



Land and Environment Court
New South Wales

Case Name: Clutch Developments Pty Ltd v Waverley Council

Medium Neutral Citation: [2023] NSWLEC 1496

Hearing Date(s): Conciliation Conference on 7 June 2023 [amended plans filed 4 August 2023]

Date of Orders: 01 September 2023

Decision Date: 1 September 2023

Jurisdiction: Class 1

Before: Byrne AC

Decision: The Court orders:
(1) The Applicant is to pay the Respondent's costs thrown away pursuant to s 8.15(3) of the Environmental Planning and Assessment Act 1979 in the sum of \$22,000 within 28 days of the date of these orders.
(2) The appeal is upheld.
(3) Development consent is granted to Development Application No. DA-472/2022, as amended, for the demolition of existing buildings, lot amalgamation and construction of a new shop top housing development with two levels of basement parking, at 141 – 155 Curlewis Street, Bondi Beach, being Lot A in DP955097, Lot 1 in DP724290, Lot 1 in DP102895 and Lot 1 in DP724793, subject to the conditions of consent in Annexure A.

Catchwords: DEVELOPMENT APPEAL – demolition existing buildings – construction shop top housing – conciliation conference – agreement between the parties - orders

Legislation Cited: Environmental Planning and Assessment Act 1979, ss 4.5, 4.15, 4.16, 8.7
Land and Environment Court Act 1979, s 34
State Environmental Planning Policy (Building

Sustainability Index: BASIX) 2004
State Environmental Planning Policy No 65—Design
Quality of Residential Apartment Development 2002, cl
28, 29, 30
State Environmental Planning Policy (Resilience and
Hazards) 2021, s 4.6
Waverley Local Environmental Plan 2012, cl 4.3, 4.6,
6.1, 6.2, 6.5

Category: Principal judgment

Parties: Clutch Developments Pty Ltd (Applicant)
Waverley Council (Respondent)

Representation: Counsel:
A Galasso SC (Applicant)
K Mortimer (Solicitor) (Respondent)

Solicitors:
Jaku Legal (Applicant)
Lindsay Taylor Lawyers (Respondent)

File Number(s): 2022/378064

Publication Restriction: No

JUDGMENT

- 1 **COMMISSIONER:** This is a Class 1 Development Appeal pursuant to s 8.7(1) of the *Environmental Planning and Assessment Act* 1979 (EPA Act) from the deemed refusal by Waverley Council (Council) of DA-472/2022 (the Development Application) seeking consent for the demolition of existing buildings, lot amalgamation and construction of a new shop top housing development with two levels of basement parking (Proposed Development) at 141 – 155 Curlewis Street, Bondi Beach being Lot A in DP955097, Lot 1 in DP724290, Lot 1 in DP102895 and Lot 1 in DP724793 (Site).
- 2 The Respondent in these proceedings is Waverley Council. The Sydney City Eastern Planning Panel was the consent authority for the determination of the DA pursuant to s 4.5(b) of the EPA Act.

- 3 The Court arranged a conciliation conference between the parties under s 34(1) of the *Land and Environment Court Act 1979* (LEC Act), which was held on site and at Court. I presided over the conciliation conference.
- 4 At the conciliation conference, the parties reached an agreement as to the terms of a decision in the proceedings that would be acceptable to the parties and which addressed the Council's contentions. The Applicant agreed to reconfigure the building in that a proposed retail arcade at street level running through the middle of the building to the rear was removed with consequential changes to the configuration of the basement parking, shops and apartments above.
- 5 The Applicant's amended plans and development application documents were approved by Council (exercising the consent authority's assessment functions) pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021.
- 6 The parties' experts agree that all Contentions raised in the Statement of Facts and Contentions filed with the Court on 13 February 2023 (SOFAC) have been resolved by the preparation of the amended plans and development application documents referred to at paragraph 2(a)(i) of the section 34 agreement (listed at the end of this judgment) and the agreed conditions of consent.
- 7 The s 34 Agreement is supported by an "Agreed Jurisdictional Statement" which summarises the nature of the development, ownership of the land, planning instruments and the jurisdictional matters about which the Court must be satisfied for the exercise of power to grant consent pursuant to s 4.16(1)(a) of the EPA Act (Jurisdictional Statement).
- 8 Section 34(3) of the LEC Act requires the Court to dispose of the proceedings in accordance with the parties' decision if I am satisfied it is a decision that the Court could have made in the proper exercise of its functions.
- 9 Taking into account the parties' advice in the Jurisdictional Statement, I am satisfied in regard to the following matters.
- 10 The DA was made by the Applicant who is the owner of the Site.

