrun is adjacent to a sprinkler panel tank which has a height of 89.48m. The request also notes that the two elements occupy only a small part of the roof (i.e. 48.44m<sup>2</sup> approximately) and are set well back from the tower's periphery. They would not be visible from the nearby public domain. The roof itself has a height of 87.48m, so is 7.48m (or 9.35%) above the 80m height limit.
  - (4) The parties agree that the written request contains the required jurisdictional content and that the merits, outlined in the written request, support a variation to the Development Standard. They agree that strict compliance with the 80m maximum building height standard in cl 4.3A

of SLEP 2012 is unreasonable and unnecessary in the circumstances of the case and that there are sufficient environmental planning grounds to justify the requested variation.

- (5) Floor Space Ratio (cl 4.4): The application does not comply with the 4.5:1 maximum Floor Space Ratio (FSR) Development Standard in cl 4.4A of the SLEP 2012. The amended application is accompanied by a cl 4.6 written request to vary the maximum FSR standard, prepared by BBC Consulting Planners and dated February 2023. The Respondent is satisfied that the request meets the requirements of cl 4.6 and is well founded.
- (6) The proposed Gross Floor Area (GFA) is 29,406.8m<sup>2</sup>. On a site area of 6,256.7m<sup>2</sup>, this equates to an FSR of 4.70:1 which does not comply with the FSR limit of 4.5:1. The written request states, in part, the additional 0.2:1 of FSR has resulted from practical design considerations involving the creation of a whole level of communal space on Level 8, and the inclusion of a more intimate east-facing communal space on Level 14 and the associated relocation and augmentation of GFA on the three additional levels.
- (7) The parties agree that the written request contains the required jurisdictional content and that the merits, outlined in the written request, support a variation to the Development Standard. They agree that strict compliance with the 4.5:1 maximum FSR standard in cl 4.4A of SLEP 2012 is unreasonable and unnecessary in the circumstances of the case, that there are sufficient environmental planning grounds to justify the requested variation of 0.20:1.
- (8) The application was placed on public notification from 24 December 2021 to 4 February 2022. The Council received and considered 15 submissions. The notification requirements under the EPA Act have been satisfied.
- (9) A BASIX Certificate has been provided to satisfy the requirements of State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004.
- (10) As required by s 4.6 of State Environmental Planning Policy (Resilience and Hazards) 2021 (SEPP Hazards), consideration has been given to whether the Site is contaminated. The site is presently being constructed under the terms of a previous Development Consent on the expectation that commercial and residential development will take place on the land.
- (11) A Design Verification Statement has been prepared by Vince Squillace (dated 8 December 2021) that the design and plans for the above Development Application are in accordance with the design quality principles set out in Pt 2 of State Environmental Planning Policy No 65—Design Quality of Residential Flat Development.
- (12) Clause 6.1 of SLEP 2012 – Acid Sulfate Soils requires Council to consider any potential acid sulfate soil affectation. The Respondent is satisfied that the development application meets the requirements of cl

6.1. The Statement of Environmental Effects identifies that no issues arise in relation to acid sulfate soils as the basement car park beneath the proposed building has already been constructed.

- (13) Clause 6.2 of SLEP 2012 – Earthworks, the Respondent is satisfied that the development application meets the requirements of cl 6.2, as the proposal does not involve any earthworks.
  - (14) Clause 6.4 of SLEP 2012 – Essential Services, the Respondent is satisfied that the development application meets the requirements of cl 6.4, as the development application satisfies the requirements for adequate essential services available to the site.
  - (15) Clause 6.9 of SLEP 2012 – Additional Provisions for Development in Parramatta Road Corridor, the Respondent is satisfied that the development application meets the requirements of cl 6.9 of the SLEP 2012, as the proposal will increase the supply of residential apartments, as required in cl 6.9(3)(b).
  - (16) Part 7 of SLEP 2012 – Intensive Urban Development Areas, the Applicant has entered into a Voluntary Planning Agreement, which has culminated in a Certificate of Adequate Arrangements from Planning NSW. The Respondent is satisfied that the Applicant's amended application satisfies the requirements of cl 7.1 of the SLEP for arrangements for designated state public infrastructure.
- 8 The parties support upholding the cl 4.6 written requests both in terms of the merit and jurisdictional considerations. The proposal, notwithstanding the non-compliance with the Development Standards, is in the public interest because it is consistent with the stated, and implied, objectives for both the Height of Buildings and Floor Space Ratio as set out in the SLEP 2012 and with the objectives of the B4 Mixed Use zone.
- 9 After reviewing the written requests for jurisdictional content, I am satisfied that the cl 4.6 written request for the variation to the Height of Buildings Development Standard, and the written request to vary the maximum Floor Space Ratio Development Standard, address the requirements of cl 4.6(3). It is for the reasons outlined above that I am satisfied that the decision to uphold the written requests is a decision that the Court could have made in accordance with s 34(3) of the LEC Act.
- 10 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' agreement. 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 the EPA Act.

## **Orders**

11 The Court orders that:

- (1) The appeal is upheld.
- (2) Development Application No. DA 2021/327, for the construction of an additional 20 storeys above the approved 8 storey building, to result in a 28-storey tower, at premises known as 21 Parramatta Road, Homebush, is determined by the grant of Development Consent subject to the conditions set out in Annexure "A".
- (3) The Applicant is to pay those costs of the Respondent, thrown away as a result of amending the development application pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979*, in the agreed amount of \$2000.

**S Harding**

**Acting Commissioner of the Court**

Annexure A

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