- 11 The DA was notified in accordance with the Respondent's Community Participation Plan between 9 November 2022 and 2 December 2022. Ten submissions were received in objection to the DA.

Jurisdictional matters – 4.15(1) EPA Act

State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development

- 12 State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development (SEPP 65) applies to the Amended DA.
- 13 The DA was considered by the Waverley Design Excellence Advisory Panel on 8 February 2023, as required by cl 28(1) of SEPP 65.
- 14 Clause 28(2) of SEPP 65 requires a consent authority to consider specified matters. Further, cl 30(2) of SEPP 65 provides that:

(2) Development consent must not be granted if, in the opinion of the consent authority, the development or modification does not demonstrate that adequate regard has been given to—

- (a) the design quality principles, and
- (b) the objectives specified in the Apartment Design Guide for the relevant design criteria.

- 15 The DA was accompanied by a Design Verification Statement (DVS), fulfilling the requirements of cl 29 of the Regulations to Council's satisfaction.

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

- 16 State Environmental Planning Policy (Building Sustainability Index: BASIX) 2004 applies to the Amended DA. The DA was accompanied by a BASIX Certificate and an updated BASIX Certificate was obtained to accompany the Amended DA.

State Environmental Planning Policy (Resilience and Hazards) 2021

- 17 Pursuant to s 4.6(1) of State Environmental Planning Policy (Resilience and Hazards) 2021 (Resilience SEPP), the consent authority must not grant consent to development unless it has considered whether the Site is contaminated and, subject to its status of contamination, is satisfied that the Site is or will be made to be suitable for the development.

- 18 The Applicant provided a Preliminary Site Investigation report prepared by GCA dated 18 October 2022 (PSI) and a detailed Site Investigation report prepared by GCA dated 12 April 2023 (DSI) which concludes that the Site will be made suitable for the Proposed Development subject to the implementation of the recommendations in section 16 of the DSI.
- 19 The agreed conditions of consent incorporate the recommendations of the DSI and require a site audit statement following the implementation of those recommendations.

Waverley Local Environmental Plan 2012

- 20 Waverley Local Environmental Plan 2012 (WLEP) applies to the Site. Compliance with the WLEP is addressed generally in the Statement of Environmental Effects prepared by GSA Planning dated October 2022 (SEE) but specific provisions are addressed below.
- 21 The Site is zoned E1 Local Centre under the WLEP. The Proposed Development is permissible with consent in the E1 Local Centre zone.
- 22 The Height of Buildings Map referred to in cl 4.3(2) of the WLEP shows that the maximum permissible height of buildings on the Site is 13m. The works proposed under the Amended DA have a maximum height of 14.29m and a variation to the development standard was sought.
- 23 The Court, having the functions of the consent authority for the purpose of hearing and disposing of the appeal, is satisfied that:
 - (1) The Applicant's written request under cl 4.6 of the WLEP has adequately addressed the following matters required to be demonstrated (cl 4.6(4)(a)(i) of the WLEP):
 - (a) compliance with the development standard is unreasonable or unnecessary in the circumstances of the case (cl 4.6(3)(a) of the WLEP); and
 - (b) there are sufficient environmental planning grounds to justify the contravention of the development standard in cl 4.3 of the WLEP (cl 4.6(3)(b) of the WLEP); and
 - (c) the proposed development is in the public interest because it is consistent with the objectives of cl 4.3 of the WLEP and the objectives for development in the E1 Local Centre zone under the WLEP (cl 4.6(4)(a)(ii) of the WLEP).

- 24 The Site is identified as Class 5 on the Acid Sulfate Soils Map under the WLEP. In accordance with cl 6.1(2) of the WLEP, development involving works within 500 metres of adjacent Class 1, 2, 3 or 4 land that is below 5 metres Australian Height Datum and by which the water table is likely to be lowered below 1 metre Australian Height Datum on adjacent Class 1, 2, 3 or 4 land requires consent. Based on information that accompanied the DA, including the Geotechnical Report prepared by GCA dated 15 September 2022 (Geotechnical Report), this is unlikely to occur. Nevertheless, the Geotechnical Report recommends that a preliminary acid sulfate soils assessment be undertaken prior to construction and this recommendation is incorporated into the agreed conditions of consent (condition 1(e)). Accordingly, cl 6.1(3) of the WLEP is not triggered and an acid sulfate soils management plan is not required before consent can be granted.
- 25 In deciding whether to grant development consent for earthworks, the consent authority must consider the matters set out in cl 6.2(3) of the WLEP. The Court is satisfied, having regard to the Amended DA, the stormwater drawings and information that accompanied the DA, the Geotechnical Report, the PSI, the DSI and the agreed conditions of consent, that the matters listed in cl 6.2(3) of the WLEP have been adequately considered.
- 26 Clause 6.5 of the WLEP applies to the Site as it is identified on the Active Street Frontages Map under the WLEP. The Proposed Development has an active street frontage as required on Curlewis Street and the residential lobby and vehicular access on Curlewis Street are permitted under cl 6.5(4) of the WLEP.

Remaining matters in section 4.15(1) EP&A Act

- 27 The parties agree that the Proposed Development can be approved taking into consideration the matters in ss 4.15(1)(b) – (e) of the EPA Act. Matters relevant to paragraphs (b), (c) and (e) are considered generally in the SEE.
- 28 The parties have considered the submissions by objectors under s 4.15(1)(d) of the EPA Act.

Conclusion:

- 29 For these reasons and based on the evidence before me, my observations on site and oral submissions made to me on site, I am satisfied that there is no jurisdictional impediment to the making of the proposed orders, and the decision is one that the Court could have made in the proper exercise of its functions.
- 30 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. 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.

Notations:

- 31 The Court notes that:

(1) Waverley Council, exercising the assessment functions of the relevant consent authority, has agreed, pursuant to s 38(1) of the Environmental Planning and Assessment Regulation 2021, to the Applicant amending Development Application No. DA-472/2022 in accordance with the following amended plans and documents:

- (a) The following amended architectural plans prepared by PBD Architects:

Drawing No.	Drawing Title	Date
DA098, Issue F	Basement 02 Floor Plan	20.06.2023
DA099, Issue F	Basement 01 Floor Plan	20.06.2023
DA100, Issue K	Ground Floor Plan	27.06.2023
DA101, Issue G	Level 01 Plan	27.06.2023

DA102, Issue G	Level 02 Plan	27.06.2023
DA103, Issue G	Level 03 Plan	27.06.2023
DA104, Issue G	Roof Plan	27.06.2023
DA200, Issue G	Elevations	27.06.2023
DA201, Issue G	Elevations	27.06.2023
DA300, Issue G	Sections 01	27.06.2023
DA301, Issue F	Sections 02	20.06.2023
DA302, Issue F	Sections 03	20.06.2023
DA501, Issue G	FSR Diagram	27.06.2023

- (b) Amended Waverley LEP 2012 Clause 4.6 Exceptions to Development Standards – Height of Buildings prepared by GSA Planning, dated May 2023.
- (c) Detailed Site Investigation prepared by Geotechnical Consultants Australia, dated 12 April 2023.
- (d) Amended Traffic & Parking Impact Assessment prepared by McLaren Traffic Engineering & Road Safety Consultants, dated 20 June 2023.
- (e) DA Substation Letter from Integrated Group Services, dated 27 June 2023.

- (f) Amended Waste Management Plan prepared by AusWide Consulting, dated June 2023.
 - (g) Acoustic Assessment of Void Letter from E-LAB Consulting, dated 23 May 2023.
 - (h) Natural Ventilation Assessment prepared RWDI, dated 10 May 2023.
 - (i) Natural Ventilation – Wind Tunnel Assessment, dated 6 June 2023.
 - (j) Updated BASIX Certificate No. 1335214M_03 prepared by ESD Synergy Pty Ltd, 31 July 2023.
- (2) The Applicant filed the amended development application with the Court on 4 August 2023.
 - (3) The Applicant's written request prepared by GSA Planning dated May 2023, pursuant to cl 4.6 of the Waverley Local Environmental Plan 2012 (WLEP), to vary the height of buildings development standard in cl 4.3 of the WLEP is upheld.

Orders:

32 The Court orders:

- (1) The Applicant is to pay the Respondent's costs thrown away pursuant to s 8.15(3) of the *Environmental Planning and Assessment Act 1979* in the sum of \$22,000 within 28 days of the date of these orders.
- (2) The appeal is upheld.
- (3) Development consent is granted to Development Application No. DA-472/2022, as amended, for the demolition of existing buildings, lot amalgamation and construction of a new shop top housing development with two levels of basement parking, at 141 – 155 Curlewis Street, Bondi Beach, being Lot A in DP955097, Lot 1 in DP724290, Lot 1 in DP102895 and Lot 1 in DP724793, subject to the conditions of consent in Annexure A.

L Byrne

Acting Commissioner of the Court

378064.22 Annexure A

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